



**RESTORATIVE JUSTICE: AN AGENDA
FOR EUROPE**

**THE ROLE OF THE EUROPEAN UNION IN THE
FURTHER DEVELOPMENT OF RESTORATIVE
JUSTICE**

Jolien Willemsens

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Restorative justice: an agenda for Europe
**The role of the European Union in the further development of restorative
justice**

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European Forum for Restorative Justice v.z.w.

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**The views expressed in this report are those of the author, not necessarily
those of the European Forum for Restorative Justice v.z.w.**

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PART I: INTRODUCTION

Restorative justice has become an important topic in discussions on how to deal with criminal behaviour in a better way. Restorative justice theory developed in the 1970s and 1980s around the innovative practice of victim-offender mediation, which arose out of discontent with the way criminal justice systems all around the world were dealing with victims and offenders. In the meantime, both restorative justice practice and theory have developed considerably. Whereas, in Europe, restorative justice was initially equated with the practice of victim-offender mediation, other practices, like family group conferences and sentencing circles, are now also included under the restorative justice umbrella. In terms of theory, restorative justice was initially frequently described by the ways in which it differed from both the retributive and rehabilitative paradigms of justice. Theoretical discussions have evolved considerably since then, with different visions on, for example, whether non-deliberative actions may also have restorative value. Depending on the position on, amongst others, this issue, different definitions of restorative justice are being formulated. Some of the most frequently cited definitions are the following: “Restorative justice is a process whereby parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (Marshall, 1999: 5); “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible” (Zehr, 2002: 37); and “Restorative justice is every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime” (Bazemore and Walgrave, 1999: 48).

Whereas until a few years ago restorative justice was mainly a topic for debate in the ‘ivory tower’ of academics (although European practice began to develop already in the early 1980s well before restorative justice theory developed), it is now being discussed increasingly by policy makers in their efforts to make criminal justice more responsive to the needs of victims, offenders and society as a whole. This is shown, for example, by the fact that in Austria, the explanatory memorandum with the legal act which introduced a comprehensive package of new diversionary measures for adult offenders – including victim-offender mediation – in the Code of Criminal Procedure, explicitly referred to restorative justice as the guiding principle (Hilf, 2007). Also in Belgium, the new Juvenile Justice Act of 2006 gives a prominent place to restorative justice principles (Van Camp and de Souter, 2007).¹ As we will see in Part II of this report, most Member States of the European Union now have legislative provisions dealing with restorative justice for both juveniles and adults.

Beyond the national level, also international policy makers have taken notice of the growing restorative justice movement, resulting in a number of international instruments. However, these documents are either not binding on national governments or are formulated in such a general way that they hardly influence national policy. Both the Council of Europe and the United Nations have formulated rather extensive non-binding recommendations on key values to be observed when implementing restorative justice. The European Union, to date, has not provided such extensive direction in the field of restorative justice. The topic has, amongst others, been mentioned in a few European Commission documents, but most prominently in Art. 10 of the Framework Decision on the position of the victim in criminal proceedings. This Art. 10 calls for the promotion of victim-offender mediation, leaving the Member States with complete freedom about how to go about this. Hence, the main question

¹ As the authors rightly state, this new Juvenile Justice Act embraces restorative justice principles, but at the same time also introduced punitive measures in reacting to juvenile crime. It hence creates a system with two faces: a restorative and a punitive one.

to be dealt with in this report is: *Is there a role for the European Union in the further development of restorative justice in Europe, and if so, what should be regulated or provided for and by which instruments?*

This report is written in the context of the European Commission co-funded AGIS project JLS/2006/AGIS/147, which was awarded to the European Forum for Restorative Justice in the course of 2006. In the remainder of this introductory chapter, we will describe this project and its instruments, and we will set out the methodology used in the research work that preceded the writing of this report.

In Part II of the report, the European restorative justice scene will be described, both in terms of its appearance in the practical field and in terms of national legal provisions. In addition, the common needs which may have an influence on international policy making will be itemised, based on the results of empirical research done. Part III will provide a detailed overview of the initiatives in the field of restorative justice taken by the three main international institutions: the Council of Europe, the United Nations and the European Union. A comparison of the main instruments adopted by these three institutions will be made. In Part IV, the evolving role of the European Union in the field of criminal justice will be explored. Finally, Part V will describe which role can be seen for the European Union in the further development of restorative justice. Concrete ideas and proposals will be formulated.

1. BACKGROUND OF THE AGIS PROJECT ‘RESTORATIVE JUSTICE: AN AGENDA FOR EUROPE’

Since its creation in 2000, the European Forum for Restorative Justice has been committed to its general aim of helping to establish and develop victim-offender mediation and other restorative justice practices throughout Europe. It pursues, amongst others, the following objectives: the promotion of international exchange of information and mutual help; the promotion of the development of effective restorative justice policies, services and legislation; the exploration and development of the theoretical basis of restorative justice; the stimulation of research; and providing assistance in the development of principles, ethics, training and good practice. In its work, the European Forum focuses on four target groups: restorative justice practitioners and services, policy makers, legal practitioners and researchers. The Forum supports the idea that, in developing a better way to deal with crime, both practice and research need to inform and support each other, and that both of these need to inform and support policy making and the work of criminal justice practitioners.

Besides its ‘regular’ activities², which include providing information and other types of services, the publication of a newsletter and the organisation of conferences and seminars, the European Forum has run several European projects. These projects have always attempted to respond to surfacing needs of the European restorative justice scene. The first of these European projects, the JAI/2003/AGIS/129 project (or AGIS 1), resulted in the elaboration of recommendations for the training of mediators in criminal matters on the one hand, and in the development of training modules for prosecutors and judges on restorative justice on the other hand.³ It was developed in order to respond to two specific needs. The first one follows from the fact that there is an enormous variety in the way European mediators are being trained, and in their level of training. By formulating very basic recommendations for the training of mediators in criminal matters, the Forum wanted to provide some guidance in this matter. The second follows from the experience that if prosecutors and judges, who are the main actors who should refer criminal cases to mediation, have only limited or no knowledge of restorative justice, cooperation with the mediation services is less than optimal. By establishing a number of training modules for prosecutors and judges on restorative justice,

² For detailed information about the work of the European Forum, please visit <http://www.euforumrj.org>.

³ Both the recommendations and the training modules can be downloaded from the website: <http://www.euforumrj.org/Projects/projects.AGIS1.htm>.

the Forum wanted to contribute to the development of such training modules in the different European countries.

The second project, project JAI/2003/AGIS/088 (or AGIS 2), focused on meeting the challenges of introducing restorative justice in Central and Eastern Europe.⁴ At that time, many of those countries were – not without difficulty – taking the first steps in the implementation of restorative justice practices. Through this project, the European Forum wanted to provide an effective support to the development of restorative justice in this part of Europe.

When contemplating a new project, two topics came to the foreground. These constitute the two interrelated topics of the JLS/2006/AGIS/147 project (or AGIS 3). The first part of the project, which resulted in a separate report by Clara Casado Coronas (2008), focused on the development of restorative justice in the south of Europe. The second topic is the subject of this report, namely: what is the role of the European Union in the further development of restorative justice? Seven years of cooperation in the context of the European Forum have made it very clear that, although there are major differences between restorative justice practices in Europe, there are a great number of common needs (see Part II of this report). Indeed, because restorative justice is a newly developing field, there are common needs and questions with which all countries are confronted. What should national legislation regulate and what not? Which cases are appropriate for mediation? What is the position of mediation services vis-à-vis the criminal justice system? How does the mediation process relate to the criminal justice procedure? How should the need for legal safeguards be met? What are the criteria for training and supervision of (volunteer) mediators? How to improve the cooperation between mediation services and judges, prosecutors and lawyers? And so on. Most countries are working on these issues in relative isolation, sometimes replicating the efforts of people in neighbouring countries. It would probably be more efficient to formulate common answers and device shared instruments which could then be adapted to national circumstances. Although the European Forum is of course trying to support people in these matters, its (financial) resources are very limited. So, to whom can the European restorative justice protagonists turn for help? When discussing this, it has become clear that a lot of hope is put on, amongst others, the European Union. However, does this domain belong to the field of competence of the European Union? And if so, what should be regulated, by which instruments and what should be the basic principles?

The European Forum has also co-organised two seminars in cooperation with the Austrian and Finnish Presidencies of the European Union on the subject of networking and cooperation between European civil servants on the topic of restorative justice (see next section).

In the meantime, the European Forum has also run a project on ‘Developing standards for assistance to victims of terrorism’ (JLS/2006/VICT/004) in which the possible role of restorative justice principles and practices in dealing with victims of terrorism was assessed, amongst other things.⁵ In the course of 2008, the European Forum also started a project on ‘Building social support for restorative justice’ (JLS/2007/JPEN/233) which focuses on ways to cooperate with the media, civil society organisations and individual citizens in order to create broad support for restorative justice.

2. OBJECTIVES AND INSTRUMENTS

The general objective of this part of the project is to research what could be the potential role of the European Union in the further development of restorative justice in the whole of the European Union. More specifically, the objective is to identify whether there is a need for further regulation about restorative justice at the level of the European Union by:

⁴ The final report can be downloaded from <http://www.euforumj.org/Projects/projects.AGIS2.htm>.

⁵ The final report of this project (Stager et al., 2008) will be published in fall 2008.

- 1) analysing the existing legislation on the national level in all European Union Member States;
- 2) making an overview of the existing international regulations;
- 3) exploring the main needs at national level which could have implications for European Union policies;
- 4) studying whether these needs require specific regulation or other initiative at the level of the European Union;
- 5) studying whether there is a legal basis and whether it is opportune to actually regulate these issues at the level of the European Union;
- 6) if so, discussing the concrete forms, instruments and the content of the European Union policies that are required.

To meet these objectives, one full-time researcher was appointed within the Leuven Institute of Criminology (LINC) of the Catholic University of Leuven.⁶ She was assisted by a steering group, consisting of the project supervisor (Prof. Dr. Ivo Aertsen of the Catholic University of Leuven) and representatives of the three partners for this part of the project (Dr. Michael Kilchling of the Max-Planck-Institut für ausländisches und internationales Strafrecht, Prof. Dr. David Miers of Cardiff Law School at Cardiff University, and Ass. jur. Cornelia Riehle, M.A. of the Academy of European Law in Trier). This steering group devised the strategy and methodology of the research and supervised the writing of this final publication.

The ongoing work of the researcher and the steering group was in turn supervised by the Board of the European Forum for Restorative Justice.

Next to the research work, five events and meetings were organised, which paid attention to both the Southern European and the European Union part of the project. All of these served to inform a wider audience about the project and to receive feedback about and input for the research work.

The project started with the organisation of the 4th biennial conference of the European Forum: 'Restorative justice and beyond: an agenda for Europe', which took place in Barcelona on 15-17 June 2006. This conference served to explore the state of affairs of restorative justice in Europe, and paid particular attention to five topics which had gained importance in the European scene: restorative justice, peace-making and peace-building; community mediation; dealing with more severe crimes in a restorative way; school mediation; and, good practice for restorative justice. Many of the sessions at this conference provided preliminary input to the research work to be undertaken in this project.⁷

The steering group met for the first time in Helsinki, on 13 December 2006, in the wake of a seminar organised by the Finnish Presidency of the European Council in cooperation with the European Forum for Restorative Justice. At this meeting, the initial plan for the research work was designed. The seminar, entitled 'Restorative justice and victim-offender mediation in Europe. Overcoming obstacles and strengthening of networking' was aimed at drawing up concrete proposals for a further development of victim-offender mediation at national level and for the networking, mainly between policy makers, in the field of restorative justice in Europe. It was organised in follow-up of a seminar on 'Restorative justice in the European

⁶ The implementation of the project has been subcontracted by the European Forum to the Leuven Institute of Criminology. Since its creation, the Secretariat of the European Forum for Restorative Justice has been located within this institute. The researcher, Jolien Willemsens, has been the Executive Officer of the European Forum since its start.

⁷ Amongst others the sessions on: 'The pros and cons of having European standards for practice and training', 'Legislating mediation procedure in Finland', 'Working under the aegis of the criminal justice system: implications for restorative justice practice', 'Thorny theses concerning victim-offender mediation in a judicial context', 'Restorative justice and more serious offences: beyond the diversion-inclusion debate'. For a full overview of the conference programme and abstracts of the papers presented, see <http://www.euforumrj.org/Activities/conferences.Barcelona.htm>.

judicial area: current practice and future strengthening of networking' which was organised in Vienna in June 2006 under the Austrian Presidency of the EU, again in cooperation with the European Forum for Restorative Justice. Because of the relevance of this seminar to the research, it was decided to link the first steering group meeting to it. The members of the steering group and the researcher took active part in the seminar (by presenting and/or chairing), and brought the results of the seminar to the table of the first steering group meeting.⁸ The main conclusions from this seminar were the following: Participants agreed that it was time to give restorative justice a more permanent and institutionalised position at European level, since there is a clear need for more systematic exchange of information and expertise between Member States at governmental level. Three proposals were formulated to organise this increased cooperation. The first option was to take up the proposal of Belgium to adopt a Council Decision setting up a European Network of National Contact Points for Restorative Justice (see Part III, 3.3. d). The second option was to create such a network outside of the formal EU structures and to make it official by giving it legal personality. This could be a new organisation, but it was preferred to entrust these networking tasks to the European Forum for Restorative Justice and to find solutions to ensure structural funding for the European Forum. The third option presented was to keep such a network informal. After discussion of these three options in workshops, it became clear that most participants preferred option 2. It was stressed that even a network of policy makers should maintain a certain level of flexibility and informality and should not become too bureaucratic. Furthermore, it was considered important to build further on the expertise and contacts of the European Forum for Restorative Justice, which would also enable the network of policy makers to establish links with other actors in the restorative justice field (practitioners, service providers, researchers, etc.). A suggestion was made to ask the future EU Presidencies to organise another seminar to further explore the different avenues, and to create an unofficial working group of government officials to support this. At the time of writing, there are no concrete plans to take further steps in this matter.

On 10-12 May 2007 then, a seminar entitled 'Restorative justice in Europe: Needs and possibilities' was organised in Lisbon. At this seminar, the first results of the research work were presented and discussed. The researcher, Jolien Willemsens, presented an overview of the existing international instruments on restorative justice and organised a workshop on the needs of the European restorative justice scene. Also the members of the steering group presented at the seminar. Ivo Aertsen provided an introduction to the project, and David Miers organised a workshop on the different ways in which restorative justice provisions were enacted in legislation in Europe. The two other members of the steering group, Michael Kilchling and Cornelia Riehle, acted as chairs in workshop sessions. External experts were also invited to make presentations in relation to the research topic.⁹ The steering group also organised a meeting to evaluate the research work done up till then, and to develop a strategy for the work to come.

A third steering group meeting was organised on 29 November – 1 December 2007 in Trier. At this meeting, draft texts for this final report were discussed, and outstanding tasks were defined. At this meeting the empirical research on the needs of the European restorative justice scene was designed.

⁸ Some of the sessions that contributed content-wise to this project were entitled: 'Needs for networking to strengthen restorative justice policy throughout Europe', 'International guidelines and best practices in restorative justice and mediation', 'Networking to strengthen restorative justice policy throughout Europe – concrete proposals', 'Research and evaluation in the field of restorative justice', and 'Collaboration between government officials, service providers and legal professionals – overcoming prejudices'. Full information about this seminar, and the papers presented, can be downloaded from <http://www.stm.fi/Resource.phx/eng/subjt/inter/eu2006/crime/crime.htm>.

⁹ Prof. Frank Verbruggen, for example, presented about the specificity of EU regulation. All information concerning the seminar, as well as most of the presentations made can be found at <http://www.euforumrj.org/Activities/seminars.Lisbon.htm>.

The final event in the course of this project was the 5th biennial conference of the European Forum: 'Building restorative justice in Europe. Cooperation between the public, policy makers, practitioners and researchers', organised in Verona on 17-19 April 2008. During this conference, the results of the project were presented and discussed in plenary through a presentation made by the researcher. Several workshops related to the theme were organised in order to receive further feedback and input from a broad group of people.¹⁰ The steering group also met for the last time to provide guidance for the finalisation of the present report.

3. METHODOLOGY

In order to meet the objectives of the project, several methods were used.

The *existing legislation on the national level* in all European Union Member States (Part II, section 4) was analysed based on different types of texts describing the state of affairs of restorative justice. The texts were analysed with the help of a number of tables in which information on the legal base, scope and practical organisation of restorative justice services was gathered. More information on the methodology and sources used can be found in point 4.4., Part II of this report.

The overview of *existing international regulations* (Part III) was compiled based on literature study and a search via the websites of the three international organisations studied: the European Union, the Council of Europe and the United Nations.

The needs of the national European restorative justice scene which could have implications for European Union policies (Part II, section 5) were evaluated through an online questionnaire comprising seven main themes: legislation; implementation and policy development; education, training and accreditation; development of good practice; cooperation and networking; communication and awareness raising; and research and data collection. All but two of these seven themes were subdivided into two sections: needs at the national level and needs at the international/supranational level. The list of needs was constructed based on the needs voiced in literature, international projects and events of European/international organisations. In addition, some questions raised by a number of 'international' documents were included. Moreover, respondents had the possibility to indicate needs that were not explicitly covered by the questionnaire. More details about the questionnaire and the way it was constructed can be found in point 5.1. of Part II.

The analysis of *whether these needs require specific regulation or other initiative at the level of the European Union* is provided in Part V of this report. A link was made to the question whether there is a legal basis for the European Union to act, and also to the question whether it is opportune to actually regulate these issues at the level of the European Union. In order to be able to do this, the role of the European Union in the field of criminal law was studied in Part IV of this report. The proposals of the concrete forms, instruments and the content of European Union policies logically followed from the two previous aspects.

¹⁰ Amongst others: 'New Council of Europe guidelines for the implementation of RJ and cooperation with the EU', 'International cooperation and its impact on RJ in Italy', 'Research on RJ in Europe', 'National and international legislation on RJ', and 'Restorative justice, the crime-victim paradigm and the CoE guidelines for a better implementation of the Recommendation 'Mediation in Penal Matters''. The full programme of this conference, as well as abstract or short papers on the presentations made, will be available from the website of the European Forum for Restorative Justice in the fall of 2008: <http://www.euforumrj.org>.

PART II:

RESTORATIVE JUSTICE IN EUROPE

In this second part, we provide an overview of the development of restorative justice in Europe and of the current restorative justice scene. We begin with some general comments on the nature and philosophy of restorative justice (section 1), before moving on to a short account of how restorative justice took root in Europe (section 2). Section 3 provides a short overview of what research tells us about restorative justice. In section 4 we provide a more detailed analysis of the core elements of the existing legislation at the national level in all EU Member States. This section will also describe the different ways in which the legislative provisions are being put in practice in Europe. The final section (section 5) presents an inventory of the main needs at national level that could have implications for EU policies.

1. RESTORATIVE JUSTICE

In 2004, Daly (2004: 500) wrote about restorative justice that “No other justice practice has commanded so much scholarly attention in such a short period of time”. Since then, the stream of publications on restorative justice has far from dried up. Within a time-span of a few months in 2006/07, three handbooks on restorative justice appeared: one edited by Johnstone and Van Ness (2007), one edited by Sullivan and Tifft (2006) and one published by the United Nations Office on Drugs and Crime (2006). This last shows that restorative justice not only attracts scholarly attention but also the attention of policy makers and international institutions.¹¹ Section 3 of this part of the report will show that almost all EU Member States now have legislative provisions allowing for restorative justice practices. Part III of this report will make clear that not only the UN, but also the Council of Europe and the European Union have paid considerable attention to the topic of restorative justice. Where does this interest come from? According to Boutellier (2006: 25), “restorative justice can be seen as ‘a solution’ for the deficit of the criminal justice system”.

Restorative justice is a notion that refers to a novel and comprehensive view of the criminal justice system, in which the needs of the victim are prioritised, offender accountability is emphasised in a positive manner, and the community is involved in an active way. “The first of its three basic principles is that a society’s response to crime should begin by repairing as much as possible the harm suffered by the victim. The second is that offenders should understand the effects of their act on their victim, and be encouraged to accept responsibility for it. The third is that the victim should have the opportunity to tell the offender directly about the effects of the offence, ask him or her questions, and then work out with the offender the best way to make reparation. There is scope for this process to be assisted by the participation of members of the community” (Aertsen et al., 2004: 9).

Restorative justice theory developed in the 1970s and 1980s around the innovative practice of victim-offender mediation, which arose out of discontent with the way criminal justice systems all around the world were dealing with victims and offenders. Restorative justice was, hence, frequently described by the ways in which it differed from both retributive and rehabilitative justice, forming a third justice paradigm.¹²

A number of reform initiatives can be said to have influenced the emergence of restorative justice practice and theory. During the 1970s and 1980s, critical criminologists devoted their attention to “the counterproductive effects of criminal justice and its incapacity to assure peace in social life” (Walgrave, 2008a: 618). Because the legal system was confronted with a growing crisis of confidence in the legitimacy of its formal structures, *informal justice* critics

¹¹ In 2004, the European Forum for Restorative Justice was already asked to write a policy-oriented guide on restorative justice by the Council of Europe. See Aertsen et al., 2004.

¹² For such a comparison, see for example Walgrave (1995: 233) and Zehr (1990; 2002).

formulated a series of proposals with “an emphasis on (a) increased participation, (b) more access to law, (c) deprofessionalization, decentralization, and delegalization, and (d) the minimalization of stigmatization and coercion” (Matthews, 1988, cited in Van Ness and Heetderks Strong, 2006: 13). In 1977, Nils Christie described in his celebrated article ‘Conflicts as property’ (Christie, 1977) how the state ‘stole’ conflicts away from people and often deprived them of any possibility to reach a resolution independently. He argued that the victim’s and offender’s rights to their own conflicts should be given back. *Abolitionists*, such as Bianchi and Hulsman, called for the abolition of prisons or a dramatic decrease in the use of prisons, and promoted the establishment of restitution, compensation and reconciliation programmes in the community. The development of restorative justice was also influenced by the resurgence of *indigenous justice*. The emancipation of native people, especially in North America and New Zealand, and their call to make the criminal justice system more responsive to their traditions of community-based, peace-oriented and deliberation-driven ways of dealing with conflict, led to the development of conferencing practices, based on the native practices of the Maori people in New Zealand, and (sentencing) circles, based on the traditions of the First Nations people in Canada. A third influence came from the “rediscovery in the 1960s that paying back the victim could be a sensible criminal justice sanction” (Van Ness and Heetderks Strong, 2006: 14). Proponents of *restitution*, like Schafer, argued that restitution takes care of the interests of the party that is harmed the most by crime, i.e. the direct victim. The *victims’ movement* has also had considerable influence on the emergence of restorative justice. “The contemporary rediscovery of crime victims was the product of an accumulation of criticisms and reforms by individuals and groups who were frustrated and angry that the victims’ interests were disregarded by a system preoccupied with the criminal suspect” (Van Ness and Heetderks Strong, 2006: 16). And whilst initially victims’ rights movements were focused on promoting victims’ interests to the detriment of offenders’ interests, today “most victims’ advocates are oriented towards a broader scope of social, personal, and juridical needs of those victimized by crime” (Walgrave, 2008a: 618). All of these – and other – tendencies and movements have led to a climate in which restorative justice could develop.

Restorative justice is far from being a unitary concept. It has been characterised variously as “a movement, a paradigm, a model, an approach, a concept, an idea, a notion, a theory, a process, a practice, a technique, a response, an alternative. Clearly restorative justice means different things to different people. It is a Leit-motiv for various policies and models which can be implemented in practice in many different ways and forms” (Fattah, 1998: 393). This is more than likely the reason why the Delphi-method experiment to have 29 experts agree on a working definition of restorative justice did not succeed.¹³ In the end, they agreed to accept Marshall’s definition as the most satisfactory at that time. “Restorative justice is a process whereby parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (Marshall, 1999: 5). Since then, many different definitions have been proposed, but none has been generally accepted until now, although Marshall’s is widely used.

Restorative justice practices can be used at any stage of the criminal justice process, and for crimes of any degree of seriousness. There is some evidence that they work better with relatively serious crimes where the victim has strong feelings that need to be resolved (see, for example, Sherman and Strang, 2007). In many countries it has been found that it is easier to obtain acceptance of restorative methods for juvenile offenders. However, there is no reason to limit restorative practices to young offenders since restoration to the victim is the starting point for restorative justice.

Whereas restorative justice as a concept was – initially – reserved for practices dealing with the aftermath of a criminal offence, increasingly it has been extended by some to other spheres –

¹³ For an account of this attempt, see McCold (1998).

to conflicts in school, at the workplace, in the community in general. Some even argue that restorative justice should be renamed 'transformative justice', believing that its underlying values can transform social life through a deliberative inclusionary life style (Sullivan and Tifft, 2006). This actually shows that the values underlying restorative justice, which include respect, empowerment, inclusiveness and encounter, are common sense values that are valuable for every aspect of social life. However, it is important to reserve the term 'restorative justice' to the application of these values – and the practices developed on the basis of these values – in criminal matters. The rapid growth of restorative justice – and its extension into non-criminal domains – has led to increased confusion about its scope and potential application, which may lead to the early death of what is a still developing notion. Walgrave (2008b: 18) has mentioned three reasons why restorative justice should remain limited to dealing with the aftermath of criminal offences. First, an extended concept of restorative justice loses meaning. Second, clarity about restorative justice is also necessary for research. And third and most important, criminal matters are intrinsically different from other injustices and conflicts. As he writes, "Only in criminalisable matters are social interests considered to be threatened to the extent that they may be defended by the use of coercion... Whereas restorative justice itself tries to avoid coercion maximally, it operates in a field where the eventuality of coercion is at hand" (Walgrave, 2008b: 18).

But even where authors agree on the fact that restorative justice should be limited to the field of criminal justice, there is disagreement on what constitutes a restorative justice practice and what not. This discussion has often been referred to as the minimalist versus maximalist approach to restorative justice or the outcome- and process-focused models of restorative justice. In the minimalist or purist approach to restorative justice, the focus is on the process. The model is called 'pure' because it "includes only elements of the restorative paradigm and excludes goals and methods of the obedience and treatment paradigms" (McCold, 2000: 372-373). It limits restorative justice to voluntary practices in which victims, offenders and their communities meet face-to-face in order to solve their problems. Proponents of this model are reluctant to bring legal professionals and authorities into the restorative justice process and reject any use of judicial coercion. For the 'purists', "The essence of restorative justice is not the end, but the means by which resolution is achieved" (McCold, 2004: 15). The outcome-focused model of restorative justice, or 'maximalist' version of restorative justice, attaches primary importance to the achievement of restorative outcomes. According to Walgrave (2008b: 23), "Deliberative processes hold the highest potential for achieving restoration but, if voluntary agreements cannot be accomplished, a maximalist option on restorative justice must be taken. Coercive obligations in pursuit of (partial) reparation have to be encompassed in the restorative justice model". Because restorative justice, in the maximalist view, is not limited to voluntary processes, but encompasses any action that is primarily aimed at achieving restoration, it can transform the whole criminal justice system by reorienting the goals of the criminal justice system away from retributive and towards restorative ones. Taking a position in this debate would take us much too far in the framework of this report. However, it is clear that gradually, agreement is growing that restorative justice lies on a continuum, and that specific processes and outcomes may be fully, partially or not at all restorative.

Undebated within the restorative justice scene is, however, what constitute its core practices: victim-offender mediation, conferencing and (sentencing) circles. It is on these practices that we will focus in the remainder of this report.

Victim-offender mediation is by far the most common restorative justice practice in Europe. In the 1999 Recommendation of the Council of Europe concerning mediation in penal matters, victim-offender mediation is defined as "... any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party, the mediator". Mediation can take place in a direct or an indirect way. In the case of direct mediation, the mediator will normally first have meetings with the victim and the offender separately to prepare them for

the direct encounter. When victim and offender meet face-to-face, the task of the mediator is to facilitate – not to steer – the communication between victim and offender. Usually it is possible for a lawyer or a parent of a juvenile to sit in on a direct mediation session, but in that case they will have to remain in the background, in a supporting capacity. In case it is not possible or appropriate for the victim and offender to meet face-to-face, mediation can also take place in an indirect way. Here the mediator will act as a go-between the victim and the offender, transferring messages from one party to the other. Whether or not a direct mediation can take place depends on a lot of factors, including the culture and environment of the participants, the kind of offence referred to mediation and the philosophy and mediation style adopted by the mediation programme/mediator. However, there is evidence from research (for example from research conducted in Austria; see Pelikan, 2008) that direct mediation leads to more victim satisfaction and increases the likelihood of the victim feeling that the offender has taken responsibility. In addition, compliance with the agreement seems to be higher where direct mediation has taken place. Variations on the typical victim-offender mediation method have been developed to deal with specific types of crimes. In Austria, for example, in cases of domestic violence a ‘mixed double’ is used in which a male and female mediator co-mediate. Also, in cases where there is no individual victim, for example in cases of racist incidents, a surrogate victim representing the (ethnic) community might take up the victim’s role.

Family Group Conferences were initially developed in New Zealand. Originally they were introduced in 1989 under provisions of the Children, Young Persons and Their Families Act to address both child welfare and youth justice matters. The reform was intended to empower the extended families of the Maori, the aboriginal people of New Zealand. The process was designed to bring families of victims and of offenders together to find their own solutions to conflicts, with the assistance of a government-provided facilitator. One of the main differences with victim-offender mediation is thus the inclusion of family members and supporters of victim and offender in the meeting. In the meanwhile, many different forms of conferencing exist and application of this practice is growing all over the world. In some projects, the role of facilitator is taken up by a police officer who is following a fixed script. In others, after the victim has expressed feelings and asked questions, a social worker will explain the options for reparation and for treatment available locally. Then everyone except the offender and his or her family leave the room. During this private meeting, they can work out a plan, which is then proposed to the victim, police officer and social worker.

Sentencing circles also include the victim’s and offender’s families and supporters, and in addition other members of the community affected by the crime or who have a contribution to make, as well as a judge, prosecutor and defence lawyer. They were developed in Canada, based on the traditions of indigenous people. However, they are now also being used to deal with conflicts involving non-indigenous people. A sentencing circle is part of a normal court proceeding and is subject to normal legal safeguards (amongst others: proceedings are open to the public and a record is made, the decision is subject to appeal). Everyone attending the circle has an equal right to speak, and discussions go beyond the current offence to include preventive considerations. The circle does not make a proposal to the court – it is the court. Circles are also used for other purposes than sentencing, for example to resolve community problems, to provide support for victims or offenders and to consider how to receive back in the community those who have offended and have been imprisoned (peacemaking circles, healing circles, etc.) As far as we know, sentencing circles have not been used in Europe.¹⁴

¹⁴ Although Dobrinka Chankova refers to sentencing circles being applied in Ireland in the framework of her research that she performed on new restorative justice models in the framework of COST Action A21, we have not been able to verify this information.

Besides these core practices, a multitude of other initiatives have been placed under the restorative justice umbrella. Again, it would take us too far to explore these in detail within the remit of this report. However, one last remark should be made. Next to these practices at micro-level, which deal with conflicts between individuals, restorative justice is also being applied to the macro-level, as illustrated by the practice of some of the Truth and Reconciliation Commissions and similar initiatives. An interesting new publication providing a comparative analysis of the potential of restorative justice in dealing with mass victimisation in the context of large scale violent conflicts is *Restoring Justice after Large-scale Violent Conflicts* (Aertsen et al., 2008a), a book resulting from COST Action A21.¹⁵

2. THE DEVELOPMENT OF RESTORATIVE JUSTICE IN EUROPE¹⁶

2.1. THE START OF RESTORATIVE JUSTICE IN EUROPE

In the 1980s and 1990s, pilot projects and initial legislation were introduced in many European countries. Norway took the lead in 1981, inspired by the ideas of Nils Christie, with a diversionary project aimed at first-time young offenders, later also aimed at contributing to the care of youngsters with behavioural problems. Two years later, the Ministry of Social Affairs began to encourage local governments to establish similar programmes, extended to adults in 1989. By 1989, already 81 of the 435 Norwegian municipalities offered mediation services. In 1991, the extension of the mediation programme throughout the country for a broad range of offences was authorised under the civil division of the Ministry of Justice. Today, trained voluntary mediators are used, as in Finland, which started its first victim-offender mediation project in 1983. Austria followed in 1985 with a pilot project for juveniles. It became part of the new Juvenile Justice Act of 1988 and was later extended to adults. Austria now has victim-offender mediation available nationwide, both for adults and for juveniles, organised by full-time professional mediators working for the semi-autonomous organisation Neustart, which runs a range of criminal law related services. In England and Wales, after small scale experiments, the Home Office funded and evaluated four projects between 1985 and 1987. But the projects did not expand as rapidly as in Germany, which started at about the same time (1984-1985) and which now has over 400 services that offer victim-offender mediation both in juvenile and adult cases. In Germany, the first mediation initiatives were confined to adults who offended and were instigated by the court's legal aid services, under existing law, and by independent associations like Die Waage (The Scales) in Hannover and Handschlag (Handshake) in Reutlingen. The protagonists of these early initiatives were mostly academics, street social workers and lawyers who were searching for new ways to address the deficiencies of the criminal justice system. The problem of high recidivism rates, coupled with the influence of abolitionism and the international restitution movement, constituted the theoretical ground from which restorative justice took root in Germany. The criminal code was amended to include victim-offender mediation in 1994.

Initially, developments in Europe were rather slow. Although experiments were considered positive, not least by the victims and offenders involved, the restorative justice movement did not immediately receive the support that was hoped for. Instead, victim-offender mediation initiatives met considerable resistance from the protagonists of the criminal justice system. The approach was indeed very new for legal professionals and criminal justice policy makers.

¹⁵ COST Action A21 on 'Restorative justice developments in Europe' was a European network of researchers from some 20 countries which started late 2002 and ran until the end of 2006. The main objective was to enhance and to deepen knowledge on theoretical and practical aspects of restorative justice with a view to supporting implementation strategies in a scientifically sound way. Researchers worked together in four working groups: 1. Evaluative research on restorative justice practices; 2. Policy oriented research on restorative justice developments; 3. Theoretical research; 4. Restorative justice, violent conflicts and mass victimisation. In the course of the Action, several meetings and seminars were organised. The Action has resulted in the publication of several books and special issues in scientific journals. For more background information, please visit <http://www.euforumrj.org/Projects/projects.COST.htm>.

¹⁶ Unless otherwise stated, information in this section is drawn from: Aertsen et al., 2004.

So, although the provisions were in place for referring cases to mediation, there were few referrals. In some countries, more than a decade was needed in order to develop a practice of any significance. The creation of a legal framework sometimes provided an important impetus, but did not lead everywhere to the expected break-through. From a quantitative point of view, the practice remained rather limited. From a qualitative point of view however, many small-scale experiments and also some national programmes provided, in the first phase, conclusive evidence that this way of responding to crime contained a strong innovative potential. Frequently these new practices were intensively researched, like in Belgium, Austria and Finland, and were followed-up in an intensive way by research institutes or university departments. In Belgium for example, the 'mediation for redress' project was introduced in 1993 on the initiative of the Catholic University of Leuven, in partnership with the public prosecutor of Leuven and a local NGO working with victims and offenders. Its purpose was to develop a concept and a method for mediation in cases of more serious crime that did not qualify for a dismissal. The first three years of the project took the form of an action-research project in which there was continuous cooperation and exchange between the researcher and the practitioner to continually adapt and improve the process (Aertsen, 2006a: 71).

During the 1990s, the number of mediation programmes and the number of cases dealt with on an annual basis increased steadily in European countries. At the end of the 1990s, a new phase in the European development of victim-offender mediation could be noted. While countries like Germany, Norway, France, Austria and Belgium, already had legislation at their disposal at the beginning of the 1990s, at the end of the decade a legislative framework was developed in several other countries (England and Wales, Czech Republic, Poland, Slovenia, Spain). In addition, the practice of victim-offender mediation was being enlarged legally or considerably refined (France, Germany, Austria). Still other countries – such as Sweden – were in the process of adopting new legislation. Pilot projects on victim-offender mediation were equally started in – amongst others – the Netherlands, Denmark, Ireland, Luxembourg and Italy. Now, in 2008, most Member States of the European Union have a legislative framework allowing for the referral of cases to restorative justice practices, as can be seen in section 3 of Part II of this report.

2.2. THE ORIGINS OF RESTORATIVE JUSTICE IN EUROPE

When we look at who took the initiative for starting victim-offender mediation or other restorative justice projects, a diverse picture appears. In Norway and Finland, for example, mediation developed quite autonomously, alongside the neighbouring fields of probation and victim support. In other countries, probation and victim support have played an important role. In Austria, Germany, England and Wales and the Czech Republic, probation services have taken the lead. The fact that in some countries offender-oriented services such as probation have been the driving force behind the early developments initially placed the victim movement in a somewhat defensive position. But as the practice of victim-offender mediation progressed, its processes were tailored more to the needs of the victim and research results showed positive effects for the victim. This decreased the resistance of victim support organisations towards victim-offender mediation. Services for victim support are now often taking part in the management of local mediation projects.

On the other hand, in other countries, for example France and Portugal, victim support has played a very important role by founding or lobbying for the start of mediation services. In France, the victim-offender mediation programmes were initially developed as a proactive and preventive response to an increasing feeling of insecurity and fear of victimisation among the inhabitants of urban areas. At that time, the new left wing government chose to address this situation by implementing new policies at municipal level. These new policies were based on the principles of citizenship and solidarity. They emphasised the value of participation by citizens in the decision making processes concerning the implementation of crime policies. This new approach sought to overcome the crisis created by social and economic difficulties and the work load on the justice system. In particular, an increasing number of juvenile crimes were dismissed by public prosecutors, who seemed unable to cope with the excessive number of cases in court. This led to frustration and distrust amongst the population, as well as to

increased conflicts in the community. New initiatives were implemented in the 1990s to address these problems, such as the *Maisons de Justice et du Droit* (Houses of Justice and Law) and mediation programmes. The mediation programmes appeared to be a better way of responding to the needs that were arising, and a number of different stakeholders participated in their implementation. Within the Communal Councils for Crime Prevention, active local citizens developed social mediation and victim-offender mediation services as a 'grass root' response to everyday delinquency. Two important organisations, *Citoyens et Justice* and *INAVEM*, also adopted the concept of mediation and developed similar programmes to provide their clients with a more constructive response to victimisation. The successful experience with the first mediation programmes, and the active lobbying of these associations, led to the adoption of a law referring to victim-offender mediation in 1992.

In Northern Ireland, the drive to implement restorative justice (conferencing) was linked specifically to the historic Good Friday Agreement which was signed in Belfast in 1998. This Agreement provided for a wide ranging review of criminal justice. A Review Group was established that produced recommendations on how to reform the criminal justice system based on the multi-party talks and further research on different possible alternatives. In Northern Ireland, community based mediation centres arose in a social context in which there was a complete lack of trust in the criminal justice system, including in police services, the judiciary and the military. In case of a dispute or an offence, some citizens were taking justice into their own hands and frequently made use of violent measures to 'make justice' happen. The community mediation centres were able to bridge this gap and provide a non-violent means to solve conflicts. This antecedent, together with international trends in the field of criminal justice, and the development of restorative justice, formed the basis of specific recommendations to reform the juvenile justice system within a restorative justice framework. This reform was introduced by the Justice (Northern Ireland) Act 2002, which established the Youth Conference Service under the auspices of the Youth Justice Agency, the body created to function as a probation service for juveniles.

2.3. FROM A GRASS ROOTS MOVEMENT TO A CONCEPT INCREASINGLY EMBEDDED IN CRIMINAL POLICY

Initially a grass roots movement, restorative justice is increasingly becoming institutionalised. The adoption of national legislation and of policy documents on restorative justice by national governments are an indication of this, as is the increased involvement of state institutions like probation departments in the delivery of restorative practices. As it is moving from the margins to the mainstream, restorative justice is presented with a number of opportunities, the most obvious of which is that more victims and offenders can benefit from it thereby increasing the possibility that it will have a real impact on the criminal justice system. However, in this process it is also faced with a number of important challenges. Hudson describes these as the risk of the ethical aspects of restorative justice being overthrown by its political aspects. She writes the following: "Restorative justice clearly has its ethical and its political aspect. Its ethical moment is its defining aspirations: to restore relationships between victims, offenders and their communities, and to be a 'replacement discourse' which decentres retributive punishment of offenders in favour of a more healing, relational approach which provides benefits for all parties to the conflict rather than imposing burdens on just one party. The political moment of restorative justice is its harnessing by criminal justice systems as merely another penal option. Restorative cautions; conferences and meetings which are mandatory for certain offenders and offences as in the new referral orders in England and Wales (...); restorative justice procedures as part of court-imposed sanctions and as part of imprisonment programmes – displacing neither court nor imprisonment – are expressions of this accommodation of restorative justice to the political moment of penal policy" (Hudson, 2006: 273-274). Boyes-Watson warns that restorative justice should learn from previous criminal justice reforms: "One need only reflect on previous criminal justice reforms – the penitentiary, the reformatory, the juvenile court, probation, diversion programs and community corrections – to see a dismal pattern of good intentions gone awry (...). In each instance, the ideal vision of reforms was undermined by forces beyond their control and

imagination. Likely pitfalls for state-sponsored restorative justice include: lip service for victims (...); re-victimization of victims (...); the phenomenon of net-widening (...); erosion of due process for offenders (...); professionalization of the restorative process (...); rationalization of the process (...); bifurcation of the system into a two-tier system based on race and class (...); and deeper penetration of the state into the community (...)" (Boyes-Watson, 2004: 215-216). Masters sees it as "critical to acknowledge the difference between conceiving RJ as a *philosophy* that would inform how an entire criminal justice system would operate, compared to restorative processes being seen as a *desirable programme* for use with certain offenders at certain stages" (Masters, 2004: 229). He continues by saying that "[t]he challenge for reformers is to lobby for the whole-sale reorganisation of criminal justice around RJ principles, rather than accept the introduction of restorative encounters at a single stage of a system as the ultimate aim for restorative justice" (Masters, 2004: 236). Aertsen, finally, writes that in several European countries, political bodies have adopted a restorative justice discourse. He mentions that "[w]hereas political acceptance and support is highly welcomed, a warning note must be sounded regarding the negative consequences of institutionalisation and the risk of political co-option" (Aertsen, 2007: 94).

Below we deal with some of the most common cited challenges that restorative justice has to confront in moving from the margins to the mainstream.

First, restorative justice has to *overcome the stereotypical view that it can only deal with minor cases*. "The likelihood that mediation will be taken seriously is decreased if the process is identified with only the "easy" cases, those that the system would have otherwise dismissed" (Umbreit, 1999: 228). If restorative justice would be identified with only the easy cases, it would be left open "to all the critiques of earlier forms of informal justice, that it was second-class justice for crimes that weren't serious enough for expensive, formal state justice" (Hudson, 2006: 276). Research to date, as reported on in the next section, actually shows that restorative justice is more efficient in more severe cases. Connected to this is the need for restorative justice to show that it can deal with a substantial volume and range of cases in a cost-effective manner. According to Umbreit (1999: 225) this can, in the short term, be done by adopting a presumptive referral-to-mediation strategy.

Second, restorative justice has to *be careful not to become 'watered down'*. Masters (2004: 230) warns against traditional agencies adopting restorative language and adding services in order to receive funding without changing values and priorities. Umbreit describes how in some parts of the USA, the term victim-offender mediation "is used quite loosely to describe quickly arranged and executed negotiations between victims and offenders, often not face-to-face, held for the sole purpose of negotiating a restitution agreement to include in a diversion or dispositional order" (Umbreit, 1999: 226). Aertsen describes for Belgium how 'mediation at the police level' and 'penal mediation' "are functioning under particular police and public prosecutor's policies, clearly oriented to offering quick, strict and visible offender-focused answers to minor crime" (Aertsen, 2006a: 78). Roach, finally, describes how in Canada restorative justice was brought into the system through the 1996 sentencing reforms, "based on the implicit premise that restorative outcomes such as offender rehabilitation and victim reparation could be achieved without restorative processes based on voluntary, free and facilitated interaction between offenders, victims and others affected by the crime" (Roach, 2006: 171).

Third, in the process of securing more stable funding sources, developing more routine day-to-day operating procedures and seeking to collaborate with system professionals, *restorative justice programmes are vulnerable to losing sight of the underlying values and principles of restorative justice*. Umbreit described a small but growing trend among some victim-offender mediation programmes of bypassing individual meetings with victim and offender prior to the mediation session (Umbreit, 1999: 227). Even if these pre-mediation sessions still take place, there is also the danger of the process becoming more agreement driven rather than dialogue driven, allowing little time for the sharing of facts and feelings. As Umbreit states, "[a]s courts seek more options for handling cases in a more "efficient" manner, and mediation programs seek to justify their existence with large numbers of case referrals, program staff may be tempted to

downplay the dialogue phase of the mediation encounter” (Umbreit, 1999: 227). He continues by stating that this might lead to a kind of ‘fast food version’ of mediation in which the mediator is “serving more as an arbitrator who directs the process toward an agreement, while the victim and offender have very little input” (Umbreit, 1999: 228). Aertsen warns against this by saying that the true participation of the parties is key to them experiencing procedural justice: “Procedural justice has taught us that the personally experienced treatment and the perceived control of the process of conflict-handling, more than the control of the final decision or the outcome, determines feelings of justice and fairness” (Aertsen, 2006a: 82-83).

Fourth, Hudson (2006: 274) speaks of the danger of restorative justice *becoming too much identified with one particular party*, whether victims, offenders or communities. For example, the low level of victim involvement in the implementation of referral orders, final warnings and reparation orders in England and Wales is problematic. There is a clear danger that victims’ interests will be subverted in the service of offenders. Aertsen writes that “[t]he more restorative justice becomes institutionalised in the framework of existing institutions, such as child welfare, probation services or the police, the higher the risk of a dominant focus on the needs of the offenders” (Aertsen, 2007: 95). This tendency, which is indeed apparent in Europe, has led to strong concerns among victim support organisations. This can for example be seen from the *Statement on the position of the victim within the process of mediation*, which was adopted by the European Forum for Victim Services (now: Victim Support Europe) in 2003. But there is also the inverse danger, namely that victims’ rights and interests are being protected at the expense of offenders’ rights. An example of a practice in which this concern could be raised is the recently introduced (2007) victim-offender conversations in the Netherlands. Blad and Lauwaert (2008) report that in these facilitated talks between victims and offenders there is a deliberate imbalance since they are geared explicitly to providing a service to victims and not to offenders.

Fifth, restorative justice has to *overcome* what Umbreit has called *the media glorification of the current retributive justice process*. “In fact, restorative justice values run counter to dominant legal culture, which rests upon the foundation of an adversarial process and the need for professional dispute resolvers (i.e., lawyers). In order for the VOM process to move beyond marginalization, it must become better-known and more accurately understood in the world of popular culture” (Umbreit, 1999: 224). Cooperation with the media, but also with civil society organisations is important to create broad social support for restorative justice.¹⁷

Sixth, restorative justice has to ensure that it is *not being evaluated against outcomes that it does not primarily aim to reach*. For example, demands are increasingly being placed upon restorative justice to show that it can reduce reoffending. However, reducing recidivism is for many not a core aim of restorative justice; restoration of harm is. Hudson reports how in England and Wales, in a policy document called ‘Restorative Justice: The Government’s Strategy’, restorative justice is presented as a kind of silver bullet which will allow the expression of victims’ feelings, reduce reoffending and control crime without significant extra costs. She writes: “While one can readily understand (indeed one expects) politicians to harness new ideas and new forms of justice to their law and order objectives, restorative justice advocates and practitioners should resist the temptation of offering their new justice modality as the silver bullet, the cure-all that can restore relationships, control reoffending, reintegrate offenders, provide reassurance and redress to victims, construct safe communities and demonstrate community norms, as well as providing appropriate punishment” (Hudson, 2006: 275). This does of course not mean that restorative justice protagonists are insensitive to the issue of reoffending. As Walgrave wrote: “While reoffending is not the first concern of restorative justice, the bottom line is that restorative justice interventions should not provoke more recidivism than traditional interventions. If they did, the effect would be negative for public safety, causing additional harm to peace and safety in the community. Moreover,

¹⁷ In 2008, the European Forum for Restorative Justice has started a project which looks exactly into the issue of how to create social support for restorative justice. More information can be found on the Forum’s website www.euforumrj.org.

increased reoffending after restorative processes would be detrimental to the public and political acceptability of restorative justice” (Walgrave, 2008b: 105).

And finally, restorative justice has to be careful *not to become a victim of rational management strategies*. Crawford describes this risk in relation to youth offender panels in England and Wales. “Organizing youth offender panels presents considerable administrative hurdles that challenge traditional ways of working. Holding panels in the evening and at weekends requires different working patterns; facilitating the attendance of the diverse stakeholders presents difficulties of organization and timing; and finding appropriate venues challenges the extent to which panels are rooted in local community infrastructures. Moreover, administering panels creatively and flexibly often sits awkwardly within a risk-averse professional culture. ... In practice balancing the demands of rational management and accommodating the emotional, expressive and human dimensions of restorative justice constitute a fundamental but precarious dynamic in implementing youth offender panels” (Crawford, 2006: 132). He provides a further example related to the Youth Offending Teams. “In relation to referral orders, not only do national standards and targets exist (against which an individual YOT’s performance is judged) in relation to the percentage of victims contacted, the number of working days within which young people and victims are to be first contacted and the number of meetings to be held (...), but there also is central *guidance* on the amount of reparation in hours that shall be agreed in the youth offender contract, dependent upon the length of the order. As such, rather than the panel process and outcome according to the needs and desires of the parties, in large part they are determined by the dictates of central guidance and standards” (Crawford, 2006: 133). Aertsen writes that “[t]he more restorative justice practices are officially accepted and publicly funded, the more governmental regulations determine practice. Local organisations are under pressure to adopt quantitative and/or evidence-based criteria to evaluate their work. Some of these requirements influence mediation practice and result in a more routine or settlement driven, outcome-oriented approach” (Aertsen, 2007: 94).

Blad warns that “... if we want to continue and maximize the application of restorative practices in the field of criminal justice and still keep their restorative integrity, the process of defining restorative practices into the punitive – cultural and structural – framework can only be counteracted by developing, communicating and safeguarding a very clear identity of restorative justice, differentiated from the identity of punitive justice. We should strive for an integration of restorative practices within the criminal justice system *understood* as restorative practices and *not* as punitive practices. In view of the dominance of punitive culture this is not an easy task” (Blad, 2006: 111). We would like to add that the conceptual confusion about restorative justice, as described in section 1 of this part of the report, compounds the difficulty of this task. Hence the need to develop broadly accepted statements of principles and codes of practice. However, Mackay warns that “... to the extent that restorative justice becomes institutionalized within a socio-political agenda rather than a legal-ethical conceptual framework, the development of statements of principle and codes of practice will serve co-option of restorative justice by the state; their orientation will be a-theoretical, and their rhetoric will be dominated by an incontestable pragmatism. However, to the extent that a legal-ethical framework does not address the socio-political agenda, principles will be abstract and unrelated to the business of responding to harms perpetrated by citizens upon each other” (Mackay, 2006: 212).

3. SOME RESEARCH RESULTS

3.1. OVERVIEWS AND META-ANALYSES

Restorative justice has been intensively researched during its short history. Aertsen et al. (2004: 34) wrote that “in some ways it has been subject to closer examination than the conventional justice system”. In what follows we will concentrate on empirical research. However, it is important to underline the essential task of continuing theoretical research on restorative justice to guide the development of practice, policy and legislation. Since restorative justice is still a developing notion, exercises as done in the working group on theoretical research in the framework of COST Action A21 continue to be essential in order to deepen the understanding of restorative justice.¹⁸

Vanfraechem et al. (2008) have found that, although conferencing is in practice available to a lesser extent (i.e. in less countries and mostly for juvenile offenders), it is proportionally more evaluated than victim-offender mediation. Based on the information on research performed in nine European countries, they further concluded that in the beginning of the development of restorative practices, research seems mostly to be descriptive-inventory (providing basic data on the organisation of the services, the number of cases, features of the cases and participants, etc.), while evaluative research tackling more in-depth questions (such as satisfaction of participants, job perception and satisfaction of mediators, performance of restorative justice programmes compared to traditional intervention methods, and reoffending) and using more complex techniques is being conducted when the restorative justice practices become more established. Action-research has also proved to be useful in developing new practices in close cooperation between researchers and practitioners. Many aspects of restorative justice practices (see below) have been investigated in European countries, including the applicability of restorative justice to cases of domestic violence and to conflicts within or with minority groups. One of the conclusions of Vanfraechem et al. (2008, forthcoming) concerns the need of developing in a comparative way data recording systems about ongoing practice in European countries.

Alongside this overview of research in nine European countries, three other meta-analyses provide important information about restorative justice. The first of these is a Canadian study (Latimer, Dowden and Muise, 2001) which brought together twenty-two studies that examined the effectiveness of 35 individual restorative justice programmes, comprising victim-offender mediation as well as conferencing models. It included only studies that met a basic standard of research, namely those which used a control group, though not necessarily random assignment of cases to experimental and control groups. The meta-analysis showed that compared to traditional non-restorative approaches, restorative justice was more successful at achieving the outcome measures that were defined as its major goals. The results that were included and entered into the analysis were: victim and offender satisfaction, fulfilment of restitution agreements and recidivism. One pronounced effect was victim satisfaction: victims who participated in restorative processes were significantly more satisfied than those participating in the traditional justice system. With regard to offender satisfaction, the differences – in favour of restorative processes – also proved statistically significant in every case except one. Unlike some studies, the analysis showed slightly higher satisfaction rates (among victims as well as offenders) for victim-offender mediation programmes than for conferencing models. Quite positive outcomes were also shown with regard to the fulfilment of restitution agreements (but only eight studies could be included here). Finally, the study

¹⁸ Working Group 2 on theoretical research aimed to clarify and further theoretical concepts, approaches and frameworks on restorative justice. Key questions concerned the relation of restorative justice to criminal law and punishment, to crime prevention and rehabilitation, and to societal developments in general. These were studied from the perspective of legal theory and philosophy, ethics, sociology of law, pedagogy, social psychology and criminology. The work of the group resulted in the publication of a book entitled *Images of Restorative Justice Theory* (Mackay et al., 2007).

showed that there is low impact on recidivism. The authors argued that this was not surprising given the fact that restorative justice interventions are mostly limited to a short period of time. Restorative justice programmes should therefore be perceived as complementary to rehabilitative approaches.

Another meta-analysis of some twenty-five evaluative studies, encompassing forty-one restorative justice programmes in Anglo-Saxon countries, showed particularly positive results for conferencing programmes, in comparison with victim-offender mediation (McCold and Wachtel, 2002). Of all victims participating in a conference, 91% expressed satisfaction with the way their case was handled, and 96% expressed a sense of fairness. For victims participating in mediation, these figures were 82% and 85% respectively. Of all offenders participating in a conference, 95% expressed satisfaction, and 94% said they felt a sense of fairness. For offenders participating in mediation, these figures were 85% and 87% respectively. But even for mediation, victims and offenders on average rated these programmes as more satisfying and fair than traditional justice.

The latest meta-analysis available is published by The Smith Institute in London under the title *Restorative justice: the evidence* (Sherman and Strang, 2007). The purpose of this review was to examine what constitutes good-quality restorative justice practice, and to reach conclusions on its effectiveness, with particular reference to reoffending. The review employed a broad definition of restorative justice, including victim-offender mediation, indirect communication through third parties, and restitution or reparation payments ordered by courts or referral panels. Much of the available and reasonably unbiased evidence of restorative justice effects on repeat offending comes from tests of face-to-face conferences of victims, offenders and others affected by a crime, most of them organised and led by a police officer; other tests cited involve court-ordered restitution and direct or indirect mediation. The review is based on a thorough screening of research on restorative justice and carefully selecting those studies that fulfil the standards set by the researchers. These standards are outlined carefully, the authors being fully aware that “the best methods of research synthesis for such a review are subject to substantial scientific and policy debate” (Sherman and Strang, 2007: 14). The research report attends to two basic claims of restorative justice the authors have stated thus:

The procedural claim is that restorative justice (RJ) is seen by victims and offenders as a more humane and respectful way to process crimes than conventional justice (CJ). The effectiveness claim is that RJ is better than CJ in producing important results that we want from justice: less repeat offending, more repair of harm to victims, fewer crimes of vengeance by victims, more reconciliation and social bonding among families and friends affected by crime, and more offences brought to justice. A systematic review of tests of these hypotheses offers, according to the authors, promising evidence in support of both claims, although with caveats. Victims and offenders who participate in RJ are generally quite pleased with the procedures, more so than with CJ. Some of that evidence may be due to self-selection bias, but other tests eliminated that bias by giving participants little or no choice. This preference is accompanied by strong evidence that RJ is at least as effective in producing the desired results of justice as CJ, often more so, and only rarely counterproductive. There are also indications of possible cost savings (Sherman and Strang, 2007: 13).

In terms of repeat offending, the most important conclusion from the review was that restorative justice works differently for different kinds of people. Tests on diverse samples have found substantial reductions in repeat offending for both violence and property crimes. In other tests, this effect has not been found, but with different populations, interventions or comparisons. In one case, for a small sample of Aboriginal offenders in Australia, an offer of face-to-face restorative justice appeared to have caused higher rates of reoffending than traditional interventions. “This very limited evidence of backfiring can be balanced against the potential RJ may have as a full or partial alternative to incarceration for young adult offenders, who had much lower two-year reconviction rates (11%) in one Canadian study (N=138) than a matched sample (37% reconviction) who served their sentence in prison” (Sherman and Strang, 2007: 8). These results in terms of effect of restorative justice on reoffending lead the researchers to conclude that more research on ‘what works for whom’ is needed.

The impact on reducing reoffending seemed to be higher with serious rather than minor offences, violent crimes rather than property offences, and offences with a direct victim involved. As with the research of McCold and Wachtel, the benefits for victims seemed to be more pronounced for conferences than for other forms of restorative justice.

At a more individual analytical level, there is a very large number of research projects that explore particular features of restorative justice and that provide evidence of its potential positive effects. As it is not possible to review them all here, we bring together some of these research results.

3.2. WILLINGNESS OF VICTIMS TO PARTICIPATE

Various studies show that 30% to 50% of all victims are interested in a personal meeting with the offender. This percentage increases up to 70% or more when the possibility for indirect mediation is also presented (Löschnig-Gspandl and Kilchling, 1997; Aertsen and Peters, 1998). Comparing several studies, it has also been found that the way the mediation offer is formulated and presented to those involved influences to a high degree the willingness to participate.

3.3. DEGREE OF SATISFACTION

Many studies show that the degree of satisfaction with respect to the process and the results of mediation and conferencing in general has been found to be high for both victims and offenders (Umbreit and Coates, 2001; Braithwaite, 2002).

The empirical evidence indicates that victims in general show high levels of approval as a result of the restorative justice experience, even though the level is somewhat lower than for other participants in that process. For offenders, levels of satisfaction with mediation or conferencing range between 80% and 95%, but victim satisfaction also goes up to 90% or even more in some studies. When participants in mediation are compared with victims and offenders who followed the normal legal procedure, the findings show, among other things, a decrease in victims' fear of re-victimisation by the same offender and fear of crime in general, as well as an increased satisfaction with the functioning of the criminal justice system as a whole (Umbreit, 1994). For conferencing, when cases were randomly assigned to a conference and to court, comparable findings were reported: after a conference a smaller proportion of victims show fear of re-victimisation, or feel anger towards their offender, and many of them receive apologies, which seldom happens in court (Strang, 2002). It should be noted, however, that in some evaluative studies on family group conferencing in New Zealand and Australia a minority of victims reported a negative experience.

The number of victims who participate in restorative justice programmes varies considerably. Victims might not wish to attend, particularly when they feel emotionally less involved (for example shop managers in the case of shoplifting). But victims have not always been invited to participate, a problem which can occur in more offender oriented programmes.

Questions related to victim and offender satisfaction were posed in the course of many of the research projects that evaluated specific (stand-alone) programmes, not only in the UK, but also in Austria, Belgium and Finland. Apart from the generally high satisfaction rates reported, studies that contained a wider range of differentiated questions and answers were also able to point to a programme's strengths and weaknesses and to the influence of mediator performance. In the 1990s, a cross-national meta-evaluation study was carried out in four projects in the United States, later extended to include one in Canada and two in England (Umbreit, Coates and Roberts, 1998). It used a quasi-experimental research design to compare experiences and perceptions of those who had been involved in victim-offender mediation (both direct and indirect mediation) with those who were referred to victim-offender mediation but who did not go through with it. Victims and offenders who participated in some form of victim-offender mediation in either of the two English projects were more likely to express satisfaction with the justice system's response to their case and to feel that

the response had been fair, than those who were referred to the process but never participated in it.

Umbreit reports that “[w]hile the possibility of receiving restitution appears to motivate victims to enter the mediation process, following their participation they report that meeting the offender and being able to talk about what happened was the most satisfying aspect of the program” (Umbreit, 1999: 219).

3.4. AGREEMENTS REACHED AND COMPLIED WITH

The number of agreements reached in victim-offender mediation and conferencing is high, usually between 70% and 90% of all cases started (Umbreit and Coates, 2001; McCold, 2003). Mediations result in more agreements when there is a direct meeting between the victim and the offender (Pelikan, 2008). The level of compliance with the agreed obligations in mediation or conferencing is very high as well, and substantially higher than for court orders to make reparation (Umbreit, 1994; Braithwaite, 2002). Compliance rates between 60% and 100% of the agreements reached have been reported, with the most frequently reported range between 80% and 90%.

3.5. THE EFFECT ON REOFFENDING

In addition to what was mentioned in connection to the meta-analyses in relation to reoffending, a recidivism study conducted in Austria deserves mention. The study was restricted to cases of minor assault by adult offenders and it used a control group of cases where for the same type of offence the court had imposed a fine (Schütz, 1999). The observation period was three years after the case had come to the notice of the prosecutor. In this study the reconviction rate of the victim-offender mediation group (14%) was significantly lower than that of the control group (33%). When looking at offenders with a previous conviction, the difference became less pronounced: 30% for the victim-offender mediation cases versus 47% for the court cases. Kurki (2003) has found that equal participation in decision making and consensus on decisions are factors that are related to lower recidivism rates.

In England and Wales the Ministry of Justice has published the final report of its four year research specifically aimed at answering the question whether restorative justice affects reconviction. One of its key findings is that “summed over all three restorative justice schemes, those offenders who participated in restorative justice committed statistically significantly fewer offences (in terms of reconviction) in the subsequent two years than offenders in the control group” (Shapland et al., 2008: iii).

3.6. THE QUALITY OF MEDIATION

Some studies have been carried out on the quality of mediation and its effects on the outcome. Daly (2003) has assessed the extent to which conferences live up to the claim that they treat victims and offenders with respect, evoke feelings of remorse in the offender, ensure that elements of the agreement are not excessive, and so on. She found that much is achieved, but that there is a gap between the hope and the experience, and it may be easier to achieve some aims, such as fairness, than others, such as restorativeness itself. Maxwell and Morris (2001) in New Zealand have shown actual effects in the way in which a family group conference was conducted. Young people are less likely to offend again if they are not shamed and made to feel that they are ‘bad’, and if they do feel involved in the decision making at the conference, and agree with the conference outcome. But many other factors in offenders’ upbringing, such as problems in the family and at school, have an effect; these also have implications for crime reduction strategy. The research also shows the importance of what happens after the conference: social inclusion (having close friends since the conference) and gaining employment. In Thames Valley, in England, the accompanying research found that some police facilitators did make the offender feel like a ‘bad person’; some bad facilitation continued even after the researchers drew attention to it, and the hope that inappropriate police behaviour would be challenged in the conference setting was not always fulfilled (Young, 2001).

3.7. FINANCIAL COSTS

Studies of the financial cost of a victim-offender mediation case show considerable variations: from \$97 in France (for the category of less time-consuming cases) to \$250 in California and \$1.069 in Germany (Gimenez-Salinas, 1997; Umbreit and Coates, 2001). In Finland, it was calculated that the net cost saving of a mediation process in comparison to a court procedure was about €750 per case; the savings for 3,050 mediation cases (the number of cases entered into the study) were calculated to be €2.15 million per year (Aaltonen, 1998).

It is important to take into account that financial costs or savings related to different options are difficult to compare. Normally savings will be higher when the programme is offered in an early stage of the criminal justice process. One can also expect that costs will decrease when a practice is implemented more widely. Mediation by volunteers rather than professionals may be expected to reduce costs, but the cost of supporting the volunteers adequately should not be over-looked. Finally, a discussion on the financial cost should be related to the aims and objectives of the programme, which can make clear that costs and benefits other than financial ones are important as well. Restorative justice could build 'a social capital' through its effects on the community, by providing ways of active participation for victims, offenders, their supporters, community members and professionals (Kurki, 2003).

4. LEGISLATION ON AND IMPLEMENTATION OF RESTORATIVE JUSTICE PRACTICES IN EUROPE

4.1. INTRODUCTION

One of the objectives of this project was to analyse the existing legislation on national level concerning restorative practices in all EU Member States. In order to do that, we repeated and refined an exercise that had been undertaken twice in the past, once by David Miers in 2001 (Miers, 2001), and once by David Miers and Jolien Willemsens in 2004 (Miers and Willemsens, 2004). This exercise consisted in analysing country-specific chapters with the help of a table in which information on the legal base, scope and practical organisation of restorative practices was gathered. Different tables, gathering the same categories of information, were used for juveniles and adults since provisions for these two do not always run parallel.

For the current exercise, we drew on seven different sources to gather the country-specific information.¹⁹ First, we made use of the extensive chapters on national legislation that were written in the context of the COST Action A21 on 'Restorative justice developments in Europe'. Within the COST Action, Working Group 2 on policy oriented research set about to collect detailed information about the legal authority on which victim-offender mediation/restorative justice is based in 14 countries.²⁰ About each of these countries an extensive chapter has been written, also including an analytical account of the political and legal understanding of victim-offender mediation/restorative justice in the respective countries and an evaluation of practice. These chapters have been published in a book entitled *Regulating Restorative Justice. A Comparative study of legislative provision in European countries* (Miers and Aertsen, 2008). The second source of information was updated versions of the chapters that had been written for the exercise in 2004, and which had been published in the book

¹⁹ One should note that this type of exercise has serious limitations. First of all, the texts on which the analysis is being made are usually written in English by non-native English speakers. Although the quality of the texts was very good, one inevitably loses a certain level of nuance. And, second, the texts are being analysed by someone who is not familiar with the fine details of the different legal and institutional systems. This means that, inevitably almost, some nuances get lost and possibilities for misinterpretation exist.

²⁰ We used chapters about the following 12 countries for our analysis: Austria, Belgium, Bulgaria, Finland, France, Germany, Hungary, Poland, Romania, Slovenia, Spain and UK. The other two countries dealt with in the legislation book resulting out of the COST Action were Turkey and Israel.

Mapping Restorative Justice. Developments in 25 European countries (hereinafter: the Mapping book). For the countries not covered by the book resulting from the COST Action, we attempted to get updated chapters of the Mapping book. Also in countries not originally included in the Mapping book, people were contacted in order to obtain a chapter on their country following the structure of the Mapping book contributions. We succeeded in obtaining chapters for the following countries: Cyprus, Denmark, Estonia, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Portugal and Sweden.²¹ Thirdly, we drew on the book by Anna Mestitz and Simona Ghetti (2005) on *Victim-Offender Mediation with Youth Offenders in Europe* to complete or seek clarification of some of the chapters previously mentioned. The same was done with country-specific articles that appeared in the *Newsletter of the European Forum for Restorative Justice*. Fifth, in the case of the Czech Republic, we used the ‘old’ Mapping book chapter as we did not succeed in getting an updated version. And, finally, for the Netherlands, we also drew on the old Mapping book chapter, completing it with information in a text written in the context of another book resulting from the COST Action A21 on research on restorative justice in Europe (Vanfraechem, Aertsen and Willemsens, 2008). In order to complete information on the practical implementation of restorative justice, we finally drew on a report on restorative justice in Europe which is currently (2008) being composed at the Secretariat of the European Forum for Restorative Justice. In the end, we lacked information about two EU Member States only: Slovakia and Latvia. For the UK the decision was made to split up the analysis in three parts, dealing with England and Wales, Scotland and Northern Ireland, since there are major differences in what exists in terms of restorative justice possibilities in these different jurisdictions. Short summaries of the texts can be found in Annex 4.

As regards the table that was used to analyse the national legislation, we started from the table that was developed by David Miers for the 2001 exercise, and which was later also used for the 2004 exercise. However, some changes were made. The initial category ‘Diversionary effect’ was split in two: ‘Stage of the referral’ and ‘Effect of successful completion’. Since it is not necessarily so that because a case is referred to a restorative justice practice at the pre-prosecution stage, it automatically has a diversionary effect, splitting up the stage of the referral and the effect of successful completion allows us to give a clearer picture. We also decided to drop the category ‘Outcome’ (i.e. what are typical outcomes of a restorative process) because there were too many difficulties with terminology and with the interpretation of the country-contributions. Many authors used the terms compensation (money payment to the victim), reparation (repair of the victim’s damaged property) and restoration (return of the victim’s property) interchangeably. In some cases corrections could be made based on descriptions by authors; in other cases this was not possible. This resulted in the situation that, in the end, we captured a multitude of possible outcomes, without really knowing what was meant. Hence the decision to drop this category altogether. Finally, we have added a category ‘Guidelines for legal professionals’ as many authors mentioned such guidelines.

4.2. BEING CAUTIOUS ABOUT COMPARATIVE STUDY²²

a) *What is being counted?*

In describing the results of this exercise, the first point is to recognise that there is no obvious, exact or agreed way in which we can be clear on what we are counting, and thus what we are comparing. In this exercise, the position was adopted that a country could be said to have victim-offender mediation or other restorative justice provision where its specific or general laws permitted or required a criminal justice official to direct given cases (whether adult or juvenile offenders) to such consideration. But this approach has the capacity to elide some important distinctions. In the 2004 Mapping book, Miers and Willemsens (2004) wrote: “Within both Belgium and the Netherlands, four separate types of intervention could be identified. For England and Wales the question arises whether its five new orders for juveniles

²¹ These new chapters have been made available on the website of the European Forum for Restorative Justice: <http://www.euforumrj.org>.

²² For this part we draw partly on what was written under ‘Being cautious about comparative study’ in Miers and Willemsens (2004: 155-160).

should be counted as five possible interventions, or as two. This is because in the case of one of them, the court is mandated to refer the young offender to a restorative justice intervention, whereas in the other four it is a matter of discretion for an official. An alternative analysis also produces two possibilities: that one of the interventions is a matter for police discretion, whereas the other four are matters for the court. The question then is not just, what are we counting, but on what basis is the count being made?" To respond – at least partially – to this concern, we have chosen – in this exercise – to analyse different provisions within one country separately if this was useful in order to show the differences between them. These are indicated by colour-codes in the tables in Annex 1.

A further difficulty results from the fact that – as mentioned before – different interpretations of what constitutes a restorative justice practice exist. In the contribution we received from Cyprus, for example, the author described initiatives in the field of victim support and of probation as being part of the governments 'restorative justice' strategy. Although we do not deny the importance of these initiatives and measures and their relevance for restorative justice practices, they have been left aside in the analysis as they are not – in our view – restorative justice measures.

The case of Greece presented us with a particular challenge. The provision that exists for juveniles foresees that victim-offender mediation is *imposed* on the juvenile offender as a condition for diversion from prosecution. One may wonder whether the complete absence of voluntariness on the side of the offender may not exclude this provision from the restorative justice realm. For adult offenders, art. 11 of Act 3500/2006 mentions that public prosecutors consider the possibility of penal mediation prior to pressing charges in cases of domestic violence. According to the author of the contribution on Greece, one can deduce from the legal provision that it is the public prosecutor himself who runs the mediation procedure. Since prosecutors can hardly be seen as impartial mediators, again one could wonder whether to include this practice in the analysis. However, and regardless of the fact that the provision for juveniles is hardly used in practice and that the provision for adults is not used at all, the decision was made to include these in the analysis.

Another country in which it was not at all clear whether or not to consider the provisions mentioned by the author as falling within the restorative justice realm is the Netherlands. As of yet, there are no statutory rules in the Netherlands with regard to victim-offender mediation or conferencing. For juveniles, the HALT programme – a voluntary diversionary measure – includes mediation only in a minority of cases. Claims settlement – another measure – focuses on compensation of the victim by the offender, and is rather administrative in nature (it does not involve any form of communication between victim and offender). Both of these were, despite their minimal restorative character, included in the analysis. Further, different forms of mediation or conferencing are part of the activities of a number of Neighbourhood Justice Centres.

In the contribution about Cyprus, reference was made to the fact that when exercising their discretion whether to prosecute, the prosecuting authorities take into consideration whether the victim has been compensated or the offender has made a serious effort to do this. In the chapter on Lithuania, reconciliation between the victim and the offender as a basis for a conditional exemption from criminal liability was described. And in Spain – as in many other countries – there are several articles that, if interpreted flexibly, can lead to certain benefits for offenders when reparation to the victim (or to the community) has been made. In these instances, a case-by-case decision was made by the author of this report whether to include it in the analysis or not. If services existed to which victim and offender could turn in order to reach a negotiated agreement on this reparation, compensation or reconciliation, the provision was included in the analysis.²³ If this possibility for mediation did not exist, the provision was

²³ This was, for example, the case in Estonia, where the legal provisions on conciliation foresee in the referral of the case to a conciliator. But also in England and Wales, both for juveniles and adults, reparation can be taken into account in sentencing in different ways. Not all of these possibilities are

excluded from the analysis. In many cases, the decision whether to include the provision or not was not an easy one. It is true that, even though mediation services do not exist yet, these provisions can be considered an important entry point for mediation cases. Also, it is not so that – if a neutral party is not involved – a direct negotiation between the victim and the offender cannot fulfil the objectives of restorative justice. Thirdly, it is not because mediation services are available that parties in a conflict always make use of it.²⁴ However, it is a balancing exercise between casting the net too wide or too narrow.

b) The presence or absence of national data

Assuming we can be clear on the theoretical possibilities, it does not follow that we can be clear on their practical implementation. The gap between the word and the deed can be considerable. This is, for example, shown by the case of Sweden. Here, the Mediation Act of 1 July 2002 does not specify an age limit for referral to mediation, meaning that – in principle – both juveniles and adults can be referred to mediation. However, in practice, the focus is mainly on juveniles. On the other hand, the absence of national legislation in Denmark masks the fact that a pilot project has run there since 1998 at the instigation of the Ministry of Justice. Also in Scotland, there are no specific laws allowing for restorative justice in either the youth or adult system. However, there are policy guidelines and directives that do not contradict the law and that allow for discretion in relation to restorative justice. The expansion of restorative justice is actually one of the Scottish Executive's high level commitments (Kearney, Kirkwood and MacFarlane, 2006).

We may therefore be able to count the normative possibilities, but can we also count their quantitative impact? Here, as Lauwaert and Aertsen observed, analysis is hampered by the general absence of national registration schemes (Lauwaert and Aertsen, 2002). They endeavoured to quantify the number of programmes in eight European countries. In some cases, for example Austria, where there is a national public service, it is possible to be confident that a given number fairly reflects the reality. But we may have less confidence about other countries where no such central organisation exists.

A similar observation can be made about other key aspects of the programmes that do exist; for example, the number of mediators available to provide victim-offender mediation services and the number of referrals. In both cases, the picture is in many respects unclear. In respect of personnel, it is clearest where the service is run by a body having public responsibility, which may, as in Austria, be a non-governmental organisation. Even a requirement that mediators be accredited or approved by a criminal justice agency before cases are referred to them, as is the case in France and Poland, does not mean that a national count is possible.

Referral numbers, too, are elusive. There are no centrally held statistics in most jurisdictions. Despite the combined effort of seven key institutes, the figures in Germany, for example, remain partial and themselves reflect only the data provided by those victim-offender mediation services that have agreed to cooperate. Apart from the immediate consequences in terms of comprehensive national and hence comparative data, these gaps inevitably limit the evaluation of outcomes.

c) Novelty

A particularly noticeable feature of many jurisdictions is the relative recency of their introduction of restorative justice and victim-offender mediation interventions. Since the 2004 exercise of the Mapping book, a considerable number of countries have adopted – for the first time – legislative provisions. These are: Bulgaria (2004 and 2006), Estonia (2007), Greece

used equally, and they do not necessarily require the intervention of a third party to come to a negotiated agreement about the reparation, but at least the possibility exists to take part in restorative initiatives.

²⁴ For example in Germany the law does not require a mediator to be involved in adult cases. Also private reconciliation has to be considered by the judicial authorities. In addition, under juvenile law, if victim and offender go to victim-offender mediation on their own initiative, diversion becomes mandatory. However, mediation services exist, hence the provisions were included in the analysis.

(2006), Hungary (2006) and Portugal (2007). It is difficult to gauge the practical impact of these new provisions. It might be that it will take considerable time for these practices to become sufficiently embedded in the respective criminal justice practices.

Also remarkable is that two countries with a longstanding experience in restorative justice, Finland and Belgium, have adopted extensive new legislation on the matter. In the case of Finland, it is the law of 2005, which provides – for the first time – a very detailed framework for the organisation of victim-offender mediation throughout the entire country. For Belgium, the new youth law of 2006 introduces restorative justice as a core element in dealing with youth who commit crimes (next to the more traditional idea of youth protection). Also, the new law of 2005 on the generalised offer of mediation in adult criminal law is a major step forward as it formulates restorative justice as a right for victims and offenders, and this throughout all stages of criminal procedure (investigation, prosecution and trial), including the execution of sentences.

d) Variations within and between countries

In his 2001 exercise, David Miers commented in particular on the variations within and between the countries analysed. The overall picture was then, and still remains, one of considerable heterogeneity. Tony Peters' comment made in 2000 (Peters, 2000: 14), that victim-offender mediation provisions within Europe comprise “a diversified landscape of competing visions” holds true.

There appears to be no correspondence between, for example, the nature of the legal base for, and the format of, any particular intervention. Nor does there appear to be any unanimity between an intervention's effect and its claimed orientation. An intervention may, for example, impact on the offender's sentence, but in different jurisdictions this may variously be presented as either victim or offender focussed in its purpose. Volunteers are highly prized in some jurisdictions as engaging the community in the mediation process, and are usually associated with private sector agencies; other jurisdictions rely entirely on professionals employed within the public sector or in private sector agencies.

It is worth observing that these differences are not merely contingent on the subsisting legal culture, nor the product of purely pragmatic choices as to the best way of running a restorative justice or a victim-offender mediation programme. They flow as much from ideological assumptions about the nature of unwanted conflicts and the way in which communities should respond to them. In the European context, as Peters reminds us (2000: 15), “the greatest danger is the illusion of a common language”.

e) Differing legal cultures

An associated danger is to ignore the theoretical and practical implications of the different legal cultures being compared. This operates at a number of levels. One of these is the prominence within the civil law traditions of the principle of legality. Prosecutors in England and Wales initiate criminal proceedings using criteria that include the public interest as a value in the prosecution of offences, but these criteria do not bear the same coercive force as does the principle of legality. This principle imposes an obligation on prosecutors to prosecute cases brought to their attention. Unlike common law jurisdictions, where prosecutors may choose whether or not to prosecute, and may take the results of victim-offender mediation into account if they so wish, civilian prosecutors can act only within the confines of their Code provisions.

A second major difference between England and Wales and the continental European jurisdictions is the prominent role that is played by the police and the courts in the invocation of restorative justice interventions, to the exclusion of the Crown Prosecution Service. This stands in stark contrast to all other countries, where the public prosecutor has a central, though not exclusive, role. This difference has changed somewhat with the Criminal Justice Act 2003. Until then it had been the function of the police to decide whether to charge a suspect with an offence. Once charged, the police then referred the case to the Crown

Prosecution Service where the decision to prosecute or not was taken. Under the Criminal Justice Act 2003, all charging decisions – except in the case of non-serious road traffic offences and a number of other minor offences where the police retain their charging function – are now taken by the Crown Prosecution Service.

But in some respects there are common concerns. One of these centres on the potential for the discrepant treatment of similarly situated offenders. One may wonder whether this is still acceptable in the area of freedom, security and justice that the European Union is meant to be. But, this is a question that we will take up in Part V of this report.

4.3.CHARACTERISTICS OF 27 EUROPEAN JURISDICTIONS

a) Legal base

As can be seen from tables 1 and 4 in Annex 1, except for Cyprus, Denmark, Lithuania and Malta, all jurisdictions now have legislative provisions that allow for restorative justice practices. In most cases, the legal base on the basis of which referrals to restorative justice practices can take place explicitly refers to restorative justice in general or victim-offender mediation or other practices in particular. Only in Italy (for juveniles), Luxembourg (for juveniles), the Netherlands (for juveniles and adults), Portugal (for juveniles) and Spain (for adults), referral takes place on the basis of a law/code/decree (or an article in these) that does not make specific mention of restorative justice or one of its practices.

The legal base can be created in a number of ways. In some instances, a legal text is adopted which deals only with this subject matter. This is, for example, the case in Finland (Act 1015/2005 on Mediation in Criminal Matters and Certain Civil Cases), Belgium (Law of 22 June 2005 introducing some provisions concerning mediation in the Preliminary Title of the Code of Criminal Procedure and in the Code of Criminal Procedure (the law on a generalised offer of mediation)), Bulgaria (the 2004 Mediation Act) and Sweden (the 2002 Mediation Act). In other cases, the legal base is created (or changed) within the framework of a broader legal instrument, like the Austrian Criminal Procedure Reform Act or the Crime and Disorder Act 1998 in England and Wales.

The legal base typically comprises a mix of primary and secondary legislation, supplemented by guidance notes. The primary legislation can be located in procedural law, substantive criminal law, penal law, Royal Decrees or a combination of these. In most cases, the primary legislation is supplemented by a range of subordinate legislation, further detailing the implementation of the provision. In Bulgaria, for example, the 2004 Mediation Act was supplemented by Training Standards for Mediators, Procedural and Ethical Rules of Conduct for Mediators and Rules Pertaining to the Unified Register of Mediators, issued by the Minister of Justice in 2005. After changes to the Mediation Act at the end of 2006, an ordinance (No. 2 of 15 March 2007) on the Conditions and Procedure for Approval of Organizations Providing Training for Mediators; on the Training Requirements for Mediators; on the Procedure for Entry, Removal and Striking off Mediators from the Unified Register of Mediators; and on the Procedural and Ethical Rules of Conducts for Mediators, was issued by the Bulgarian Ministry of Justice. Also in Portugal, the initial legislation of 2007 was supplemented by three ‘Portarias’ issued by the Ministry of Justice in the course of 2008: one establishing the content of the letter that the court administration shall send to victim and offender in order to inform them of the fact that their case has been referred to mediation, one regulating the procedure of the selection of mediators, and one regulating various aspects of the victim-offender mediation programme (amongst others data collection, rights and duties of the mediator, etc.). A further ‘Despacho’, also issued in 2008, determines the fee of the mediators. Germany, on this issue, presents a particular picture. In Germany, the federal states (Länder) are responsible for implementing victim-offender mediation. All, except the state of Bavaria, have issued guidelines addressed to the public prosecutors in this field. These guidelines often provide important instructions to the prosecutors about which cases to refer to mediation and which not. Since these guidelines do not present a common approach, they have a major influence on the types of cases that prosecutors will send to mediation. For example, the guidelines issued in the state of Schleswig-Holstein make explicit reference to

the fact that mediation shall apply in severe cases, whereas other states – *contra legem* – suggest that prosecutors concentrate referrals on cases of minor and medium gravity (Kilchling, 2008).

Some examples of guidelines supplementing primary and secondary legislation are: the comprehensive circular issued by the Austrian Ministry of Justice in 1999, addressed to the judiciary and public prosecutors to introduce the diversion package; the Codes of Practice issued by official bodies in England and Wales; the Finnish guidance note on mediation practice that the Ministry of Social Affairs and Health and the Research Centre of Social Welfare and Health (Stakes) have prepared; and the Regulations on Mediation in Criminal Matters issued by the Slovene Minister of Justice in 2004. Next to the Ministries, Prosecutors General and Chiefs of Police may issue such guidelines. Examples are the 2007 guidelines from the Swedish Prosecutor General stating the minimum extent of the prosecutors' obligations in this area, the guidelines of the Swedish Chief of Police on how the police should refer a case to a mediation service, and the General Instructions of the Slovene State Prosecutor General on conditions and circumstances guiding the prosecutor's decision to refer cases to mediation.

An interesting aspect is that in some countries there is legislation for juveniles but not for adults, or vice versa. In France and Luxembourg for example, the legal base is more firm for adults than for juveniles. In France there is no legal base at all to refer cases of juvenile offenders to mediation. According to Jacques Faget, an extensive interpretation of the law for adults could allow the referral of cases of juvenile offenders to mediation, but it happens very seldom (Faget, 2008). In Luxembourg, a law of 6 May 1999 created the legal framework for referral of adult cases to mediation, whilst there is no explicit legal reference to victim-offender mediation for juveniles. Referral of juvenile cases takes place as an exercise in prosecutorial discretion in the context of the law of 10 August 1992 relating to juvenile protection. Vice versa, both in Ireland and Northern Ireland, there is legislation allowing for the referral of juveniles to restorative justice practices, whilst there is no such legislation for adult offenders.

As Miers and Willemsens wrote in the Mapping book, the legal effect of the provisions can be permissive, coercive or mandatory. Where it is permissive, the legal base does no more than give a prosecutor (or other gatekeeper) a discretion whether or not to refer cases to restorative justice practices. Where it is coercive in effect, the law obliges the gatekeeper to consider such intervention as a condition prior to the further decision whether to proceed or discontinue. Where it is mandatory, the gatekeeper must refer the case. As can be seen from the overview in tables 1 and 4 in Annex 1, the legal effect is most often permissive. There are only a few examples of coercive or mandatory legal effect – most often in the case of juveniles. In Austria, both for adults and for juveniles, public prosecutors are obliged to offer diversion when the prerequisites are satisfied, and victim-offender mediation is one of the four possible diversionary offers. Only in exceptional cases may considerations of general prevention influence the decision. In Belgium, under the new juvenile law, the prosecutor has to motivate in writing why a case should or should not be referred to mediation or conferencing. But this obligation does not apply where the prosecutor decides to dismiss the case, or when he or she needs to refer the case to the juvenile judge as a matter of urgency. This forces juvenile judges to consider referral to restorative justice practices in all cases that come to their attention. In Hungary, where the objective conditions for referral to mediation are met, and where mediation is requested by any of the parties, the prosecutor has to give reasons for dismissing the request, and there is a possibility to appeal against this decision. In Northern Ireland, all young offenders have to be referred to the youth conferencing scheme. This is an example of a mandatory legal effect. Another example can be found in England and Wales where the youth court is obliged to impose a referral order if a young offender makes a first appearance and pleads guilty.

The most common stage in the criminal justice process at which cases are referred to restorative justice practices is still the pre-charge and pre-prosecution stage; this is true both for adults and for juveniles. However, referrals at the pre-trial and pre-sentencing stage are

also frequently possible. The least common are referrals as a sentencing alternative, or referrals at the post-sentencing stage. However, two observations are in place here. First, it is not because the legal framework allows for referrals in all stages of the criminal justice process that this, in practice, also takes place. For this, a more detailed look into the actual practice would be useful. Second, it is not because the law stays silent about the possibility to refer cases in, for example, the post-sentencing stage, that particular agencies do not refer cases, or that victims and offenders do not find their way – on their private initiative – to restorative justice practices.

b) The point in the criminal justice process at which restorative justice practices may intervene

Although in Europe, most cases are referred to restorative justice practices at the pre-prosecution stage, restorative justice interventions can take place at any stage of the criminal justice system, both for juveniles and for adults. The example of Belgium is ideal for showing the wide range of possibilities for organising restorative justice, as it truly has victim-offender mediation available at all stages of the criminal justice system, at least for adults.

The law of 22 June 2005 has introduced provisions on mediation in the preliminary title of the Criminal Code and the Code of Criminal Procedure. It came into force on the 31st of January 2006 and introduces a generalised offer of mediation throughout all the stages of the criminal procedure (investigation, prosecution and trial), including the execution of sentences. The law neither specifies nor excludes certain types of offences as suitable for mediation.

When we now look at the practice in Belgium, as it has come to develop over the past years, we can see that mediation is indeed available at all of these stages. Today, mediation practices for adults are implemented at the police stage, at the level of the public prosecutor before prosecution (penal mediation) and after prosecution (mediation for redress), and even during the execution of penal sentences, usually in prison settings (mediation at the stage of execution of punishment).

Between 1996 and 1998, police mediation programmes were started in three Flemish towns and in eight municipalities in the Brussels region, in close cooperation with the local police departments. These programmes focus on minor property and violent offences with clear financial or material damage. This type of mediation is undertaken at the police stage, shortly after the offence has been committed and before the case is transferred to the public prosecutor's office. The mediator is not a policeman but a civil servant, who has an office in the local police department. A successful mediation at the level of the police mostly (but not always) results in a dismissal of the case by the public prosecutor.

At the level of the prosecutor there is penal mediation. Penal mediation was introduced in 1994 in the Code of Criminal Procedure as an additional diversionary measure. The public prosecutor may propose four measures to the suspect, which can be combined: reimbursing or repairing the damages towards the victim; medical treatment or therapy; following a training programme; and community service. Penal mediation can be offered in cases in which the public prosecutor would normally not demand more than 2 years of imprisonment. Although the framework of penal mediation covers the four measures, in practice mediation is only applied to repair the damages vis-à-vis the victim. Justice assistants carry out the mediation work. They lead the preliminary negotiations with the parties. When an agreement is reached, the prosecutor must agree with its content. The procedure is concluded with a formal mediation session, which is led by the magistrate. It is considered to be a confirmation of the agreement that was reached between the victim and the offender. The justice assistant is responsible for following up the implementation of the agreement.

Next, mediation can also take place parallel to prosecution. This is organised within the project mediation for redress. This practice is aimed at more serious offences in which the decision to prosecute has already been taken. The process of mediation is focused on in-depth communication between the parties. This type of mediation is organised by two NGOs (one on the Flemish and one on the Walloon side of the country) which are subsidised by the federal Ministry of Justice. They have set up mediation services in almost all Belgian judicial

districts. In each of these judicial districts, a cooperation protocol is the basis for the cooperation between the mediation service, the judicial actors and other related services (victim support, probation, prison services, etc.). These protocols are always the result of a negotiation process, and hence there can be considerable differences from one judicial district to another. Cases are generally referred to mediation by the public prosecutor or the investigating judge. In some judicial districts, the mediators actually go to the court to look through the cases. Victim and offender receive a letter from the referring agent explaining the offer of mediation. After this, the mediation service contacts the parties to see whether they would be interested to participate. If a mediation takes place, a record of the outcome of mediation is attached to the offender's judicial file. The judge is then free to take the result of mediation into account upon sentencing. If no agreement can be reached, or if no mediation could be started, the judicial services are informed of this without specifying reasons or circumstances.

We may finally note that the 'mediation for redress' project also deals with mediation cases after sentence, during the execution of the punishment. In these cases requests can come from the victims and offenders themselves. The following section deals with referrals more generally across European national legislation.

c) Referrals

Referrals to restorative justice practices can be made by a variety of people and organisations: the police, the public prosecutor, the judge, victim, offender, social services, victim and offender support services, prison or probation services, etc. But in the majority of countries, it is a judicial authority (judge or prosecutor) that refers cases to mediation, and of these it is the public prosecutor who is the most important gatekeeper.

In general the police play a comparatively minor role, but there are some exceptions. In England and Wales the police have played a significant role in respect of the diversion of both young and adult offenders. Police officers can also refer cases in Denmark, Germany, Finland, Sweden and the Netherlands. Also within Belgium's local mediation projects for adults, for example, the police can refer cases to mediation.

It is also possible for informal approaches to be made, for example by social services, victim support and prison staff, as happens for example in Sweden and Spain. In most countries, victim and/or offender can suggest to the gatekeeper (most often the prosecutor) to refer their case to mediation. In Germany, parties can themselves take the initiative to go to mediation. A particular situation presents itself in Belgium where, under the law on the generalised offer of mediation, the decision whether or not to inform the judicial authorities about the result of mediation, is entirely left up to the parties themselves. According to the law, it is the task of the magistrates to ensure that the parties are informed of the possibility to go to mediation.

But, overall, the central gatekeeping function remains with the public prosecutors. In a good number of countries they are in fact the only authority formally allowed to refer cases to restorative justice practices (amongst others in Slovenia, Luxembourg, Czech Republic and France).

The most common effect of a successful restorative encounter on the judicial procedure is that the case is dismissed. Where more serious cases are being dealt with, mitigation of the sentence is possible. In a few cases, a successful restorative encounter might lead to early access to conditional release (Spain for adults), the suspension of a prison sentence (Germany for juveniles), or is made a condition for parole/probation (Germany for adults, Poland for juveniles). In Poland (for juveniles and adults) and Greece (for adults), but possibly also in other places, the dismissal of the case is subject to conditions (in the case of Greece, for example, the case is dismissed if the offender fulfils the agreed conditions during 3 years).

d) Scope

In terms of offences amenable to restorative justice practices, the picture is very diversified. This was also very difficult to capture since some authors went into very great detail, whilst others just mentioned that only minor cases were typically referred to restorative justice practices. Some general observations can nevertheless be made. First, there are a number of countries for which the authors reported that, in principle, no offences are excluded from the realm of restorative justice practices. This was the case for Belgium (under the new law on the generalised offer of mediation), Denmark, Germany and Poland. This, of course, does not mean that in practice all types of cases reach the mediation or conferencing services. Second, there seems to be disagreement on the suitability of certain types of crime. A good – and much debated – example is domestic violence. Whereas the authors of a number of country-contributions mentioned that domestic violence belongs to the category of offences that are typically being referred to mediation (Austria, Finland, Greece, Poland and Romania), other countries explicitly prohibit the use of restorative justice practices in domestic violence cases (for example Luxembourg if victim and offender cohabit, and France if the violence is serious and repeated). In Finland, domestic violence is excluded from the realm of mediation if the violence is recurring, the parties have already been through mediation for domestic violence, and if the offender regards the use of violence as an acceptable way of dealing with the problems within the relationship. Moreover, whereas for other types of crimes the parties themselves can take the initiative to start mediation in Finland, this is not possible in the case of domestic violence; only the police or the prosecutor can refer these cases to mediation. In Greece, mediation in criminal matters is only foreseen by law for cases of domestic violence, and not for any other types of crime. However, as we have noticed before, this piece of legislation is not being used. Moreover, since it is the public prosecutor himself who conducts the mediation process, one can wonder whether this possibility really belongs within the restorative justice realm.

Another type of offence for which there seems to be disagreement is the category of traffic offences. In the contributions about Hungary and Ireland they were mentioned as typical offences to go to restorative justice practices, whilst in Slovenia they are formally excluded. Offences resulting in death are formally excluded in Austria, Estonia and Hungary. Other countries exclude offences attracting custodial sentences above a specific term of imprisonment (2 years in Belgium for penal mediation, 5 years in Hungary for adults and juveniles, 5 years for adults in Austria, offences attracting life imprisonment in Northern Ireland for juveniles, 5 years for adults and juveniles in Portugal, and 3 years for adults in Slovenia).

In any case, what comes to the fore when comparing the categories of offences that are formally excluded from referral, and the types of offences that are typically sent to mediation, is that there is still a big gap between what is legally possible and what happens in practice. In many countries, the legal potential is not being used to the fullest extent possible.

In terms of claimed orientation of the legal provisions, a primary orientation on the benefits restorative justice might have for offenders is reported more often with regard to provisions for juveniles than for adults. Also, where victim interests have clearly found their place, some authors still mentioned that they remained secondary; that the primary focus was still on the offenders (indicated as OV in tables 2 and 6 in Annex 1). A good example of this is Germany, where the term for victim-offender mediation deliberately translates as ‘offender-victim mediation’. It is nevertheless clear that there is greater awareness of victim needs in all countries, and that this awareness also translates in policy and practice.

e) *Implementation*

When describing who is responsible for the delivery of restorative justice practices, one should differentiate between the body that has the responsibility to implement them, and the body that delivers the practice.

Responsibility for the implementation of the law always falls upon a public body. This can be the central (for example in Austria), regional (for example in Spain, where responsibility lies with the Autonomous Communities) or local (for example in Finland, where the municipalities are responsible) government. The responsibility may also fall upon statutory agencies, as in England and Wales (Youth Justice Board) and Northern Ireland (Youth Conferencing Service).

The delivery of the practice presents a varied picture. At one end of the spectrum there are statutory organisations that are fully integrated into the structures of the criminal justice system with highly institutionalised internal systems and practices. On the other extreme of the continuum, there are programmes that operate as an entirely separate and independent entity, completely unattached to any governmental structure. These are usually incorporated into NGOs.

The Belgian penal mediation programme is an example of a fully integrated statutory model. This service is provided by the public prosecutor's office. Cases are referred by the public prosecutor to justice assistants in the House of Justice. The programme operates on a nationwide basis so that all citizens have equal access to it. In some parts of England and Ireland, restorative practices function within police services.

When delivered by a statutory body (i.e. a body operating on behalf of the state), restorative justice programmes are more commonly attached to governmental agencies such as the police, probation or social services, than to prosecution services. Within this group, mediation is sometimes provided by the same individuals who provide probation services. In other cases, there are specialised teams for mediation within the main institution. In the Czech Republic for instance, the Probation and Mediation Service is responsible for both mediation and probation. The professional staff combine probation and mediation work, although they cannot mediate in a case for which they are responsible as probation officer. Also in Hungary and Greece, the probation service is responsible for the mediation work. In Denmark and Sweden it are the Crime Prevention Councils that are responsible for providing restorative services.

The Youth Conference Service in Northern Ireland is an example of a service integrated into the formal justice system, but provided by an independent statutory body which is exclusively devoted to providing a restorative justice service (in this case conferencing). The Youth Conference Service is part of the Youth Justice Agency which is a function of the Northern Ireland Office, the temporary government of Northern Ireland. It aims to service the entire community ensuring equal access to all young offenders and their victims.

In other countries, private bodies (NGOs) are authorised by the state to act on its behalf. This is, for example, the case in Austria where NEUSTART is responsible for victim-offender mediation. It is an autonomous body, a private organisation with its own management and supervisory committees. It is informed by public law and subsidised by the Ministry of Justice and delivers its services throughout the country. In Belgium, the federal Ministry of Justice has recognised two NGOs – one for the Flemish and one for the French-speaking part of Belgium – by Ministerial Decree. In Germany independent agencies or social services provide mediation. Some of these share offices with the court's legal aid service. They receive either public or private funding, or a mix of these. Although traditionally these NGOs were also involved in other victim or offender oriented programmes, the tendency of the last years is to concentrate exclusively on mediation. In England and Wales a number of small organisations are under contract with Youth Offending Teams and local probation services to deliver

restorative services. Many of these services, whether they are public or private, have adopted a code of practice or ethics.

In Spain, the Autonomous Communities are responsible for implementing measures in the juvenile justice system. They have a certain margin of discretion in the way services are delivered, and the mediation services they provide vary somewhat in implementation from community to community. Generally, mediation is provided by professionals of the so-called 'judicial advisory teams'; these can be civil servants working within the administration of the Autonomous Community or people working in an external agency, usually an NGO that is subcontracted to deliver mediation. The referral procedure varies depending on whether mediation is offered by a statutory body or by an NGO. Hence, mediation is not offered in a uniform way across Spain.

The situation is similar in Italy, where mediation is a possible measure for young offenders. It is only being used in regions where there is a youth social service able to provide victim-offender mediation, or where there is a mediation centre that accepts referrals from the juvenile courts in addition to their mediation work in other fields (community mediation etc.). In some regions, however, no such service is available.

In a number of countries, individuals – rather than organisations – are responsible for delivering the practice. These individuals may or may not organise themselves. This is the case in Slovenia (for adults and juveniles), Portugal (for adults), Luxembourg (for adults) and Bulgaria (for adults and juveniles). These individuals then need to be approved either by the authority responsible for the implementation of the law, or by the judicial authorities. In Poland both individuals and organisations can be accredited by the Court of Appeal to act as mediators. In 2004, the total number of approved mediators was 630. In France, mediators can be individuals or can belong to an independent organisation. In any case, the mediators must be accredited by the local prosecutor and by the president of the tribunal.

In terms of funding of the practice, only exceptionally do the parties have to pay for the service. This is the case in Slovenia (where the parties pay a fee to the public prosecutor, who then pays the mediator) and Romania. Otherwise, funding is always a public matter, although in Germany, for example, funds from charitable foundations play a part as well, and in Austria, NEUSTART receives 90% of its funding from the Ministry of Justice. Where the funding is public, it may come from the central or the local government (or a mix of these). In both France and Poland, the cost of mediation in adult cases falls upon the budget of the court system.

Victim-offender mediation is still the main form of restorative justice practice used. In some countries direct mediation is the norm (amongst others Finland and Denmark), whereas in other countries (such as Belgium and France), indirect mediation is most common. Conferencing is being used in England and Wales, the Netherlands (pilot projects), Belgium, Ireland, Northern Ireland, Scotland and Sweden. Restorative cautioning takes place in England and Wales.

f) Mediators

Where the delivery of mediation practice is in the hands of a statutory body, mediation is often (but not always) delivered by professionals for whom mediation is not their primary occupation. This is for example the case in Hungary where probation officers have been trained as mediators, or in Czech Republic where probation officers are also responsible for mediation. In Estonia, it is the civil servants of the Social Insurance Board Victim Assistance Department within the Ministry of Social Affairs who are responsible for carrying out the conciliation procedures. In Austria, Belgium, Germany and Spain, mediators are professionals too, but for them mediation is frequently their sole task.

Volunteers and paid lay mediators are being used in, amongst others, Finland, Denmark, Slovenia, Portugal and Scotland. Volunteer mediators usually receive money to cover the expenses that they incurred in a given case. Paid lay mediators, on the other hand, receive a fixed – mostly symbolic – amount of money per case they dealt with.

In some countries, a mixed model is applied. In Sweden, for example, certain services work with professionals – generally social workers – who practice mediation as part of their tasks. In certain municipalities, however, the service relies on lay mediators. France is also an example of a country where both types of mediators can be found. In general, however, the mediation practice in France is highly professionalised. INAVEM is an exception to this because the majority of its mediators are volunteers.

But whether professional or volunteer, mediators are typically required to meet certain minimum requirements. In general, every country or programme selects candidates on the basis of criteria that include not only skills, but also personal attitudes, personality, values, etc. These have a clear link to the underlying philosophy and context of the programme.

Some examples of objective criteria that are being used are:

- Age: usually a minimum age applies; in Finland, for example it is 18 years.
- No criminal record: this is a prerequisite in, amongst others, the Czech Republic, Denmark, Slovenia and France.
- Profession: In Poland and France for example, people who practise law (like lawyers, judges and prosecutors) cannot become mediators.
- Residence: In those countries where mediators are volunteers, there may be an additional requirement related to the objective of ensuring a connection with the community. Mediators may be required to live in the area of the mediation centre. In Slovenia, for example, mediators must have their permanent residence in the judicial district where the victim-offender mediation service operates.

Criteria concerning the personality of the mediator may also be used in the selection process. In Poland, for example, the following terms are used: honesty, prudence, wisdom, reliability and life experience. Finland, amongst others, refers to flexibility and impartiality. Slovenia requires the person to be in good health and to be of good character. In Belgium and Finland, attention is being paid to aspects that are related to the capacity to learn and to understand issues relating to crime: candidates have to be sensitive to social issues and have an open mind, be willing to participate in further education, and be unprejudiced. In Denmark, such personal attitudes are considered to be more significant than personal skills in communication since these aspects can be trained. In Finland, at the selection stage, the commitment of the mediator to devote the necessary time to mediation work and to undertake training and supervision are checked.

When mediators are volunteers, no specific professional background is required. Quite on the contrary, the diversity in professional backgrounds is usually considered a value in itself. When mediators are professionals, most of the programmes tend to rely on professional backgrounds within the social and humanities spheres. However, whereas in some programmes this is just an element that is valued, in others it is a prerequisite. In Austria, for example, mediators must be social workers, although psychologists and lawyers can also be employed if they have prior experience in social work. In Portugal, mediators for juveniles should already have experience in social work with youth, in particular in the field of social rehabilitation.

In terms of educational background, only a certain level of education is required in some places, without specifying the field or domain. In Slovenia, for example, 6th level post-secondary education is a minimum requirement. Other countries require a university degree in humanities or social sciences, such as Belgium (mediation for redress), the Czech Republic and Portugal. In Spain, to mediate in adult cases people must have a degree in psychology, law or social work, although exceptions have been made if the person's skills and experience are equivalent.

The situation in terms of the training of mediators is very varied as well.²⁵ In Finland and the Czech Republic, the training programmes are designed by a body with a national remit. Consequently, all the mediators receive the same training. In the Czech Republic, for example, the contents and the structure of the training have been determined at a national level by the Ministry of Justice. The training programme is also organised by the Ministry of Justice, together with the Association for the Development of Social Work in Criminal Justice. The situation is different in Germany, Spain, France, Poland and Italy, where there is no common, unified programme. However, in some countries standards on training exist, usually established by one of the more prominent organisations in the field. An example is the TOA-Servicebüro in Germany. Despite the fact that the standards adopted by this organisation are not compulsory, they provide training to mediators all over the country. In France, INAVEM and *Citoyens et Justice* (the two main organisations involved in mediation work) provide basic training programmes for new mediators. They also offer other types of courses that deal with specific topics in mediation or related disciplines or practice.

In countries like Belgium, Scotland and Spain, training is provided on the job, once a mediator is employed by the service. In the case of Suggnomè in Belgium, a one-week training course is offered. After the first week, the trainees start to work under intensive supervision. The situation is similar in Scotland where training is delivered principally by either the Scottish Restorative Justice Consultancy or Sacro. In Spain, the mediators also receive an intensive training during the first week of work, although there is no structured programme. Information is provided through written documents and the new mediator shadows an experienced mediator who explains the mediation process. In the initial period of work, the new mediator will co-mediate with an experienced mediator.

In some services, attention is also paid to ongoing training. In Northern Ireland for example, the conference coordinators must follow a two week course when they take up employment. They also have to follow a postgraduate course on issues related to peace and conflict studies, including a specialisation in restorative justice, at university level.

In Austria, mediators must undergo a multi-level training programme. Beginners take a four week programme dealing with basic practical and theoretical issues. Afterwards, there is a second four week period which allows them to obtain a certification as mediator in criminal matters. However, before they can enter this second four week period and become certified, they have to meet a number of criteria, amongst others: have mediated 150 cases; have received 32-50 hours of supervision; have followed the practical guidance of an experienced mediator for at least one year. Altogether, the process of certification can take up to three or four years.

4.4. CONCLUSION

Except for Cyprus, Denmark, Lithuania and Malta, all EU Member States have legal provisions allowing or, in a small number of cases, requiring the use of restorative justice practices. Although Latvia and Slovakia were not included in the analysis because we did not succeed in getting updated information on the state of affairs, we know that some provisions also exist there. However, this seemingly positive balance should not lead to unnuanced optimism. In some countries (for example Greece and the Netherlands), there is clearly still a restorative deficit in the provisions. Also, the lack of comparable information about the practical implementation of these provisions does not allow us to say anything about the extent to which, and the quality with which, these provisions are being implemented. The diversity in the way restorative justice services in European countries are organised and positioned should not necessarily be seen as a problem, as long as the elementary principles of

²⁵ For an extensive report on this issue, please see the final report of the European Forum for Restorative Justice's project on *Working towards the creation of European training models for practitioners and legal practitioners in relation to restorative justice practices. Exchange of training models for mediation practitioners*, available at <http://www.euforumrj.org/readingroom/ReportMediators.pdf>. The European Forum for Restorative Justice has also developed Recommendations on the training of mediators in criminal matters which can be consulted at <http://www.euforumrj.org/Training/Recommendations.pdf>.

good restorative justice practice are respected. Differences in the historical, legal, social, cultural and political context of European countries are responsible for this divergence.

Despite all these differences, it seems that the European restorative justice scene by and large has the same unmet needs. This is the subject of the next section.

5. THE NEEDS OF THE EUROPEAN RESTORATIVE JUSTICE SCENE

According to the UN Handbook, “[s]uccessful implementation of restorative justice programmes requires strategic and innovative initiatives that build on the collaboration of governments, communities, non-governmental organizations, victims and offenders” (2007: 39). As can be inferred from the situation concerning restorative justice in Europe, in most countries restorative justice has, by some margin, not reached its full potential. Over the last few years, European restorative justice protagonists (and those beyond Europe) have been voicing a number of needs. One should note at the outset, however, that the needs and the level at which they are felt in a specific country or even a specific restorative justice programme, depends entirely on the very particular situation of this country or restorative justice programme. As should also be clear from the sections above, the restorative justice movement has not known a homogenous development in the Member States of the European Union. Also, the needs of a long-established mediation service will be rather different than those of a newly established conferencing programme, to name just one example.

5.1. DEVELOPING A QUESTIONNAIRE

To capture the needs of the European restorative justice scene, we have constructed an online questionnaire with 131 questions, divided over seven themes: legislation; implementation and policy development; education, training and accreditation; development of good practice; cooperation and networking; communication and awareness raising; and research and data collection.²⁶ All but two of the seven themes were subdivided into two sections: needs at the national level and needs at the international/supranational level. The two sections for which this was not done (communication and awareness raising and research and data collection), however, also asked at which level action should be undertaken to respond to the need: at national, at international, or at national and international level combined.

The questionnaire asked key actors in the restorative justice field (practitioners, but also academics, policy makers and legal practitioners) how relevant a certain need was for them. The list of needs was constructed based on the needs voiced in literature, international projects and events of European/international organisations.²⁷ In addition, some questions raised by a number of ‘international’ documents were included.²⁸ Moreover, respondents had the possibility to indicate needs that were not explicitly covered by the questionnaire.

For most needs it was asked to indicate:

- its importance (not/relatively/very important or no opinion);
- whether the need was already adequately met (no/yes or no opinion).

The section of the questionnaire dealing with needs for legislation at the international/supranational level also asked about the legal force of the legal instrument that was needed (binding/non-binding or no opinion). The questions about the needs at international/supranational level related to education, training and accreditation on the one hand, and development of good practice on the other hand, asked about the level of support there was for undertaking certain actions.

²⁶ The questionnaire has been included as Annex 2.

²⁷ The sources for developing the questionnaire included, amongst others, the reports of the different projects and conferences run by the European Forum for Restorative Justice (see www.euforumrj.org for an overview) and the report and publications of COST Action A21 on ‘Restorative justice developments in Europe’.

²⁸ Most importantly the EC Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (2004) and the Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters (2007), formulated by the Council of Europe’s Commission for the Efficiency of Justice. See Part III for more information about these two documents.

In answering the questionnaire, the respondents were asked to – as much as possible – not only reflect their own point of view, but rather to reflect the general objective standpoint of their background group (e.g. if they were restorative justice practitioners, they were asked to reflect the position of restorative justice practitioners in their country). By doing this, we have attempted to avoid purely individual standpoints, but of course it is difficult to check to which extent respondents were able to do this.

A request to answer the online questionnaire was sent by e-mail to the members of the European Forum for Restorative Justice, and to the members of the COST Action A21 on “Restorative justice developments in Europe”. The reason for selecting this response-group was that we could reasonably expect them

- a) to be relatively well to very well informed about restorative justice developments in their own country;
- b) to have knowledge of what is already available in terms of regulation at the international/supranational level because of their involvement in international fora;
- c) to be members of or be associated with national NGOs or other groups having awareness of practice; and,
- d) for that reason be able to reflect national concerns.

In total, the invitation was sent to about 310 people.²⁹ We addressed European countries but did not limit the invitation to people working in a Member State of the European Union because we felt that it would be worthwhile to have a ‘global’ European perspective.

Table 1. Countries in which the respondents are professionally active

EU Member States	76	Other countries	14
Austria	3	Albania	1
Belgium	10	Croatia	2
Bulgaria	1	Israel	2
Estonia	1	Norway	3
Finland	2	Russia	3
France	6	Switzerland	1
Germany	3	Ukraine	2
Greece	2		
Hungary	3	Country unknown	4
Ireland	3		
Italy	4		
Latvia	1		
Malta	1		
Netherlands	6		
Poland	4		
Portugal	3		
Romania	3		
Slovenia	1		
Spain	3		
Sweden	3		
UK	13		

We received completed questionnaires from 94 respondents³⁰, coming from 28 countries, amongst which 21 belonging to the European Union (see table 1).

²⁹ It is not possible to give an exact number of people who have received the invitation to take the questionnaire. For some people we have a general e-mail address for the office (e.g. info@), so it is not clear at all how many people have seen the invitation. Also, some messages bounced back, but it is not at all sure whether we have always received such a notification that the message was not delivered to the respondent. Hence, the number of 310 respondents should be approached with care.

³⁰ Originally there were 97 responses, but we excluded 3 from the analysis because they only filled out a very limited number of questions.

Table 2. Professional group to which the respondents belong

Professional group	N	%
RJ practitioner/working at a RJ service	35	37.2
Legal practitioner	5	5.3
Police	1	1.1
Civil servant/policy maker	6	6.4
Researcher	35	37.2
Other ³¹	12	12.8
Total	94	100.0

Most of the respondents were either restorative justice practitioners (35) or researchers (35) (see table 2).

Before we present the main findings of the questionnaire, we would like to make some (methodological) remarks:

- The questionnaire was rather long. It is estimated that it took respondents between 30 and 45 minutes to respond to the questionnaire. Hence, it is quite possible that some level of fatigue played towards the end of the questionnaire. This can, to a certain extent, be seen from the comments given with the different sections of the questionnaire. Whereas a good number of comments were formulated with the first three sections of the questionnaire, comments became less frequent in the following sections.
- Although respondents were explicitly asked to reflect as far as possible their background group's opinion, it is difficult to gauge to which extent this was actually done. Also, it is not clear to any extent whether respondents were actually well placed to reflect more than a purely individual standpoint.
- With a response rate of about 31.3%, we can say that we have received a good response to our invitation to take the questionnaire. Nevertheless, care should be taken when interpreting the results since the potential to generalise results is limited.
- Although questions were formulated with as much care as possible, some respondents commented that a number of questions were not clear. In particular the parts of the questionnaire that asked about the level of support for undertaking certain actions at an international/supranational level raised doubts about whose support we were interested in (from policy makers? restorative justice practitioners? etc.).
- Also the lack of possible nuances was commented upon by several respondents. The categories 'yes' and 'no' (where asking about whether a certain need was already adequately met or not) were considered too crude. Also, a further category of 'importance of the need', lying between 'relatively' and 'not' important was asked for. Moreover, 'relatively' was seen as being too open for individual interpretation. These are of course justified remarks. We had hoped that the comments-boxes with each section of the questionnaire would have given enough possibilities to nuance ones answer. However, this was apparently not the case. Of course, it might have been possible to capture these nuances with a more detailed set of questions, but that would have added to what was already a substantial exercise.
- Since respondents were asked to indicate the level of importance for each need separately, and not to score needs in terms of importance as compared to the other needs within the same section, one should be careful in ranking needs inside a specific section. In reporting about the results of the questionnaire we will refer to the needs that scored highest and lowest in terms of, e.g. level of importance, but we should keep in mind that the order

³¹ The group 'other' consisted of 2 respondents for which the professional activity was unknown, 1 student, 1 person working with youth, 1 person working as a trainer and supporting marketing, 1 consultant, 1 person combining work as a restorative justice practitioner with research work and work as a lawyer, 1 person acting as a head of an NGO in public work, 1 person combining work as a restorative justice practitioner with a function as policy maker, and 3 trainers.

- might have looked differently if respondents were asked to weigh the importance of needs as compared to each other.
- Since the overview of national legislation has made it clear that restorative justice developments for juveniles and adults do not necessarily run parallel within countries, responses to the questionnaire, certainly as regards the sections on 'legislation' and 'policy development and implementation', could have been different if the possibility was given to differentiate between provisions for adults and provisions for young offenders.
 - In analysing the responses we have filtered out the respondents who did not provide an answer to a certain question.
 - It is difficult to interpret the meaning of a 'no opinion' answer. Does a 'no opinion' answer mean that the respondent did not have enough knowledge about a certain topic to provide a clear answer? Or does it mean that the respondent felt indifferent about a certain need?
 - In asking about the importance of a need, we intended to obtain information about how important a certain action is/was for restorative justice developments within a country. By asking about whether the need was already adequately met or not, information on whether this was adequately regulated or implemented within the country was strived for. The answers to these two different questions do not always run parallel (e.g. even respondents who felt that a certain need was already adequately met could indicate that it was very important).
 - In order to improve the readability of the results, we have rounded off percentages to one point behind the comma.

In presenting the results of the questionnaire, we focus mainly on the frequencies. However, we have also looked at whether there was a difference in response according to the professional group. For that purpose, we have divided the respondents into three groups: restorative justice practitioners (35), researchers (35) and others (24). In analysing the responses of these three groups to each question, we have made abstraction of the 'no answer' and 'no opinion' responses as we wanted to know whether the professional groups had a different view on the importance of a certain issue, or a different view on whether a certain need was already adequately met, yes or no. In analysing the responses (by using SPSS) of the different professional groups, we have made use of the Pearson Chi-Square Test (significance level set at 5%³²) to see whether the correlation we found between the different ways in which the professional groups answered was statistically significant or not. We also calculated the Cramer's V in order to measure the strength of association between the professional group and their answer. In what follows, we will only refer to the difference in response between the professional groups if this difference was found to be statistically significant.³³

³² $P < .05$ significant *, $p \leq .01$ very significant **, $p \leq .001$ highly significant ***.

³³ The detailed tables of the questions for which a statistically significant difference was found in the responses of the professional groups, are included in Annex 3. I would like to express my gratitude to Nele De Ranter (Leuven Institute of Criminology, Catholic University of Leuven) for her help with this part of the research work.

5.2. RESULTS OF THE QUESTIONNAIRE

a) *Need for legislation at the national level*

Table 3. Importance of the needs in terms of national legislation

Needs in terms of national legislation Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
formulate RJ as a right for victims and offenders in legislation	3.3	11.0	83.5	2.2
expand the reach of RJ beyond diversion	4.4	17.8	71.1	6.7
more (detailed) national legislation concerning the cases that can go to RJ and the procedure to deal with them	3.3	25.3	69.2	2.2
provide for legal guarantees in legislation for preserving the voluntary character of the participation	5.5	26.4	68.1	0.0
more (detailed) legislation ensuring the availability of RJ services	7.8	22.2	66.7	3.3
provide for legal guarantees in legislation for confidentiality	8.8	23.1	65.9	2.2
take legislative measures to ensure respect for the main principles of RJ practices	5.6	31.1	62.2	1.1
extend the categories of offences that can be referred to RJ practices	8.8	22.0	61.5	7.7
a more concrete legal basis that explicitly regulates RJ practices and their relation to the criminal justice system	5.6	31.1	61.1	2.2
implement provisions for the suspension of time limits applicable to criminal proceedings during the time that a case is being dealt with through mediation	12.1	23.1	56.0	8.8
more (detailed) legislation on the organisation of RJ services	7.7	33.0	54.9	4.4
change the legal force of the legislative provisions concerning RJ (e.g. changing a permissive formulation into a coercive one)	18.9	33.3	33.3	14.4

From table 3 it can be seen that the need scoring highest in the category ‘very important’ is the need to formulate restorative justice as a right for victims and offenders in legislation, followed by the need to expand the reach of restorative justice beyond diversion. The two needs that score lowest in terms of being important³⁴ are the need to change the legal force of the legislative provisions concerning restorative justice and the need to implement provisions for the suspension of time limits applicable to criminal proceedings when a case is being dealt with through mediation.

Table 4. Needs in terms of national legislation – already adequately met or not?

Needs in terms of national legislation Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
formulate RJ as a right for victims and offenders in legislation	78.2	18.4	3.4
expand the reach of RJ beyond diversion	74.2	15.7	10.1
a more concrete legal basis that explicitly regulates RJ practices and their relation to the criminal justice system	69.7	24.7	5.6
extend the categories of offences that can be referred to RJ practices	69.3	21.6	9.1
more (detailed) legislation ensuring the availability of RJ services	68.6	27.9	3.5
more (detailed) legislation on the organisation of RJ services	68.5	23.6	7.9
take legislative measures to ensure respect for the main principles of RJ practices	67.8	25.3	6.9
more (detailed) national legislation concerning the cases that can go to RJ and the procedure to deal with them	65.9	31.9	2.2
change the legal force of the legislative provisions concerning RJ (e.g. changing a permissive formulation into a coercive one)	60.2	27.7	12.1
implement provisions for the suspension of time limits applicable to criminal proceedings during the time that a case is being dealt with through mediation	57.0	24.4	18.6
provide for legal guarantees in legislation for confidentiality	50.0	43.2	6.8
provide for legal guarantees in legislation for preserving the voluntary character of the participation	44.8	52.9	2.3

³⁴ This actually refers to the needs that scored highest in terms of being ‘not important’ but in order to improve the readability we will refer to this as the needs scoring the lowest in terms of importance.

In terms of which needs were already adequately met or not (see table 4), the need to formulate restorative justice as a right for victims and offenders in legislation, and the need to expand the reach of restorative justice beyond diversion scored the highest in terms of not being met adequately. The need to provide for legal guarantees in legislation for preserving the voluntary character of the participation, and for legal guarantees for confidentiality scored the highest for already being adequately met.

The question whether the need to implement provisions for the suspension of time limits applicable to criminal proceedings during the time that a case is being dealt with through mediation was already adequately met, was answered differently by the three professional groups. Both researchers and the ‘other’ professional group felt – more often than restorative justice practitioners – that this need was not adequately met yet ($\chi^2=11.340$; $dF=2$; $p=0.003^{**}$; Cramer’s $V=0.402$) (see point 1, Annex 3).

Three points should be retained from the comments provided by the respondents. First, there are still European countries in which there are no legislative provisions for restorative justice practices. Second, some respondents mentioned that the already existing legislation needed to become more detailed or needed to be improved considerably. And, third, in certain instances the need for adequate funding is greater than the need for more legislation.

b) Need for legislation at the international/supranational level

Table 5. Importance of the needs in terms of international/supranational legislation

Needs in terms of international/supranational legislation Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
more regulation at the level of the EU concerning the Member States’ implementation of RJ	2.2	26.7	61.1	10.0
harmonise the way in which mediation agreements can be recognised and executed in other countries	6.8	39.8	47.7	5.7
more regulation at the level of the EU concerning the internal process of mediation (e.g. working principles)	15.9	38.6	32.9	12.5
more regulation at the level of the EU concerning the procedural treatment of a dossier (e.g. referral)	13.8	37.9	32.2	16.1
harmonise the categories of offences that are amenable to RJ practices	20.0	47.1	28.2	4.7

Table 5 deals with the level of importance that respondents attributed to a number of needs for legislation at the international/supranational level. It is very clear from the answers that the need for EU regulation concerning the implementation of restorative justice in the Member States scored the highest in terms of level of importance. The picture becomes more diversified, however, when asking about the need to adopt regulation dealing with more detailed aspects. It seems, also from the comments, that the respondents recognise the importance of rather general regulation, promoting the use of restorative justice in the national systems, but that there is more reluctance vis-à-vis more detailed EU regulation.

Table 6. Legal force of legislative initiatives at the international/supranational level

Needs in terms of international/supranational legislation Need for/to ...	Legal force of the legislative initiative (in %)		
	Binding	Non-binding	No opinion
more regulation at the level of the EU concerning the Member States' implementation of RJ	65.4	16.1	18.5
harmonise the way in which mediation agreements can be recognised and executed in other countries	41.3	41.3	17.3
more regulation at the level of the EU concerning the internal process of mediation (e.g. working principles)	24.7	58.4	16.9
more regulation at the level of the EU concerning the procedural treatment of a dossier (e.g. referral)	24.4	51.3	24.4
harmonise the categories of offences that are amenable to RJ practices	21.3	60.0	18.7

Table 6 re-affirms the high support for rather general EU legislation concerning the implementation of restorative justice, since this need was the only one for which there was high support for a binding instrument.

Table 7. Needs in terms of international/supranational legislation – already adequately met or not?

Needs in terms of international/supranational legislation Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
harmonise the categories of offences that are amenable to RJ practices	63.6	5.2	31.2
harmonise the way in which mediation agreements can be recognised and executed in other countries	61.7	12.4	25.9
more regulation at the level of the EU concerning the Member States' implementation of RJ	61.7	9.9	28.4
more regulation at the level of the EU concerning the internal process of mediation (e.g. working principles)	57.7	11.5	30.8
more regulation at the level of the EU concerning the procedural treatment of a dossier (e.g. referral)	51.8	9.9	38.3

In terms of which needs were considered to be already adequately met or not, all needs scored rather high in terms of not being met adequately yet, indicating that there is considerable room for improvement. The high rate of 'no opinion' could suggest that people in Europe are not very familiar yet with initiatives already taken at EU level.

c) *Needs in terms of policy development and implementation at the national level*

Table 8. Importance of the needs in terms of national implementation and policy development

Needs in terms of national implementation and policy development Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
more stability in funding of RJ programmes	0.0	5.6	90.0	4.4
a national strategic approach to the implementation of RJ programmes	0.0	10.0	88.9	1.1
ensure direct financial government support to RJ services	2.2	10.1	84.3	3.4
the introduction of RJ processes in the prevention and management of conflicts to be increased through programmes, e.g. in criminal matters, schools, sports clubs, neighbourhoods and families	3.3	13.3	83.3	0.0
a clear political statement on RJ from the government	0.0	18.7	80.2	1.1
expand the equal availability of RJ services across the country	1.1	16.7	79.1	1.1
adopt clear and unambiguous guidelines for the referral of cases to RJ practices and for reporting back to the criminal justice system	1.1	18.9	78.9	1.1
take steps to ensure that certain social groups and immigrant groups have equal access to RJ services	1.1	21.1	74.4	3.3
the codes of conduct for lawyers to include an obligation for lawyers to inform their clients about mediation and to consider the use of RJ when appropriate	3.3	20.0	74.4	2.2
the adoption of formal ethical rules for RJ practices	1.1	25.3	70.3	3.3
identify key officials in all the competent administrative authorities and establish a permanent consultation structure between them	0.0	25.6	67.8	6.7
strong leadership from senior criminal justice managers	6.8	22.7	64.8	5.7
reconcile differing interpretations that judges and prosecutors have of the legal provisions concerning RJ	0.0	30.8	63.7	5.5
create a specific RJ unit in the competent ministries	11.2	27.0	57.3	4.5
the creation of a deontological commission for RJ practices	7.9	22.5	53.9	15.7
take steps to ensure that volunteers can play an active role in RJ practices	6.6	35.2	51.6	6.6

The need scoring the lowest in terms of importance was the need to create a specific restorative justice unit in the competent ministries. The need scoring the highest in terms of being very important was the need for more stability in the funding of restorative justice programmes. The relatively high ‘no opinion’ rate for the need for the creation of a deontological commission for restorative justice practices probably has to do with the fact that a number of respondents did not understand what was meant with a deontological commission.

The importance of the need for a clear political statement on restorative justice from the government, was considered differently by the three professional groups. The researchers more often answered that it was ‘relatively important’ than both the restorative justice practitioners and the ‘other’ professionals. ($\chi^2=6.553$; $dF=2$; $p=0.038^*$; Cramer’s $V=0.270$; see point 2, Annex 3).

Table 9. Needs in terms of national implementation and policy development – already adequately met or not?

Needs in terms of national implementation and policy development Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
a national strategic approach to the implementation of RJ programmes	88.2	8.2	3.5
identify key officials in all the competent administrative authorities and establish a permanent consultation structure between them	86.9	2.4	10.7
strong leadership from senior criminal justice managers	84.1	6.1	9.8
the codes of conduct for lawyers to include an obligation for lawyers to inform their clients about mediation and to consider the use of RJ when appropriate	82.9	11.0	6.1
create a specific RJ unit in the competent ministries	82.9	8.5	8.5
a clear political statement on RJ from the government	82.6	13.9	3.5
more stability in funding of RJ programmes	81.9	12.0	6.0
the introduction of RJ processes in the prevention and management of conflicts to be increased through programmes, e.g. in criminal matters, schools, sports clubs, neighbourhoods and families	79.8	9.5	10.7
reconcile differing interpretations that judges and prosecutors have of the legal provisions concerning RJ	72.9	8.2	18.8
the adoption of formal ethical rules for RJ practices	72.6	21.4	5.9
take steps to ensure that certain social groups and immigrant groups have equal access to RJ services	71.4	19.0	9.5
ensure direct financial government support to RJ services	69.9	18.1	12.0
expand the equal availability of RJ services across the country	69.4	23.5	7.1
the creation of a deontological commission for RJ practices	65.8	10.1	24.1
adopt clear and unambiguous guidelines for the referral of cases to RJ practices and for reporting back to the criminal justice system	65.1	24.4	10.5
take steps to ensure that volunteers can play an active role in RJ practices	63.9	21.7	14.5

All needs scored relatively to very high in terms of not being met adequately yet, as can be seen from table 9. The needs that scored highest in terms of being already adequately met were the need to adopt clear and unambiguous guidelines for the referral of cases to restorative justice practices and for reporting back to the criminal justice system, and the need to expand the equal availability of RJ services across the country.

d) Needs in terms of policy development and implementation at the international/supranational level

Table 10. Importance of the needs in terms of international/supranational support for implementation and policy development

Needs in terms of international/supranational support for implementation and policy development Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
a network to exchange practical and theoretical questions, experiences and strategies for RJ between RJ stakeholders internationally (policy makers, researchers, RJ practitioners, legal practitioners)	1.1	13.5	85.4	0.0
work for a common understanding of the basic principles of RJ	2.2	18.0	79.8	0.0
European institutions to encourage countries to institutionalise public funding of RJ practices	2.2	19.1	76.4	2.2
technical assistance in the adoption of RJ practices from countries with more experience	2.3	32.9	63.6	1.1
a network to exchange information between representatives of the ministries of justice of the different Member States or other relevant departments dealing with RJ	4.6	28.4	63.6	3.4
the adoption of formal ethical rules for RJ practices	1.1	35.2	61.4	2.3
more guidance from supranational/international institutions in national policy developments concerning RJ	6.8	35.2	55.7	2.3

Table 10 shows that the highest level of importance was given to the need for a network to exchange practical and theoretical questions, experiences and strategies for restorative justice. The need for more guidance from supranational/international institutions in national policy developments concerning restorative justice scored lowest in terms of level of importance.

Table 11. Needs in terms of international/supranational support for implementation and policy development – already adequately met or not?

Needs in terms of international/supranational support for implementation and policy development Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
European institutions to encourage countries to institutionalise public funding of RJ practices	77.1	6.0	16.9
more guidance from supranational/international institutions in national policy developments concerning RJ	71.1	19.3	9.6
a network to exchange information between representatives of the ministries of justice of the different Member States or other relevant departments dealing with RJ	70.7	9.8	19.5
technical assistance in the adoption of RJ practices from countries with more experience	67.9	13.6	18.52
work for a common understanding of the basic principles of RJ	65.5	21.4	13.1
the adoption of formal ethical rules for RJ practices	65.4	14.8	19.7
a network to exchange practical and theoretical questions, experiences and strategies for RJ between RJ stakeholders internationally (policy makers, researchers, RJ practitioners, legal practitioners)	60.2	21.7	18.1

In terms of what needs were already adequately met and what not, the need for European institutions to encourage countries to institutionalise public funding of restorative justice practices scored the highest in terms of not being met adequately. The need for a network to exchange practical and theoretical questions, experiences and strategies for restorative justice between stakeholders internationally scored the highest in terms of being adequately met. However, it was still considered as not adequately met by 60.2% of the respondents. The comments from the respondents also indicated that although such a network (referring to the European Forum for Restorative Justice) is available, it would need adequate funding in order to fully play its role.

e) Needs in terms of education, training and accreditation at the national level

Table 12. Importance of the needs in terms of education, training and accreditation at the national level

Needs in terms of education, training and accreditation at the national level Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
national standards for training of RJ practitioners	0.0	23.6	76.4	0.0
include RJ in the curricula for the initial and continuous training programmes for referral agents (police, lawyers, judges, prosecutors)	0.0	23.3	75.6	1.1
include RJ in the curricula of university education in humanities/social sciences	7.8	16.7	74.4	1.1
a stable national training system for RJ practitioners	2.2	22.2	73.3	2.2
national standards for the accreditation of RJ practitioners	3.3	28.9	67.8	0.0
include RJ in the schools' national curricula	7.8	25.6	65.6	1.1

Table 12 shows that all these needs scored very high in terms of being very important. The need to include restorative justice in the schools' national curricula scored the lowest, with 7 respondents (7.8%) indicating that it was not important. Some respondents commented that there was rather a need for restorative justice principles to be adopted in the way schools were managed and conflicts within schools were dealt with. Others mentioned in their comments that the need to promote peacemaking and conflict resolution skills in the general population were more important than including them in schools' curricula.

The importance of the need to include restorative justice in the curricula for the initial and continuous training programmes for referral agents (police, lawyers, judges, prosecutors) was considered differently by the three professional groups. Restorative justice practitioners by and large feel that this is very important, whereas researchers more often say that it is 'relatively important'. ($\chi^2=9.473$; $dF=2$; $p=0.009^{**}$; Cramer's $V=0.326$; see point 3, Annex 3).

Table 13. Needs in terms of education, training and accreditation at the national level – already adequately met or not?

Needs in terms of education, training and accreditation at the national level Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
include RJ in the schools' national curricula	100.0	0.0	0.0
include RJ in the curricula for the initial and continuous training programmes for referral agents (police, lawyers, judges, prosecutors)	87.2	5.8	7.0
include RJ in the curricula of university education in humanities/social sciences	78.3	10.8	10.8
national standards for training of RJ practitioners	74.7	17.2	8.1
national standards for the accreditation of RJ practitioners	73.8	17.9	8.3
a stable national training system for RJ practitioners	73.3	20.9	5.8

Table 13 shows that – again – a lot of work remains to be done in relation to training, education and accreditation in the field of restorative justice. None of the respondents have answered that the need to include restorative justice in the schools' national curricula was already adequately met. But also all other needs scored very high in terms of not being met adequately.

In relation to the training of restorative justice practitioners, several respondents mentioned that this kind of training should be in the hands of NGOs, and that it needed to be provided by experienced independent trainers. Funding for training seems to be a major issue and warnings were voiced against training that is of insufficient quality and duration.

f) Needs in terms of education, training and accreditation at the international/ supranational level

Table 14. Needs in terms of education, training and accreditation at the international level – level of support

Needs in terms of education, training and accreditation at the international level Need to ...	Level of support (in %)			
	No	Average	Strong	No opinion
establish links between national training institutes for RJ practitioners	20.4	35.2	23.9	20.4
develop European recommendations concerning the training of referring agents (police, lawyers, judges and prosecutors)	25.0	30.7	22.7	21.6
develop common European standards for the training of RJ practitioners	23.9	32.9	21.6	21.6
develop a framework for external support (funding and expertise) for training at the national level	25.0	34.1	20.4	20.4
establish a European training programme for RJ practitioners	25.0	27.3	20.4	27.3
establish a European training programme for referring agents	28.4	30.7	15.9	25.0
develop common European standards for RJ practice	21.6	48.9	13.6	15.9
develop a shared framework for quality control and accountability	21.6	37.5	13.6	27.3
develop common European criteria for the accreditation of institutions which train RJ practitioners	25.0	36.4	13.6	25.0
develop common European criteria for the accreditation of RJ practitioners and/or institutions which offer RJ services	27.3	35.2	12.5	25.0

With on average one-quarter of the respondents mentioning that there would be no support at all for undertaking above actions, support for common European instruments and activities in the field of training, education and accreditation is rather low. The many 'no opinions', combined with the comments provided by the respondents, indicate that for many the questions were unclear (support from whom?) or difficult to answer without having done a survey. Several respondents mentioned that the needs at national level needed to be met first before any action at European level would receive support. However, one respondent from the Netherlands mentioned that devising such instruments at European level could also provide the necessary pressure on the national government to start organising matters better at national level.

g) Needs in terms of development of good practice at the national level

Table 15. Importance of the needs in terms development of good practice at the national level

Needs in terms of development of good practice at the national level Need for/ to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
clear policies and guidelines concerning case referral by referral agencies	0.0	17.2	82.8	0.0
establish adequate procedural guarantees for the participation of minors in RJ practices	1.1	18.2	80.7	0.0
clarify mechanisms through which to protect the individual rights of the parties	1.1	18.2	80.7	0.0
develop mechanisms to monitor the compliance with any agreement that is reached in the restorative process	3.5	22.1	69.8	4.6
increase the use of local resources and experience, including the not-for-profit/NGO sector	3.4	25.3	69.0	2.3
clear policies and guidelines concerning case acceptance decisions by RJ programme personnel	4.6	25.3	69.0	1.1
develop appropriate complains procedures when RJ practitioners breach a code of conduct	3.4	27.3	68.2	1.1
define criteria that could be used as benchmarks for quality assessment	3.5	28.7	67.8	0.0
develop data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants	4.5	26.1	64.8	4.5
encourage and support the involvement of mediators from the communities (lay or volunteer mediators)	5.7	36.8	55.2	2.3
develop appropriate disciplinary procedures when RJ practitioners breach a code of conduct	3.4	38.6	54.6	3.4
put in place monitoring schemes	5.7	33.3	54.0	6.9
set up programme performance standards and targets	4.6	43.7	47.1	4.6

Table 15 shows that the need that scored highest in terms of importance is the need for clear policies and guidelines concerning case referral by referral agencies, followed by the needs to establish adequate procedural guidelines for the participation of minors in restorative justice practices, and for clarifying mechanisms through which to protect the individual rights of parties. The lowest level of importance was given to the need to set up programme performance standards and targets.

Table 16. Needs in terms of development of good practice at the national level – already adequately met or not?

Needs in terms of development of good practice at the national level Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
develop data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants	81.0	7.1	11.9
develop appropriate disciplinary procedures when RJ practitioners breach a code of conduct	77.4	8.3	14.3
define criteria that could be used as benchmarks for quality assessment	77.1	7.2	15.7
develop appropriate complaints procedures when RJ practitioners breach a code of conduct	76.5	9.4	14.1
clear policies and guidelines concerning case referral by referral agencies	69.0	17.9	13.1
put in place monitoring schemes	66.7	7.4	25.9
develop mechanisms to monitor the compliance with any agreement that is reached in the restorative process	66.3	16.9	16.9
increase the use of local resources and experience, including the not-for-profit/NGO sector	66.2	22.5	11.2
set up programme performance standards and targets	65.8	9.8	24.4
encourage and support the involvement of mediators from the communities (lay or volunteer mediators)	63.3	25.3	11.4
clear policies and guidelines concerning case acceptance decisions by RJ programme personnel	61.0	20.7	18.3
clarify mechanisms through which to protect the individual rights of the parties	57.3	20.7	22.0
establish adequate procedural guarantees for the participation of minors in RJ practices	52.4	36.9	10.7

The development of data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants scored the highest in terms of not being met adequately yet, whilst about one-quarter of the respondents indicated that the need to encourage and support the involvement of mediators from the communities was well met already. The importance of the role of NGOs in these matters, and the need for adequate funding, were stressed.

b) Needs in terms of development of good practice at the international/ supranational level

Table 17. Needs in terms of development of good practice at the international level – level of support

Needs in terms of development of good practice at the international level Need to ...	Level of support (in %)			
	No	Average	Strong	No opinion
develop specific guarantees in order to protect vulnerable parties to RJ practices	18.2	35.2	26.1	20.4
develop European guidelines specific to the participation of minors in RJ practices	21.8	37.9	21.8	18.4
define common European criteria that could be used as benchmarks for quality assessment	23.0	40.2	17.2	19.5
harmonise the mediation procedure	28.7	37.9	14.9	18.4
develop a European Code of Conduct for RJ practitioners	25.0	42.0	12.5	20.4
harmonise the status of RJ practitioner	30.7	36.4	10.2	22.7

The lowest support was given to the need to harmonise the status of restorative justice practitioner, whilst the need to develop specific guarantees in order to protect vulnerable parties to restorative justice practices could count on the highest support. Overall, the responses to these questions are very divided.

i) Needs in terms of cooperation and networking at the national level

Table 18. Importance of the needs in terms of cooperation and networking at the national level

Needs in terms of cooperation and networking at the national level Need for/ to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
establish working relationships between stakeholders (policy makers, legal practitioners, academics and other related statutory and not-for-profit organisations)	0.0	11.2	88.8	0.0
establish a regular dialogue between RJ practitioners, referring agents, policy makers and other stakeholders concerning the meaning and terms of RJ	1.1	10.1	88.8	0.0
more exchange of information on successful practices and their evaluation	1.1	10.2	88.6	0.0
foster both institutional and individual links between RJ practitioners on the one hand, and judges and prosecutors on the other hand	1.1	15.9	81.8	1.1
create a common perspective for RJ amongst service providers, training providers, practitioners and the actors of the criminal justice system	1.1	21.6	76.1	1.1
better cooperation between organisations working for similar aims (e.g. mediation and victim support projects)	0.0	21.8	73.6	4.6
more communication between the different RJ projects in your country	2.3	18.0	73.0	6.7
develop interagency protocols and formal agreements (e.g. on matters such as governance, programme policy setting, public communication, case referrals, joint training, cost-sharing, information flow, data sharing, protection of privacy, confidentiality of information, dispute resolution among partners, etc.)	3.3	21.1	70.0	5.6
collaborative partnerships between criminal justice personnel, the not-for-profit/NGO sector and community-based organisations	2.2	28.1	67.4	2.2
more exchange between stakeholders on the role of volunteers in RJ practices in order to increase the level of confidence in the quality of the work of volunteers	5.7	21.6	67.0	5.7
bar associations and lawyers associations to have lists of RJ programme providers and to disseminate them to lawyers	5.6	28.1	62.9	3.4

The needs in terms of establishing regular dialogue and working relationships between restorative justice stakeholders scored the highest in terms of importance, together with the need for more exchange of information on successful practices and their evaluation. The lowest level of importance was awarded to exchange on the role of volunteers in restorative justice practices.

Table 19. Needs in terms of cooperation and networking at the national level – already adequately met or not?

Needs in terms of cooperation and networking at the national level Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
create a common perspective for RJ amongst service providers, training providers, practitioners and the actors of the criminal justice system	78.0	18.8	6.1
collaborative partnerships between criminal justice personnel, the not-for-profit/NGO sector and community-based organisations	76.5	12.9	10.6
bar associations and lawyers associations to have lists of RJ programme providers and to disseminate them to lawyers	76.5	8.6	14.8
establish a regular dialogue between RJ practitioners, referring agents, policy makers and other stakeholders concerning the meaning and terms of RJ	74.7	20.5	4.8
more exchange of information on successful practices and their evaluation	74.7	13.2	12.0
develop interagency protocols and formal agreements (e.g. on matters such as governance, programme policy setting, public communication, case referrals, joint training, cost-sharing, information flow, data sharing, protection of privacy, confidentiality of information, dispute resolution among partners, etc.)	73.5	10.8	15.7
foster both institutional and individual links between RJ practitioners on the one hand, and judges and prosecutors on the other hand	71.9	20.7	7.3
establish working relationships between stakeholders (policy makers, legal practitioners, academics and other related statutory and not-for-profit organisations)	71.1	20.5	8.4
better cooperation between organisations working for similar aims (e.g. mediation and victim support projects)	70.0	13.7	16.2
more exchange between stakeholders on the role of volunteers in RJ practices in order to increase the level of confidence in the quality of the work of volunteers	69.9	9.6	20.5
more communication between the different RJ projects in your country	54.2	33.7	12.1

The need to create a common perspective for restorative justice amongst stakeholders scored the highest in terms of being unmet adequately, whilst the communication between restorative justice projects was deemed adequate by 33.7% of the respondents.

j) *Needs in terms of cooperation and networking at the international/supranational level*

Table 20. Importance of the needs in terms of cooperation and networking at the international level

Needs in terms of cooperation and networking at the international level Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
more exchange of information on successful practices and their evaluation	0.0	13.6	86.4	0.0
support international cooperation through structural funding of a European organisation bringing together all stakeholders in RJ	2.3	11.5	81.6	4.6
networking between researchers of different countries	1.1	18.2	80.7	0.0
organise bilateral, regional and/or international conferences, seminars and projects to exchange information on good practice, legislation, research and training	1.1	20.4	78.4	0.0
have an international forum to coordinate above actions	3.4	17.0	77.3	2.3
networking between legal practitioners of different countries	4.5	22.7	71.6	1.1
networking between service providers of different countries	0.0	30.7	69.3	0.0
networking between policy makers of different countries	0.0	27.6	69.0	3.4
organise study visits to RJ services in other countries to exchange experiences	3.4	29.2	66.3	1.1

Networking between legal practitioners of different countries was deemed to be least important, whilst the need for more exchange of information on successful practices and their evaluation scored very high with 86.4% of the respondents saying that it was ‘very important’.

Table 21. Needs in terms of cooperation and networking at the international level – already adequately met or not?

Needs in terms of cooperation and networking at the international level Need for/to ...	Already adequately met? (in %)		
	No	Yes	No opinion
organise bilateral, regional and/or international conferences, seminars and projects to exchange information on good practice, legislation, research and training	78.3	15.7	6.0
more exchange of information on successful practices and their evaluation	76.5	12.9	10.6
support international cooperation through structural funding of a European organisation bringing together all stakeholders in RJ	76.5	8.6	14.8
networking between policy makers of different countries	76.2	19.0	4.8
networking between legal practitioners of different countries	73.5	10.8	15.7
networking between service providers of different countries	72.3	20.5	7.2
networking between researchers of different countries	71.4	20.2	8.3
have an international forum to coordinate above actions	70.0	13.7	16.2
organise study visits to RJ services in other countries to exchange experiences	53.6	32.1	14.3

The need for study visits was met most adequately, but more than half of the respondents still indicated that this was not adequately met. All the other needs scored high in terms of not being met adequately yet.

Several respondents referred – in their comments – to the excellent role that the European Forum for Restorative Justice is playing in this regard, but commented that it needed adequate funding in order to play its role fully.

k) Needs in terms of communication and awareness raising

Table 22. Importance of the needs in terms of communication and awareness raising

Needs in terms of communication and awareness raising Need for/to ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
develop effective communication strategies to educate and inform the community, the police, the judiciary, correctional authorities and others involved in the delivery of justice services about RJ	0.0	6.8	93.2	0.0
raise awareness about RJ among social workers, the police, policy makers and legal professionals (lawyers, prosecutors and judges)	1.1	6.7	92.1	0.0
promote the use of peaceful conflict resolution skills amongst the population	0.0	10.2	87.5	2.3
raise awareness about RJ among the international/supranational organisations	2.3	14.8	81.8	1.1
set up recurrent publicity campaigns about RJ	4.5	20.4	73.9	1.1
develop strategies for cooperation with the media	3.4	22.5	73.0	1.1
develop an integrated communication strategy to spread information about the possible negative effects of the criminal justice system	13.5	25.8	52.8	7.9

The need deemed least important by the respondents was the need to develop an integrated communication strategy to spread information about the possible negative effects of the criminal justice system. More importance was given to developing communication strategies and raising awareness among actors of or related to the criminal justice system.

Table 23. Level for action to meet needs in terms of communication and awareness raising

Needs in terms of communication and awareness raising Need for/to ...	Level for action (in %)			
	National	International	National and international	No opinion
raise awareness about RJ among the international/supranational organisations	1.1	14.9	77.0	6.9
develop effective communication strategies to educate and inform the community, the police, the judiciary, correctional authorities and others involved in the delivery of justice services about RJ	20.7	0.0	77.0	2.3
promote the use of peaceful conflict resolution skills amongst the population	19.8	0.0	76.7	3.5
raise awareness about RJ among social workers, the police, policy makers and legal professionals (lawyers, prosecutors and judges)	25.3	0.0	72.4	2.3
develop an integrated communication strategy to spread information about the possible negative effects of the criminal justice system	14.3	1.2	65.5	19.0
develop strategies for cooperation with the media	27.6	1.1	65.5	5.7
set up recurrent publicity campaigns about RJ	27.6	0.0	64.4	8.0

Respondents felt that all needs needed to be met at both national and international level. Setting up recurrent publicity campaigns and developing strategies for cooperation with the media scored the highest for national action alone, but even then most respondents felt that action at the international level was also needed.

l) Research and data collection

Table 24. Importance of research needs

Needs in terms of research and data collection Research on ...	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
ways to assess whether RJ works and on the basis of which criteria	0.0	9.2	89.7	1.1
the relation between RJ and criminal justice	1.1	8.0	89.7	1.1
the benefits for the parties	0.0	9.1	88.6	2.3
the improvement of RJ practice	1.1	11.5	85.1	2.3
the practical aspects of implementing RJ	0.0	14.8	84.1	1.1
revising criminal justice principles and reformulating them in the light of the RJ philosophy	5.7	10.2	84.1	0.0
acceptance by the public of RJ	0.0	16.1	83.9	0.0
in depth-research into the meaning that victims and offenders and other parties give to their participation in RJ practices	1.1	13.6	82.9	2.3
the special consideration that should be given to the needs of the victim before, during and after the RJ intervention	1.1	15.9	81.8	1.1
the limitations of RJ (when is it not successful or not applicable)	0.0	15.9	81.8	2.3
the degree of satisfaction of the parties	1.1	14.8	81.8	2.3
the internal dynamics of RJ practices	2.3	18.2	79.5	0.0
the possible role of the local community in RJ	0.0	21.6	75.0	3.4
explore and study the different ways in which RJ can be regulated by law	1.1	24.1	73.6	1.1
the effects of RJ on reoffending	2.3	21.6	72.7	3.4
cost-effectiveness of RJ	0.0	24.1	72.4	3.4
the concept of RJ	1.1	25.8	71.9	1.1
how to conduct research in the RJ field	5.7	23.9	67.0	3.4
the differences between various RJ models	0.0	33.3	66.7	0.0
the role of volunteers in RJ and how they relate to professional RJ practitioners	3.4	31.8	62.5	2.3
use of RJ practices in non-conventional crimes (e.g. white collar crime)	9.1	32.9	50.0	7.9

The subject for research deemed least important was research on the use of restorative justice practices in non-conventional crimes. Research on ways to assess whether restorative justice works and on the basis of which criteria, research on the relation between restorative justice

and criminal justice, and research on the benefits for the parties scored the highest in terms of importance.

The need to do research on the differences between various restorative justice models was considered more important by researchers and the ‘other’ professional groups, than by restorative justice practitioners, who only found it ‘relatively important’ ($\chi^2=14.248$; $dF=2$; $p=0.001^{***}$; Cramer’s $V=0.405$; see point 4, Annex 3). The need to do research on the limitations of restorative justice (when is it not successful or not applicable) was, on the contrary, considered less important by researchers than by restorative justice practitioners ($\chi^2=11.797$; $dF=2$; $p=0.003^{**}$; Cramer’s $V=0.370$; see point 5, Annex 3).

Table 25. Level for action to meet research needs

Needs in terms of research and data collection Research on ...	Level for action (in %)			
	National	International	National and international	No opinion
the benefits for the parties	7.9	0.0	89.8	2.3
the degree of satisfaction of the parties	8.0	0.0	89.7	2.3
the practical aspects of implementing RJ	4.5	2.3	88.6	4.5
cost-effectiveness of RJ	5.7	1.1	88.6	4.5
the limitations of RJ (when is it not successful or not applicable)	5.7	2.3	88.5	3.4
the improvement of RJ practice	5.7	2.3	87.5	4.5
the special consideration that should be given to the needs of the victim before, during and after the RJ intervention	7.9	0.0	87.5	4.5
in depth-research into the meaning that victims and offenders and other parties give to their participation in RJ practices	7.9	0.0	86.4	5.7
the relation between RJ and criminal justice	1.1	11.4	84.1	3.4
the effects of RJ on reoffending	7.9	1.1	83.4	4.5
the concept of RJ	5.6	5.6	82.2	6.7
the differences between various RJ models	11.4	4.5	81.8	2.3
explore and study the different ways in which RJ can be regulated by law	9.2	3.4	81.6	5.7
revising criminal justice principles and reformulating them in the light of the RJ philosophy	10.2	0.0	80.7	9.1
the internal dynamics of RJ practices	8.9	2.2	80.0	8.9
ways to assess whether RJ works and on the basis of which criteria	12.5	6.8	77.3	3.4
how to conduct research in the RJ field	5.7	5.7	75.0	13.6
the role of volunteers in RJ and how they relate to professional RJ practitioners	18.0	4.5	70.8	6.7
the possible role of the local community in RJ	23.9	2.3	68.2	5.7
acceptance by the public of RJ	5.6	10.1	66.3	18.0
use of RJ practices in non-conventional crimes (e.g. white collar crime)	5.6	10.1	66.3	18.0

For all research topics included in the questionnaire, respondents felt that there was a need to do research at both the national and international level. The research topic which scored the highest for only doing national research was – understandably – research on the possible role of the local community in restorative justice. Nevertheless, 68.2% of the respondents felt that also this topic required research at both levels. The topic scoring the highest for only doing international research related to the relation between restorative justice and criminal justice, but again most respondents (84.1%) saw a role for both national and international research.

Table 26. Actions to be undertaken in the research field

Actions to be undertaken in the research field	Importance of the need (in %)			
	Not	Relatively	Very	No opinion
Develop appropriate evaluation schemes and criteria that are coherent with the principles and goals of RJ	0.0	14.6	83.2	2.2
Make available more funding for international research	2.3	13.6	81.8	2.3
More systematic evaluative research	0.0	18.9	78.9	2.2
Set up a national data recording system	2.2	15.7	78.7	2.4
Develop common criteria, including both qualitative and quantitative evaluation aspects, to enable comparison between mediation services	0.0	27.0	71.9	1.1
Need for Member States to continually monitor their RJ schemes and to arrange for their external and independent evaluation	1.1	27.8	67.8	3.3
Harmonise national data recording systems between countries	6.7	25.6	65.6	2.2
Need for mediation services to do research themselves (rather than an independent research institute)	12.4	31.5	43.8	12.4

The actions to be undertaken in the research field deemed to be most important were to develop appropriate evaluation schemes and criteria, coherent with the principles and goals of restorative justice, and to make available more funding for international research. The action considered least important was for mediation services to do research themselves, rather than an independent research institute. However, several respondents mentioned that it is not an either/or situation. Restorative justice services need to monitor their work, and can gather data and do descriptive research. Independent researchers should, on the other hand, be responsible for evaluative research.

Table 27. Level at which these actions in the field of research need to be undertaken

Actions to be undertaken in the research field	Level for action (in %)			
	National	International	National and international	No opinion
Develop common criteria, including both qualitative and quantitative evaluation aspects, to enable comparison between mediation services	5.6	3.4	86.5	4.5
Develop appropriate evaluation schemes and criteria that are coherent with the principles and goals of RJ	7.9	2.3	86.4	3.4
More systematic evaluative research	8.9	1.1	85.6	4.4
Make available more funding for international research	2.2	5.6	85.4	6.7

Again, the majority of respondents felt that these actions should be undertaken at both national and international level.

5.3. CONCLUSIONS TO BE DRAWN FROM THE QUESTIONNAIRE

The most important conclusions from this questionnaire can be summarised as follows:

- *National legislation*: The need to formulate restorative justice as a right for victims and offenders and the need to expand the reach of restorative justice beyond diversion scored very high in terms of being important and in terms of not being met adequately yet.
- *International/supranational legislation*: Respondents felt that it was important to have more regulation at the level of the European Union concerning the Member States' implementation of restorative justice. 65.4% of the respondents felt that such regulation should be binding in nature, and 57.7% felt that this need was not adequately met yet. There is more reluctance vis-à-vis EU regulation about the internal dynamics of restorative practices.
- *Policy development and implementation at the national level*: It is clear that a lot of work remains to be done at national level to ensure a stable place for restorative justice. All needs included in the questionnaire scored between 63.9% and 88.2% in terms of not being met adequately yet. More stability in funding, a national strategic approach to the implementation of restorative justice programmes and the adoption of formal ethical rules

for restorative justice practices are only a few examples of needs that scored high in terms of being very important and not being met adequately yet.

- *Policy development and implementation at the international/supranational level:* Support for a network to exchange practical and theoretical questions, experiences and strategies for restorative justice between restorative justice stakeholders internationally was considered the most important need among those included in the questionnaire. 60.2% of the respondents felt that this need was not adequately met yet. Several respondents mentioned that such a network is available already, but that it is not able to play its role fully because of lack of funding. Work for a common understanding of the basic principles of restorative justice scored also high in terms of importance.
- *Education, training and accreditation at the national level:* The needs in terms of training of restorative justice practitioners (national standards for training, national standards for accreditation, and a stable national training system) and of referral agents are all considerable.
- *Education, training and accreditation at the international/supranational level:* Support for common European instruments (such as European standards for restorative justice practice) and common European activities (like European standards for the training of restorative justice practitioners and referral agents) is rather low. Several respondents mentioned that the needs at national level needed to be met first before any action at European level would receive support. However, comments and the many 'no opinion' answers to these questions indicate that respondents found it hard to answer these questions.
- *Development of good practice at the national level:* The development of data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants was felt to be not met adequately by 81% of the respondents, which is extremely high. However, all other needs included in the questionnaire scored very high as well in terms of not being met adequately. There is reason for concern if more than 50% of the respondents mention that the need to establish adequate procedural guarantees for the participation of minors in restorative justice practices, and the need to clarify mechanisms through which to protect the individual rights of the parties are not met adequately in their country.
- *Development of good practice at the international/supranational level:* Support for undertaking action in this field at a supranational level was again very divided. The many 'no opinions' seem to confirm that the way in which this question (as with the question on support for actions at supranational level in the field of training, education and accreditation) was formulated was not optimal. The strongest support was reported for the need to develop specific guarantees in order to protect vulnerable parties to restorative justice practices (26.1% strong support and 35.2% average support).
- *Cooperation and networking at the national level:* There is considerable room for improvement in cooperation and networking at national level, especially between restorative justice providers and actors of the criminal justice system and related agencies. Most needs included in the questionnaire were deemed not to be adequately met by over 70% of the respondents.
- *Cooperation and networking at the international/supranational level:* The need for international exchange between the various stakeholders in restorative justice (policy makers, legal practitioners, service providers and researchers) is very high. The existence of the European Forum for Restorative Justice, and the fact that it did excellent work but could not play its role fully because of lack of adequate funding, was referred to by several respondents.³⁵

³⁵ Since the questionnaire was being sent through the European Forum for Restorative Justice, and to respondents who have a clear link with the Forum, it was foreseeable that respondents would refer to it.

- *Communication and awareness raising*: It is very important to communicate with and raise the awareness of the actors of or related to the criminal justice system, the international institutions and the general population about restorative justice. Actions need to be undertaken at both national and international level.
- *Research and data collection*: Research on ways to assess whether restorative justice works and on the basis of which criteria, research on the relation between restorative justice and criminal justice, and research on the benefits for the parties scored the highest in terms of importance. However, almost all research topics scored over 70% for being very important, including research on the concept of restorative justice. All these topics needed to be research at both national and international level. The actions to be undertaken in the research field deemed to be most important were to develop appropriate evaluation schemes and criteria, coherent with the principles and goals of restorative justice, and to make available more funding for international research.

6. GENERAL CONCLUSIONS ABOUT RESTORATIVE JUSTICE IN EUROPE

It should be clear from the above that the restorative justice scene is very diversified. There are major differences between the Member States of the European Union in the way restorative justice provisions have been included in national law and in the way restorative justice services are being implemented. This diversity is – in itself – not a problem. Differences in the historical, legal, social, cultural and political context of European countries are, amongst other factors, responsible for this divergence. But, as Ivo Aertsen wrote, “[t]he European restorative justice field ... also undergoes influences towards uniformity, at times through international co-operation” (Aertsen, 2007: 92). He remarks that “a remarkable degree of homogeneity can be observed when it comes to a number of basic principles and standards of restorative justice practice. These principles and standards of good practice and organisation are formulated, for example, in Recommendation R(99)19 of the Council of Europe concerning mediation in penal matters. Another example is the statement on standards for training, launched by the European Forum for Restorative Justice” (Aertsen, 2007: 92). Instruments adopted by the Council of Europe, United Nations and European Union in the field of restorative justice, which all contribute to a greater uniformity of restorative justice in Europe, are the subject of the next part of this report.

As mentioned, there are some developments linked to the institutionalisation of restorative justice that may be thought contentious. Victim-offender conversations being introduced under the header of restorative justice, but being implemented as a measure that ‘uses’ the offender to benefit the victim; imposed referrals to restorative justice practices; arbitration/adjudication by prosecutors being called mediation; increased involvement of probation services in providing restorative justice services with the attached risk that the provision of this service will come second in place and that the service becomes offender-oriented with the ensuing risk of ‘using’ the victim; the use of reoffending rates as a yardstick to measure effectiveness of restorative justice practices; and so on. In order to ensure that the political moment of restorative justice does not overtake its ethical moment (Hudson, 2006), a legal-ethical conceptual framework that takes into account the socio-political agenda (Mackay, 2006) needs to be developed.

The many needs of the restorative justice scene make it clear that it is a field in full development and in many countries yet to mature. Whereas there is reluctance about too great an involvement from the European Union in prescribing how restorative justice should be organised and practised nationally, there is also a great demand for international exchange and research and a preference for European institutions to provide general direction for its implementation. What the European Union could usefully do in this field is the topic of Part V of this report. In Part III we first provide an overview of what international and supranational organisations have already done in the field of restorative justice.

PART III:
**RESTORATIVE JUSTICE AND THE THREE MAIN
INTERNATIONAL INSTITUTIONS**

Over the past few years, international and supranational organisations have also started to pay attention to restorative justice. In the following account, we provide an overview of the different initiatives and instruments and of their content. We first start with describing initiatives taken by the Council of Europe as it was the first of these institutions to act in the restorative justice field. We then look at initiatives under the umbrella of the United Nations, and finally at those taken within the framework of the European Union. At the end of each of these three sections, a short evaluation of the initiatives is made. In the last section of part III we will make a comparison between the main instruments of these three institutions.

1. THE COUNCIL OF EUROPE

1.1. THE COUNCIL OF EUROPE'S MISSION IN THE FIELD OF CRIMINAL JUSTICE

In the legal field, the Council of Europe contributes to the harmonisation of Europe's legal systems on the basis of standards which are laid down within the organisation. Its overall aim is to encourage the establishment and development of democratic institutions and procedures at national, regional and local level, and to promote respect for the principles of the rule of law.³⁶

Set up in 1958, the European Committee on Crime Problems (CDPC) was entrusted with the responsibility for overseeing and coordinating the Council of Europe's activities in the field of crime prevention and crime control by the Committee of Ministers³⁷ of the Council of Europe. The CDPC identifies priorities for intergovernmental legal cooperation, makes proposals to the Committee of Ministers on activities in the fields of criminal law and procedure, criminology and penology, and implements these activities. It also elaborates conventions, agreements, recommendations and reports, and organises criminological conferences.³⁸

The Council of Europe's Committee of Ministers has adopted a fair number of recommendations that relate – directly or indirectly – to restorative justice. It is important to mention that these recommendations are not legally binding on the member states³⁹, although the Statute of the Council of Europe empowers the Committee of Ministers to ask member governments to inform it of action taken by them on recommendations. Moreover, "... such instruments quite often have a high moral force and provide practical guidance to States in their conduct. The value of such instruments rests on their recognition and acceptance by a large number of States and, even without binding legal effect, they may be seen as declaratory of broadly accepted goals and principles within the international community" (Groenhuijsen and Letschert, 2006: 5).

³⁶ Website of the Directorate General of Legal Affairs: http://www.coe.int/T/DG1/Default_en.asp (consulted on 21.10.2006).

³⁷ The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg.

³⁸ Website of the European Committee on Crime Problems: http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/Cdpc (consulted on 21.10.2006).

³⁹ Within the context of the Council of Europe, states that are members of the organisation are referred to as 'member states', or – in more recent documents – 'member States'. In documents of the European Union, the words are being written with capital letters: 'Member States'. In this text we try to follow this usage as much as possible.

1.2. OVERVIEW OF RELEVANT LEGAL INSTRUMENTS

*a) Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure*⁴⁰

As early as 1985 one can find a first reference in an instrument of an international institution to the – then brand new – developing practice of victim-offender mediation. In Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, the Committee of Ministers of the Council of Europe recommends the governments of the member states to examine the possible advantages of mediation and conciliation schemes. The document mentions that measures to improve the position of the victim “... need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender” (preamble, para. 6). It is recognised that, traditionally, criminal justice has dealt with the relation between the state and the offender, and that the problems of victims have been neglected. In order to increase confidence of the victims in the criminal justice system, and in order to encourage their cooperation, more regard should be paid to the physical, psychological, material and social harms suffered by victims.

The Committee of Ministers also recommends the governments of member states to review their legislation and practice in accordance with, amongst others, following guidelines which we deem relevant for restorative justice practice:

- “The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation” (point I.A.2). Since compensation is one of the possible elements that may be agreed upon in a restorative justice practice, it could be concluded from this that the police has a responsibility to inform victims about the possibilities of participating in restorative practices.
- “A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender” (point I.B.5). This guideline has different potential consequences for restorative practices. It suggests that if victim and offender participate in a restorative practice before the decision to prosecute has been taken, this should be taken into account by the prosecutor when deciding whether to prosecute or not. However, it is not only the (amount of) compensation that is to be taken into account. Any serious effort on behalf of the offender towards compensating his victim may have an influence on the decision whether to prosecute or not. This means that even if no agreement on compensation could be reached in the course of a restorative practice, or that even if a restorative process was never started (for example due to the unwillingness of the victim to participate), the offender’s genuine willingness and effort are to be taken into account.
- “All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:
 - the victim’s need for compensation,
 - any compensation or restitution made by the offender or any genuine effort to that end” (I.D.12).

The same remarks as made in the previous point are relevant here, but they now relate to the process of deciding upon the form and the quantum of the sentence, instead of on the process of deciding whether or not to prosecute.

⁴⁰ Recommendation No. R (85) 11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure, adopted on 28 June 1985.

- “If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible” (point I.E.14). This suggests that when victim and offender have agreed on a certain amount of compensation during a restorative process, the victim should be assisted in the collection of the money. It is not clear who should be responsible for doing this.

This Recommendation of the Council of Europe bears a number of similarities with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, which will be discussed later.

b) Recommendation No. R (87) 18 concerning the simplification of criminal justice⁴¹

A 1987 recommendation concerning the simplification of criminal justice mentions out-of-court settlement by authorities competent in criminal matters and other intervening authorities, as a possible alternative to prosecution, as one of the possible ways to remedy delays in the administration of criminal justice, especially in relation to minor and mass offences. Although mediation is not explicitly mentioned in this document, compensation to the victim of the offence is mentioned as one of the conditions which authorities may propose to the offender as a condition for an out-of-court settlement.

c) Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation⁴²

In this Recommendation, the governments of member states are recommended to “encourage experiments (whether on a national or a local basis) in mediation between the offender and his victim and evaluate the results with particular reference to how far the interests of the victim are served” (point 17). It has since been replaced by Recommendation Rec(2006)8 on assistance to crime victims (see further).

d) Recommendation No. R (87) 20 on social reactions to juvenile delinquency⁴³

This document also refers to restorative practices when it recommends the governments to review, if necessary, their legislation and practice with a view:

- “II. Diversion – mediation
 2. to encouraging the development of diversion and mediation procedures at public prosecutor level (discontinuation of proceedings) or at police level, in countries where the police has prosecuting functions, in order to prevent minors from entering into the criminal justice system and suffering the ensuing consequences; to associating Child Protection Boards or services to the application of these procedures;
 3. to taking the necessary measures to ensure that in such procedures:
 - the consent of the minors to the measures on which the diversion is conditional and, if necessary, the co-operation of his family are secured;
 - appropriate attention is paid to the rights and interests of the minor as well as to those of the victim”;
- to give preference to alternative measures which allow greater opportunity for social integration, and to pay particular attention to such measures which, amongst others, “entail reparation for the damage caused by the criminal activity of the minor (point IV, 15, 3rd indent);
- to promoting and encouraging comparative research in the field of juvenile delinquency so as to provide a basis for policy in this area, laying emphasis on the study of, amongst

⁴¹ Recommendation No. R (87) 18 of the Committee of Ministers to member states concerning the simplification of criminal justice, adopted on 17 September 1987.

⁴² Recommendation No. R (87) 21 of the Committee of Ministers to member states on assistance to victims and the prevention of victimisation, adopted on 17 September 1987.

⁴³ Recommendation No. R (87) 20 of the Committee of Ministers to member states on social reactions to juvenile delinquency, adopted on 17 September 1987.

others, “measures and procedures of reconciliation between young offenders and their victims” (point V, 18, last indent).

- e) *Recommendation No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families*⁴⁴

This Recommendation states that governments of member states should “... ensure that these young people benefit equally with young nationals from innovations in the juvenile justice and care system (diversion, mediation, other new forms of intervention, etc.)” (point III, 10).

- f) *Recommendation No. R (95) 12 on the management of criminal justice*⁴⁵

In this document, mediation is mentioned as one way (next to decriminalisation, depenalisation or diversion, and the simplification of criminal procedure) to tackle the problems the criminal justice systems throughout Europe are faced with: increase in the number and often in the complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff.

- g) *Recommendation No. R (96) 8 on crime policy in Europe in a time of change*⁴⁶

More indirectly, it can be said that this Recommendation incorporates some of the ideas of restorative justice. It was adopted in reaction to the changes in the political, economic and social, as well as the legal and institutional situation in Europe, especially due to the fall of the totalitarian regimes in central and eastern Europe and the creation of the single market in western Europe. These changes required a harmonisation of responses to crime within a coherent and concerted European crime policy. The recommendations are split up in domestic and international responses to crime. The document focuses on crime as a societal problem, pays particular attention to the need to prevent crime by addressing its causes, to the individualisation of sanctions and measures, the promotion of alternatives to custodial sanctions, the social reintegration of the offender, active participation by the public, and the need to pay adequate attention to the psychological, material and social needs of the victims of crime.

- h) *Recommendation No. R (99) 19 on mediation in penal matters*⁴⁷

1. Presentation

In 1999, the Committee of Ministers devoted a complete recommendation to victim-offender mediation, or mediation in penal matters as it was called. This Recommendation and its detailed explanatory memorandum, have been prepared by a Committee of Experts on Mediation in Penal Matters composed of practitioners, legal professionals, policy makers and academics from several European countries, and set up under the authority of the European Committee on Crime Problems (Pelikan, 2004: 49).⁴⁸ This Committee of Experts, which met five times between November 1996 and April 1999, succeeded in making a truly innovative document.

⁴⁴ Recommendation No. R (88) 6 of the Committee of Ministers to member states on social reactions to juvenile delinquency among young people coming from migrant families, adopted on 18 April 1988.

⁴⁵ Recommendation No. R (95) 12 of the Committee of Ministers to member states on the management of criminal justice, adopted on 11 September 1995.

⁴⁶ Recommendation No. R (96) 8 of the Committee of Ministers to member states on crime policy in Europe in a time of change, adopted on 5 September 1996.

⁴⁷ Recommendation No. R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, adopted on 15 September 1999.

⁴⁸ This Expert Committee, for a considerable part, later on provided the basis for the start of the European Forum for Victim-Offender Mediation and Restorative Justice, later renamed European Forum for Restorative Justice.

It recommended that the governments of the member states consider the principles set out in the appendix to the Recommendation when developing mediation in penal matters, and give the widest possible circulation to the text.

The appendix starts by defining mediation in penal matters as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)” (point I).

In point II, the general principles of mediation are described. They are:

- Voluntary participation. Parties should be able to withdraw their consent at any time.
- Confidentiality. Discussions in mediation may not be used subsequently, except with the agreement of the parties.
- General availability and availability at all stages of the criminal justice process.
- Sufficient autonomy for the mediation services.

Point III (legal basis) mentions that legislation should facilitate mediation. There should be guidelines defining the use of mediation, which should in particular address the conditions for referrals of cases and the handling of cases following mediation. Fundamental procedural safeguards should be applied to mediation, in particular the right to legal assistance and translation/interpretation, and the right to parental assistance in cases of minors.

Point IV deals with the operation of criminal justice in relation to mediation. It mentions that:

- Criminal justice authorities should remain responsible for referring a case to mediation, and for assessing the outcome of the mediation procedure.
- The parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision before agreeing to participate in mediation.
- Neither the victim nor the offender should be induced by unfair means to accept mediation.
- Special regulations and legal safeguards governing minor’s participation in legal proceedings should also apply to the mediation procedure.
- Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.
- The basic facts of a case should normally be acknowledged by both parties. Participation in mediation does not mean that the offender accepts guilt (presumption of innocence stands) and cannot be used against him in subsequent criminal proceedings on the same matter.
- Obvious disparities between the parties (for example age, threats, etc.) should be taken into consideration before a case is referred to mediation.
- A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.
- Discharge based on mediated agreements should have the same status as judicial decisions and should preclude prosecution in respect of the same facts (*ne bis in idem*).
- When no agreement can be reached, or the agreement is not implemented (fully), the criminal justice authorities should decide on how to proceed without delay.

Point V deals with the operation of mediation services. It sets out recommendations with regard to:

- Standards: Mediation services should be governed by recognised standards, should be monitored by a competent body, should have sufficient autonomy in performing their duties, and standards of competence, ethical rules and procedures for the selection, training and assessment of mediators should be developed.
- Qualifications and training of mediators: Mediators should be recruited from all sections of society, should generally possess a good understanding of local cultures and

communities, should be able to demonstrate sound judgement and interpersonal skills necessary to mediation, and should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders, and basic knowledge of the criminal justice system.

- Handling of individual cases: Before mediation starts, the mediator should be informed of all relevant facts of the case by the competent criminal justice authorities. Mediation should be performed in an impartial manner, and with respect for and between all parties. Mediation should take place in a safe and comfortable environment. The mediator should be sensitive to the vulnerability of the parties. Mediation should be carried out efficiently, but at a pace that is manageable for the parties. Mediation sessions should not be open to the public. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the person concerned.
- Outcome of mediation: Mediated agreements should be voluntary, reasonable, and appropriate. The mediator should report to the criminal justice authorities on procedural steps taken and on the outcome of the mediation. Because of the importance of confidentiality, the mediator's report should not reveal the contents of the mediation sessions or describe the behaviour of the parties during the mediation session.

Point VI finally, deals with the continuing development of mediation and states that there should be regular consultation between criminal justice authorities and mediation services to develop common understanding, and that member states should promote research on, and evaluation of, mediation in penal matters.

In the explanatory memorandum, each of the above points is dealt with in more detail.

2. Evaluation

Christa Pelikan, who was the chairperson of the Committee of Experts that prepared the recommendation, has evaluated the impact the recommendation has had on the development of victim-offender mediation in the member countries. She found that there were different ways in which it had influence: (1) It had served as an important instrument in providing orientation and support, and even made its mark on developments in legislation; (2) It had mainly been read and subsequently used by NGOs and individual professionals outside the criminal justice system, and thus exerted some limited influence; (3) It had contributed to and enhanced national policy establishing victim-offender mediation; (4) It had contributed to the introduction of victim-offender mediation; and (5) It had not been paid much notice or had even been neglected. Her final conclusion was that the Recommendation only had some modest influence. She states that: "... a document becomes influential – and thus useful – when it is made use of" (Pelikan, 2004: 64). Or, in other words: "It needs people coming together voicing a need and an interest and making use of international documents to promote a policy that attends to those needs" (Pelikan, 2004: 67).

i) Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures⁴⁹

In this document, victim-offender mediation is mentioned as one example of a community sanction or measure for which provision could be made in legislation, and which could contribute to achieving a wider and more effective use of community sanctions and measures.

j) Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice⁵⁰

This document states that: “8. To address serious, violent and persistent juvenile offending, member states should develop a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures. They should directly address offending behaviour as well as the needs of the offender. They should also involve the offender’s parents or other legal guardian (unless this is considered counterproductive) and, where possible and appropriate, deliver mediation, restoration and reparation to the victim”.

k) Recommendation Rec(2006)2 on the European Prison Rules⁵¹

In this Recommendation, the potential role of restoration and mediation in dealing with conflicts in prison is recognised. Under the heading ‘Discipline and punishment’ it is mentioned that “Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners” (point 56.2). Later on, mediation is mentioned as the preferred option for dealing with requests and complaints from prisoners, individually or in group, to the director of the prison or to any other competent authority.

l) Recommendation Rec(2006)8 on assistance to crime victims⁵²

This Recommendation, which replaces Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation, refers to mediation in article 13:

“13. Mediation

13.1. Taking into account the potential benefits of mediation for victims, statutory agencies should, when dealing with victims, consider, where appropriate and available, the possibilities offered for mediation between the victim and the offender, in conformity with Committee of Ministers’ Recommendation R (99) 19 on mediation in criminal matters.

13.2. The interests of victims should be fully and carefully considered when deciding upon and during a mediation process. Due consideration should be given not only to the potential benefits but also to the potential risks for the victim.

13.3. Where mediation is envisaged, states should support the adoption of clear standards to protect the interests of the victims. These should include the ability of the parties to give free consent, issues of confidentiality, access to independent advice, the possibility to withdraw from the process at any stage and the competence of mediators”.

⁴⁹ Recommendation Rec(2000)22 of the Committee of Ministers to member states on improving the implementation of the European rules on community sanctions and measures, adopted on 29 November 2000.

⁵⁰ Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, adopted on 24 September 2003.

⁵¹ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006.

⁵² Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, adopted on 14 June 2006.

1.3. OVERVIEW OF OTHER RELEVANT INITIATIVES

Next to the legal instruments mentioned above, the Council of Europe has taken a number of other initiatives which have been important for the further development of restorative justice in Europe.

a) *Integrated Project 'Responses to violence in everyday life in a democratic society'*

This project, which ran from 2002 until 2004, focused on comprehensive policy development and the preparation of a new set of practical tools to prevent violence in everyday life. Twelve policy priorities were formulated which were to inspire an integrated national policy for reducing everyday violence. Next to an integrated approach, systematic reliance on partnership, democratic accountability and participation in civic society, preventive approach, victim-oriented approach, offender-oriented prevention, giving priority to local prevention programmes, planning and continuous evaluation, sustainability, training for all partners, and interdisciplinary research policy, developing the use of mediation was formulated as one of these policy principles. It was said that mediation, as a non-violent and restorative means of preventing and solving conflicts, should be promoted, whilst its scope of application, methods and ethics should be clarified.

In the final report of the project, following recommendations relating to mediation were formulated:

1. The introduction of mediation procedures in the prevention and management of conflicts should be stepped up through special programmes, for example, in penal matters, schools, sports clubs, neighbourhoods and families.
2. The emergence and close involvement of mediators from the communities concerned should be encouraged and supported.
3. The scope of application, methods and ethics of mediation should be clarified and, when appropriate, regulated through supervision, guidance or regulatory frameworks which allow sufficient flexibility between the different fields of mediation while ensuring that the individual rights of the parties involved are sufficiently protected under all circumstances.
4. Training and support should be provided for both professional and voluntary mediators to match their tasks as well as for other partners involved in mediation.
5. The concept and practice of mediation should be further discussed and developed while information on successful practices and their evaluation should be exchanged at national and international levels⁵³.

It is also in the framework of this Integrated Project that the European Forum for Restorative Justice was asked to write a book on restorative justice and mediation. *Rebuilding community connections – mediation and restorative justice in Europe*⁵⁴ outlines the main features of restorative justice, including different models and research findings, and proposes guidelines for setting up programmes. It also identifies problems and ways of dealing with them.

⁵³ 'Confronting everyday violence in Europe: an integrated approach', Final Report of the Integrated Project "Responses to violence in everyday life in a democratic society", available from <http://www.coe.int/t/e/integrated%5Fprojects/violence/09%5FFinal%5FReport/> (downloaded 20.09.2006).

⁵⁴ Aertsen, I., Mackay, R., Pelikan, C., Willemsens, J. and Wright, M., *Rebuilding community connections – mediation and restorative justice in Europe*, Strasbourg, Council of Europe Publishing, 2004, 123p.

b) Resolution No. 2 on the Social Mission of the Criminal Justice System – Restorative Justice

In 2005, during the 26th Conference of European Ministers of Justice in Helsinki, a resolution on ‘The Social Mission of the Criminal Justice System – Restorative Justice’ was adopted. In this resolution, the Ministers of Justice agree “on the importance of promoting the restorative justice approach in their criminal justice systems”.⁵⁵ In the preamble, they refer to, amongst other things, following reasons for taking this option:

- It is of great importance for social peace to promote a criminal policy which focuses also on the prevention of anti-social and criminal behaviour, the development of community sanctions and measures, the victim’s needs and offender reintegration.
- The use of imprisonment causes a heavy burden on society and causes human suffering.
- Community sanctions and measures as well as restorative justice measures can have a positive effect on the social costs of crime and crime control.
- By a restorative justice approach the interests of crime victims may often be better served, the possibilities for offenders to achieve a successful reintegration into society be increased and public confidence in the criminal justice system be thereby enhanced.
- The purpose of restorative justice is also to decrease the number of proceedings before the criminal court and alternative non-judicial systems for restorative justice should be developed as far as possible within the national context.
- Prison sentences cannot always be avoided but the treatment and management of prisoners can also benefit, *inter alia*, from the restorative justice approach so as to promote successful reintegration of the offender.
- The restorative justice approach should be developed both in the framework of community measures as well as in all stages of criminal justice procedure, including restorative justice measures applied during and after imprisonment.
- The prevention of crime, support and compensation for crime victims, and reintegrating sentenced offenders requires a multidisciplinary and/or multi agency approach.

In the resolution, the Committee of Ministers is also invited to support and develop cooperation programmes put in place to promote the widespread application of restorative justice in the member countries.

The resolution was transmitted to the European Committee on Crime Problems for it to bear it in mind in its future work.

In preparation of this resolution, the Finnish Ministry of Justice had drafted a questionnaire on the social mission of the criminal justice system. This questionnaire was sent to the 46 member states of the Council of Europe. 40 were returned in time for the analysis.⁵⁶

In the introduction to the questionnaire, restorative justice is described as “... an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities”.

The questionnaire in itself consists of ten questions. The first group of questions deals with mediation:

1. Is there mediation in action in your country? What is its scope? Does it have legal recognition? How is it financed?
2. Are there other mechanisms to this end applied in your country? If yes, please specify?
3. What are the main obstacles hampering progress in this respect?

⁵⁵ Resolution No. 2 on The Social Mission of the Criminal Justice System – Restorative Justice, adopted at the 26th Conference of European Ministers of Justice, Helsinki, 7-8 April 2005, MJU-26 (2005) Resol.2 Final, point 15 of the preamble.

⁵⁶ The questionnaire, the responses to the questionnaire and the report prepared by the Finnish Ministry of Justice based on the responses can be downloaded from http://www.coe.int/t/dgl/legalcooperation/minjust/mju26_en.asp (consulted on 22.01.2007).

The next two questions deal with victim support:

4. What kind of victim support mechanisms and programmes exist in your country?
5. Do such mechanisms or programmes receive public financial support? Do they have legal recognition?

These are followed by two questions concerning the reintegration of offenders.

6. What kinds of procedures or programmes intended to prevent re-offending and to improve the reintegration of the offender into society have been introduced in your country? Could you recommend some of these to be adopted also by other countries?
7. What are the main obstacles hampering progress in this respect?

Then follow two questions concerning restorative justice and offender groups with particular problems, including juveniles:

8. In your country, have you introduced special reintegration procedures or programmes for offender groups who may be faced with particular problems, such as juveniles, ethnically specific groups, substance abusers and immigrants?
9. What are the main obstacles hampering progress in this respect?

The final question deals with the restorative role of courts and prisons:

10. In your country, are the judges and prosecutors systematically trained on the job in order to create an awareness of the role of the courts in restorative justice?

The responses to this questionnaire were analysed and summarised in a report, presented by the Minister of Justice of Finland at the 26th Conference of European Ministers of Justice (Helsinki, 7-8 April 2005).

From reading the questionnaire, the responses and the report it seems that there is some misunderstanding concerning the concept of restorative justice. Victim support, preventing re-offending and reintegration of offenders are seen as integral parts of what is called a 'restorative justice approach'. However, restorative justice proponents do not traditionally see these as elements of restorative justice. They are indeed important objectives to strive for alongside restorative justice, but it is not so that, for example, measures to help offenders reintegrate into society are seen as a restorative justice measure. Initiatives taken to reintegrate offenders might even be very un-restorative if they, for instance, do not take into account the needs of the victims. This confusion of terminology becomes obvious when reading through the answers sent in by the member states. Most countries only deal with restorative justice-relevant points under questions 1, 2, 3, and, sometimes, 10. Countries that are not familiar at all with restorative justice are even mentioning very un-restorative initiatives under question 1. All of this to say that the results of the analysis of the questionnaire should be read with caution.⁵⁷

As concerns mediation in criminal matters, the report concludes that:

- The benefits of victim-offender mediation are broadly accepted, bearing in mind however that this approach may not be applicable in all cases, and that it does not replace the

⁵⁷ This conceptual confusion should be cleared up as soon as possible since, until that happens, it will be continued with possible negative effects. This is shown, for example, in the report presented by the Secretary General of the Council of Europe on the follow-up to Resolution No. 2 at the 27th Conference of European Ministers of Justice in Yerevan. Here it is suggested that, amongst others, updating the European Prison Rules and examining means of enhancing prevention policies are a means to promote a restorative justice approach in the criminal justice system. The confusion is continued in the report presented by the Secretary General to the 28th Conference of European Ministers of Justice, which was held on 25-26 October 2007 in Lanzarote. It is encouraging, however, that in the country-reports of the Ministers of Justice, this terminological confusion does not seem to seep through. Five of the 14 reports of Ministers of Justice make a clear reference to progress made in the implementation of mediation/restorative justice in their country (see www.coe.int/t/dg1/legalcooperation/minjust/mju28, consulted on 26.12.2007).

traditional measures of the criminal justice system, but rather functions as a complementary element that is often able to bring positive aspects to crime control.

- Mediation may be an alternative sanction, a prerequisite to dropping a case, or part of a diversion programme. According to the responses it may be voluntary or obligatory.⁵⁸ It is suggested that this broad range of alternatives deserves closer analysis, and comparative work with the objective of sharing experiences about the different variants should be conducted. The European Forum for Restorative Justice is mentioned as a possible platform for this work.
- In many countries mediation is being practised parallel to the legal system. It is then a supplement to the ordinary criminal proceedings.
- In a number of member states mediation in penal matters is recognised in the legal system. In several other member states it is about to be formally introduced, with local experiments already existing and draft legislation being prepared.
- In some countries the mediation practice receives public funding. But, more often the system is based on mixed funding where public and private (NGO) financing go together. Even exclusively NGO-based financing is found.⁵⁹

The report identifies a number of obstacles to the further development of mediation:

- Obstacles of a legislative nature: the lack of relevant legislation or the lack of detailed regulation, the absence of legal tradition, the Roman tradition of law requiring the involvement of the State in criminal matters, unfinished penal and justice system reforms.
- Obstacles of an 'ideological' nature: the need to inform the public about restorative justice and its benefits, social acceptance of mediation may take a long time, a common view among police and prosecutors that mediation should not replace regular prosecution and punishment in cases of serious crimes.
- Other obstacles: inconclusive evidence about the effects of restorative justice on re-offending rates and specifically the impact on offence types.

As concerns the training of judges and prosecutors, the report mentions that the questionnaire did not provide much positive response on this issue. Most countries reported that they have some systematic training for judges and prosecutors, but that restorative justice is mostly not an (important) issue.

The conclusions formulated at the end of the report are the following: "First, the Council of Europe may definitely play an active and important role in promoting the restorative justice approach in its member countries both at the level of further recommendations, and collecting and disseminating experiences of good and promising practices, and also by providing technical support, expertise and advice for individual member States requiring such support, as well as promoting bilateral and regional co-operation between member States in these issues, its role then being one of a clearing-house. Second, member States could be recommended to become more involved in learning from each other in these reforms. It is often the practical experience that overrides any general principles and recommendations when trying to learn how to improve one's criminal justice system. Third, member States may take a more active role in promoting restorative justice principles in their respective jurisdictions since much remains to be done even in the most advanced countries".⁶⁰

⁵⁸ Here the confusion about the subject becomes really clear. Obliging someone to go to mediation is generally seen as contrary to the basic restorative justice principles.

⁵⁹ For an overview of the different ways in which mediation in criminal cases is organised in European countries, please consult: Miers, D. and Willemsens, J. (eds.), *Mapping Restorative Justice. Developments in 25 European Countries*, Leuven, European Forum for Victim-Offender Mediation and Restorative Justice, 2004, 195p. and Miers, D., *An International Review of Restorative Justice*, London, Home Office, 2001, 113 p.

⁶⁰ Report on social aspects of justice presented by the Minister of Justice of Finland, on the occasion of the 26th Conference of European Ministers of Justice in Helsinki, 7-8 April 2005, MJU-26(2005) 1, 26.

It is then suggested that within the Council of Europe's framework a number of issues concerning joint international efforts on the social mission of the criminal justice system be discussed. In addition to issues dealing with victim support and the prevention of re-offending and promoting the re-integration of offenders, following questions arise:

- Is the situation regarding the progress being made in different realms of restorative justice satisfactory, which may indicate that joint international efforts are not required for the time being?
- Should member States accept it as their obligation to promote the application of principles of restorative justice?
- Regarding victim-offender mediation, what kind of measures could be recommended:
 - a) to improve the adoption of victim-offender mediation as a formal part of the criminal justice systems?
 - b) to provide victim-offender mediation financing from public funds?
 - c) to raise awareness and understanding about the benefits of victim-offender mediation?
 - d) to develop joint general standards of victim-offender mediation?
 - e) to provide support to member States in need of technical assistance in the adoption of victim-offender mediation?
- Regarding the training of judges and prosecutors in their role in promoting restorative justice, what kind of measures could member States adopt:
 - a) to raise awareness amongst judges and prosecutors?
 - b) to further involve judges and prosecutors in the restorative process?
 - c) to develop joint recommendations regarding the training of judges and prosecutors concerning their role in promoting restorative justice?
 - d) to provide support to member States in need of technical assistance regarding the training of judges and prosecutors concerning their role in promoting restorative justice?

It is not clear how an answer to these questions is sought. It seems that a huge potential exists for restorative justice organisations to work together with the Council of Europe on these matters.

c) Resolution No. 1 on victims of crime

Also in this resolution, adopted at the 27th Conference of the European Ministers of Justice in 2006, mediation and restorative justice are mentioned, albeit briefly. In point 23, the Committee of Ministers is invited to entrust the European Committee on Crime Problems to envisage further activities dealing with restorative justice, including mediation, with a view notably to examining the implementation of the 1999 Recommendation on mediation in penal matters.⁶¹

Although this point does not give us a lot of new information⁶², it is interesting to see that in the reports made by the various national ministries to the Conference, mediation (and sometimes restorative justice) was a recurring issue.⁶³

The Austrian delegation even presented a very comprehensive contribution as to possible guidelines for the carrying out of future work by the Council of Europe in this area, namely:

- 1) to explore consensual and restorative means for preventing and resolving conflicts;
- 2) to establish a broader diversity of social and penal reactions to illegal behaviour;
- 3) to promote active participation of the parties directly involved with a view to contributing to reconciliation and conflict resolution;

⁶¹ Resolution No. 1 on victims of crime, adopted at the 27th Conference of the European Ministers of Justice, Yerevan, Armenia, 12-13 October 2006, MJU-27(2006)Resol. 1 Final.

⁶² Certainly not since the implementation of Recommendation No. R (99) 19 was already evaluated for the Council of Europe by Christa Pelikan (Pelikan, 2004).

⁶³ Available from <http://www.coe.int/t/dgl/legalcooperation/minjust/mju27/>

- 4) to enhance the role of victims in criminal proceedings with a view to improving information, taking account of their specific interests and further restitution, compensation, reconciliation and rehabilitation;
- 5) to promote different forms of restorative justice, in particular victim-offender mediation and conferencing, out of court as well as at the pre-trial, sentencing and post sentencing stage;
- 6) to provide for an outcome of proceedings more reasonable and understandable, in particular for young people and first offenders;
- 7) to develop specific models for cases of domestic violence and intimate partner violence;
- 8) to explore appropriate models of cooperation between government agencies and the providers of restorative justice and victim-offender mediation services;
- 9) to work for the institutionalisation of restorative justice models suitable for the social and legal conditions and traditions of national societies;
- 10) to develop and support transborder exchange of experiences and strategies for restorative justice;
- 11) to work for a common understanding of the basic principles of restorative justice;
- 12) to take into account the work of the European Forum for Victim-Offender Mediation and Restorative Justice;
- 13) to identify good practice and successful examples of restorative justice and to aim to an integrated policy;
- 14) to entrust a consultant with the task of elaborating an inventory/a survey of regulations and practices of restorative justice in member states;
- 15) to consider, on the basis of such an inventory/survey of existing programmes and good practice, updating Recommendation No. R (99) 19 on mediation in criminal matters and possibly to broaden its scope by including other forms of restorative justice.

One can expect this list to have been formulated on the basis of perceived needs in the restorative justice field which should be addressed at a European level.

d) 2006 Conference of Prosecutors General in Europe

On 5 and 6 July 2006, the Council of Europe organised the 7th session of the Conference of Prosecutors General of Europe⁶⁴ in Moscow. This conference focused on the role of the public prosecutor in the protection of individuals. In preparation of this conference, two questionnaires had been developed and sent out to the prosecution services of the 46 member states of the Council of Europe. One of these questionnaires dealt with the duties of the public prosecutor in the criminal field towards victims and witnesses, and in particular those who are juveniles.⁶⁵ The responses to this questionnaire were analysed by Prof. Dr. Ivo Aertsen, who prepared a report which was presented at the Moscow conference (Aertsen, 2006b).

One of the questions in the questionnaire dealt with mediation, namely question 5: “Is the public prosecutor empowered to mediate in criminal cases?” In his report, Prof. Dr. Aertsen concluded that in most jurisdictions the public prosecutor is not empowered to mediate in criminal cases. His findings were reflected in point 5 of the conclusions of Working Group I of the Moscow conference: “The Working Group considered that victim-offender mediation can be in the interest of victims if certain conditions are respected; the public prosecutor can

⁶⁴ In July 2005, the role of the Conference of Prosecutors General in Europe was institutionalised by the Committee of Ministers through the creation of the Consultative Council of European Prosecutors (CCPE).

⁶⁵ The other questionnaire dealt with duties of public prosecutors towards persons deprived of their liberty.

play an active role in identifying appropriate cases and referring them to mediation services in those countries where it is envisaged by law”.⁶⁶

e) *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*

At the Third Summit of the Council of Europe, in Warsaw in May 2005, the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.⁶⁷

In the light of this decision, the European Commission for the Efficiency of Justice (CEPEJ)⁶⁸ decided – in the course of 2005 – to create a Working Group on Mediation (CEPEJ-GT-MED). Its task is to enable a better implementation of the recommendations of the Committee of Ministers concerning mediation. Its specific tasks are to:

- “assess the impact in the states of the existing Recommendations of the Committee of Ministers concerning mediation, that are: Recommendation (98) 1 on family mediation, Recommendation (99) 19 concerning mediation in penal matters, Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties, Recommendation (2002) 10 on mediation in civil matters;
- draft, if appropriate, guidelines and specific measures aimed to ensure an effective implementation of the existing Recommendations;
- suggest, if appropriate, areas in which it could be useful to draft new international legal instruments or amendments to existing ones, taking namely into account the work of other institutions, and in particular the European Union”.⁶⁹

The CEPEJ-GT-MED held its first meeting in March 2006. In a first step, it issued a questionnaire aimed at assessing the impact of Council of Europe instruments in the mediation field and more generally the situation of mediation to 16 Council of Europe member states⁷⁰ considered as representing the situation of mediation in Europe.⁷¹ The questionnaire was aimed primarily at the bodies (private or public) in those countries competent in the area of mediation. Based on the responses to this questionnaire, draft guidelines for a better implementation of the existing recommendations of the Council of Europe concerning mediation were prepared. Delegations were asked to provide comments on these guidelines before 15 September 2007.

⁶⁶ Conclusions of the 7th session of the Conference of Prosecutors General of Europe, CPGE (2006) conclusions.

⁶⁷ See introduction to the *Draft Guidelines for a better implementation of the existing Recommendation concerning Penal mediation*,

[https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2007\)13&Language=lanEnglish&Ver=prov&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2007)13&Language=lanEnglish&Ver=prov&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6) (consulted on 20.09.2007).

⁶⁸ The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end. The CEPEJ was created by the Committee of Ministers of the Council of Europe in 2002. See: http://www.coe.int/t/dg1/legalcooperation/cepej/presentation/cepej_en.asp (consulted on 17.09.2007).

⁶⁹ http://www.coe.int/t/dg1/legalcooperation/cepej/mediation/default_en.asp (consulted on 20.09.2007).

⁷⁰ These were the Czech Republic, Germany, Lithuania, Portugal, Slovenia, the United Kingdom (the home countries of the experts) and Armenia, Austria, Bosnia and Herzegovina, Finland, France, Hungary, the Netherlands, Poland, Romania and Sweden.

⁷¹ It is not clear on what basis it was decided that these countries were representative of the situation of mediation.

The Working Group also appointed a scientific expert, Mr Julien Lhuillier from France, to write a report on the current situation of and prospects for penal mediation in Europe. In this report, Mr Lhuillier concludes that, although practices still vary greatly across Europe, a certain degree of harmonisation can be achieved, and that common quality standards can and should be adopted (Lhuillier, 2007).

At its June 2007 meeting, the CEPEJ discussed the possibility of bringing the guidelines on mediation to the attention of the 28th Conference of European Ministers of Justice, to be held in Lanzarote (Spain) on 25-26 October 2007. On the same occasion, a representative of the European Committee on Legal Co-operation (CDCJ) mentioned that the CDCJ might, over the next two years, envisage updating certain recommendations in the light of the guidelines adopted by the CEPEJ.

Based on the research it performed, the CEPEJ-GT-MED formulated *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*⁷² (hereafter: Guidelines) which were finally adopted during the 10th plenary meeting of the CEPEJ on 5 and 6 December 2007.

According to the introduction to the Guidelines, 52 replies were received to the questionnaire, in which only limited information was supplied on penal mediation. It is mentioned that “since the adoption of the Recommendation, the concept and scope of mediation in penal matters has developed, and a broader concept of ‘restorative justice’ has emerged, including ‘victim-offender mediation’. Therefore, it is suggested that further work should be undertaken on updating the Recommendation. Before doing so, it would be necessary to have a fuller evaluation of the impact of restorative justice in member states based on up-to-date comparable data” (point 6).

The introduction to the Guidelines also mentions some obstacles which have caused considerable differences between member states in the way that victim-offender mediation has advanced (point 7):

- lack of awareness of restorative justice and mediation;
- lack of availability of victim-offender mediation before and after conviction;
- power to refer parties to mediation limited only to a single criminal justice institution;
- relatively high cost of mediation;
- lack of specialised training and disparities in qualifications of mediators.

The Guidelines make following recommendations to member states to help implement the Recommendation:

1. *Availability*

To expand equal availability of mediation services, measures should be taken to promote and set up workable mediation schemes across as wide a geographical area as possible, at all stages of the criminal justice procedure, including the execution of sanctions.

1.1. Support of mediation projects by member states

Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

⁷² European Commission for the Efficiency of Justice (CEPEJ), *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*, CEPEJ(2007)13, 7 December 2007, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2007\)13&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6/](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2007)13&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6/) (consulted on 22.01.2008).

1.2. Role of the judges, prosecutors and other criminal justice authorities

Judges, prosecutors and other criminal justice authorities have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation, and, where applicable, invite victims and/or offenders to use mediation and/or refer the case to mediation. Member states are encouraged to establish and/or improve co-operation between criminal justice authorities and mediation services to reach victims and offenders more effectively.

1.3. Role of social authorities and non governmental organisations

Member states are encouraged to recognise social authorities, victim support organisations and other organisations engaged in the criminal justice system, since they have an important role in promoting restorative justice and mediation. Where applicable, such bodies may invite victims and/or offenders to use mediation. They may for example have a role in conducting mediation, in offering different forms of restorative justice as well as in supporting the parties.

1.4. Role of lawyers

The codes of conduct for lawyers should include an obligation or a recommendation for lawyers to take steps to provide relevant information and, where appropriate, suggest the use of victim-offender mediation to parties and plead for referral to mediation by the competent authorities.

1.5. Quality of mediation schemes

It is essential for judges, prosecutors and other criminal justice authorities when referring parties to mediation, for lawyers when advising clients, and for the general public confidence in the mediation process that the quality of mediation is assured.

It is important that member states continually monitor their mediation schemes and on-going pilot projects and arrange for their external and independent evaluation. Certain common criteria, including both qualitative and quantitative evaluation aspects, should be developed to enable the quality of mediation schemes to be compared. Legislators and/or criminal justice authorities of member states are encouraged to identify possible consequences of mediation and mediated agreements on criminal procedures.

In view of the imbalance of power between the victim and the offender following a crime, member states should be aware that the needs of the victim require special consideration before, during and after the mediation. For this reason, member states are recommended to carry out further research and developments in this matter.

1.6. Confidentiality

The duty of confidentiality should be binding for the mediator at all stages of the mediation process and after its termination. Whenever this duty is subject to exceptions, these exceptions should be clearly defined by legislation.

Member States should provide for legal guaranties of confidentiality in mediation. The breach of the confidentiality duty by the mediator should be considered as a serious disciplinary fault and be sanctioned appropriately.

1.7. Mediator's qualifications

Member states and/or mediation stakeholders should provide adequate training programmes for mediators and, taking into account the disparities in training programmes, set up common standards concerning the training.

As a minimum, following items should be covered in mediation training:

- principles and aims of mediation,
- attitude and ethics of the mediator,

- phases of the mediation process,
- basic knowledge of criminal justice system,
- the relationship between criminal justice and mediation,
- indication, structure and course of mediation,
- legal framework of mediation,
- skills and techniques of communication and of work with victims, offenders and others engaged in the mediation process, including basic knowledge on reactions of victims and offenders,
- skills and techniques of mediation,
- adequate amount of role plays and other practical exercises,
- specialist skills for mediation in cases of serious offences and offences involving minors,
- various methods of restorative justice,
- assessment of knowledge and competence of the trainee.

This training should be followed by supervision, mentoring and continuing professional development.

Member states should recognise the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

As certain member states encounter problems where the quality of training of mediators is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for mediators and for mediation trainers (for example, a European training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8. Participation and protection of minors

Member states should recognise the importance of supporting and protecting minors during their participation in the mediation process by the establishment of adequate safeguards and procedural guarantees.

Member states should work together to examine, evaluate, and identify good practices in order to establish specific guidelines to the participation of minors in mediation in penal matters. This could be facilitated by the Council of Europe in co-operation with the European Union.

These specific guidelines should include:

- a. the relevance of the child's age or mental maturity and its consequences for the involvement of the minor in the mediation procedure;
- b. the role of parents, in particular in those situations where parents may oppose participation in mediation;
- c. the involvement of social workers, psychologists and/or legal guardians in mediation when minors are present.

1.9. Codes of conduct

Member states should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of mediation such as confidentiality and others within their countries, by legislative measures and/or by developing codes of conduct for mediators.

Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that a special Code of Conduct shall be elaborated with respect to the particularities of mediation in penal matters.

1.10. Breaches of codes of conduct

Where mediators breach a code of conduct, member states and mediation stakeholders should have in place appropriate complaints and disciplinary procedures.

1.11. International mediation

Discharges based on mediated agreements should have the same status as judgments or other judicial decisions, if they are taken by official judicial staff, e.g. member of the office of the public prosecutor or judge. Such a decision will preclude prosecution in respect of the same facts in another member state (*ne bis in idem*).

2. *Accessibility*

2.1. The rights of victims and offenders

In order to enable victims and offenders to take part in mediation, member states should take all necessary steps to ensure that their rights are protected and that they are fully aware of their rights. Mediation requires the free and informed consent of both victims and offenders, and should never be used if there is a risk that mediation may disadvantage one of the parties. Due consideration should be given not only to the potential benefits but also to the potential risks of mediation for both parties and in particular for the victim.

Special effort should therefore be made to ensure that information about victim-offender mediation is clear, complete and timely. This information should contain:

- the process of the mediation itself;
- the rights and obligations of users;
- the legal effects of mediation.

The parties in mediation should, in particular, be fully informed of the possible consequences of the mediation procedure on the judicial decision making procedure, including discontinuation of the criminal procedure, suspension or mitigation of the sanction imposed on the alleged offender. Also, in cases where victims are particularly vulnerable, they should be made aware of the possibility of conducting a mediation without face-to-face contact with the alleged offender.

2.2. Cost of the mediation for the users

In order to make mediation accessible, member states should ensure direct financial support to mediation services via legal aid and/or other means. Exceptionally, in those member states where the offender has to finance partly his/her participation in mediation, member states should ensure that his/her contribution remains proportionate to his/her income. A costly mediation procedure not covered by legal aid might be an obstacle to mediation.

2.3. Suspension of limitation terms

In order to make mediation accessible, its use should not be prevented by the risk of expiry of limitation terms. In order to rectify this problem, member states are encouraged to consider implementing provisions for the suspension of limitation terms.

3. *Awareness*

It appears from the questionnaire responses that lack of awareness about restorative justice among the judiciary, prosecutors and other criminal justice authorities, victim support organisations, legal professionals, victims and offenders and the general public is one of the main obstacles to the development of mediation.

In order for the Recommendation on mediation in penal matters to be accessible to policy makers, academics, mediation stakeholders and mediators, it is vital that it is translated and disseminated in the languages of all member states.

It is recommended that CEPEJ creates a special page on mediation on its website. It could include translated texts of the Recommendation, its explanatory memorandum and other relevant texts of the Council of Europe concerning mediation, assessment of the impact in countries of the Recommendation on mediation in penal matters. This special page could also include information on the monitoring and evaluation of mediation schemes and mediation pilot projects, list of mediation providers in member states, useful website links, etc.

3.1. Awareness of the general public

Member states, NGO's and other mediation stakeholders should take appropriate measures to raise awareness of the benefits of mediation among the general public.

Such measures may include:

- articles/information in the media,
- dissemination of information on mediation via leaflets/booklets, internet, posters,
- mediation telephone helpline,
- information and advice centres,
- focused awareness programmes such as 'mediation weeks',
- seminars and conferences,
- open days on mediation at courts and institutions which provide mediation services.

Member states, universities, other academic institutions and mediation stakeholders should support and promote scientific research in the field of mediation and restorative justice.

Mediation and other forms of restorative justice should be included in school national curricula.

3.2. Awareness of the victims and offenders

Members of the judiciary, prosecutors, the police, criminal justice authorities, lawyers and other legal professionals, social workers, victim support organisations as well as other bodies involved in restorative justice should provide early information and advice on mediation to the victims and offenders, accentuating the potential benefits and risks to both.

3.3. Awareness of the police

Since the police intervene during the early stages of a case, and are therefore the first to be in contact with the victims and offenders, their training should include an understanding of restorative justice. Specific consideration should be given to the matter of referring cases to mediation. This could be achieved by training including information on perpetrators and victims, as well as through the distribution of leaflets/brochures.

3.4. Awareness of the judiciary and prosecutors

An increasing number of member states have adopted legislative measures to allow judges and prosecutors, on an equal footing, to invite victims and/or offenders to use mediation and/or refer the case to mediation. For this reason, these two bodies should be fully informed of the mediation procedure and conscious of its advantages and possible risks. This could be achieved via information sessions and initial and continuous training programmes.

It is important to foster both institutional and individual links between mediators and judges/prosecutors. This can be done in particular by conferences and seminars.

3.5. Awareness of the lawyers

Restorative justice and mediation should be included in the curricula of initial as well as continuous training programmes for lawyers.

Bar associations and lawyers associations should have lists of mediation programmes providers and disseminate them to lawyers.

Member States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use mediation in settling disputes

3.6. Awareness of social workers

Member states are encouraged to take measures to raise the awareness of social workers to restorative justice and mediation.

As of this point in time, it is unclear what kind of effect these Guidelines will have on the further development of restorative justice in Europe. It is to be expected that much will depend – as it was the case with the original Recommendation – on the extent to which these Guidelines will be known and used by key people in the different countries.

In terms of content, the Guidelines have touched on some very important challenges in the implementation of restorative justice in a number of European countries. However, they remain very general, and on some crucial points, such as for example with regard to safeguarding the autonomy of mediation services vis-à-vis the criminal justice system, they remain silent.

It remains to be seen whether the suggestion to update the Recommendation, formulated in the introduction to the Guidelines, will be followed.

f) Supporting developments in specific countries or regions

In the framework of regional support, the Council of Europe has supported initiatives in the field of restorative justice on numerous occasions. An example of this is the two training seminars which were organised in Bulgaria with the financial support of the Council of Europe. At these seminars, Belgian experts were invited to share experiences with Bulgarian colleagues. Similar support has been given to initiatives in Poland and in Albania. Furthermore, several requests for financial support to attend international conferences on restorative justice were granted to people from less-advantaged parts of Europe.

1.4. THE INITIATIVES OF THE COUNCIL OF EUROPE: A SHORT EVALUATION

The Council of Europe took an early interest in the developing theory and practice of restorative justice, and more specifically victim-offender mediation. It has done so in a very balanced way, on the one hand dealing with the potential benefits (and risks) it can have for victims, and on the other hand dealing with the positive effects it may have on juvenile and adult offenders.⁷³ In the documents that focus on either one of these parties, the interests of the other party are recognised as well, thereby drawing attention to the fact that restorative justice should not serve the interests of one party to the detriment of the other.⁷⁴ Initiatives have also recognised the way restorative justice can help to meet the various challenges the criminal justice system is facing. From the start, this option has been inscribed in a criminal justice policy that should meet the needs of victims, whilst paying attention to crime prevention, harm reduction, involvement of the community and reintegration of the offender. This reflects the balance that the Council of Europe has always sought in its work in the area of (criminal) justice. This balanced approach may be influenced or supported by the fact that

⁷³ According to Aertsen, this balance can be discerned in the work of the Council of Europe in the field of criminal law in general: “Looking at the many Recommendations the Council of Europe has adopted in the field of criminal law in the course of the last 20 years, a continuous search for a balanced approach of the interests of victims and offenders can be discerned” (Aertsen, 2007: 97).

⁷⁴ To illustrate this point: In Recommendation No. R (87) 20 on social reactions to juvenile delinquency (which is focused on the offender), point II.3. second indent mentions that in mediation procedures appropriate attention should be paid to “the rights and interests of the minor as well as to those of the victim”.

the Council of Europe is relying heavily on experts from the field to prepare its recommendations.⁷⁵

The initial focus in the work of the Council of Europe on the practice of victim-offender mediation is starting to be extended to the broader restorative justice framework. The Guidelines, for example, explicitly refer to restorative justice as being the broader concept under which victim-offender mediation could be placed. Although the more recent initiatives show some promising possibilities for further exploring what the Council of Europe could contribute to the European development of restorative justice, there is also some reason for concern. The fact that crime prevention, offender reintegration and victim support are seen as integral parts of what is called 'a restorative justice approach', points in the direction of a need to agree on basic principles of restorative justice and a clearer communication strategy about what restorative justice is and what it is not. Should Recommendation R(99)19 on mediation in penal matters be updated, this will be the ideal opportunity to do so. In doing so, it would be useful if the Council of Europe sticks with its tradition to not only give a voice to government delegations, but also to practitioners, academics and NGOs across Europe working in the field of restorative justice.

2. THE UNITED NATIONS

2.1. THE UN'S MISSION IN THE FIELD OF CRIMINAL JUSTICE⁷⁶

The United Nations Office on Drugs and Crime (UNODC) is the United Nations Office responsible for crime prevention, criminal justice and criminal law reform. Although it pays special attention to combating transnational organised crime, corruption and illicit trafficking in human beings, it also defines and promotes internationally recognised principles in such areas as independence of the judiciary, protection of victims, and alternatives to imprisonment.

The UNODC supports the work of intergovernmental bodies which set out a global strategy to prevent crime and promote stable criminal justice systems. The 40-member UN Commission on Crime Prevention and Criminal Justice formulates international policies and recommends activities in the field of crime control. The UNODC carries out the Commission's decisions. The Commission, which was established in 1992, is a subsidiary body of the Economic and Social Council. Its priority areas are:

- international action to combat national and transnational crime, including organised crime, economic crime and money laundering;
- promoting the role of criminal law in protecting the environment;
- crime prevention in urban areas, including juvenile crime and violence; and
- improving the efficiency and fairness of criminal justice administration systems.

Since 1995, a UN Crime Congress has been organised every five years, dealing with a wide array of topics.

The legal effect of instruments of the organs of the UN is not always clear-cut. Covenants, statutes, protocols and conventions are legally binding for those States that ratify or accede to them. Declarations, resolutions, principles, guidelines, standards, rules and recommendations have in principle no legal effect, but such instruments have an undeniable moral force and provide practical guidance to States in their conduct. They express generally accepted principles and represent a moral and political commitment by States. The same goes for general policy instruments, such as the outcome documents of world summits and conferences. They can also be used as guidelines for States in enacting legislation and formulating policies. Declarations, however, can also be treaties in the generic sense, intended to be binding at the level of international law. Some instruments entitled 'declarations' were not originally intended to have binding force, but their provisions may have reflected

⁷⁵ Recommendations of the Council of Europe are prepared by a committee of experts, composed of representatives of the responsible national ministry but also practitioners and researchers.

⁷⁶ See the website of the UNODC: <http://www.unodc.org/unodc> (consulted on 09.03.2007).

customary international law or may have gained binding character as customary law at a later stage. This was the case with the 1848 Universal Declaration of Human Rights.⁷⁷

2.2. OVERVIEW OF RELEVANT LEGAL INSTRUMENTS

a) *Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power*⁷⁸

In 1985, the General Assembly of the UN⁷⁹ adopted a 'Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power' which states that "informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims" (point 7).

In 1999 a 'Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principle on Justice for Victims of Crime and Abuse of Power' was published.⁸⁰ For each basic principle suggestions were made for actions that had proved useful and effective in different jurisdictions. In the field of mediation, this Guide only mentions very general information, namely that a few jurisdictions had shown interest in this approach and that non-judicial dispute resolution mechanisms had traditionally been used and were still applied in many parts of the world.

A more detailed 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power' also appeared in 1999.⁸¹ This Handbook was designed as a practical tool for implementing victim service programmes and for developing victim-sensitive policies, procedures and protocols. One chapter (p. 41-43) of this handbook deals with 'Victim involvement in mediation and restorative justice'. In short, following points are being addressed in this chapter:

- informal mechanisms of conflict resolution are particularly interesting in cases where the victim and the offender have an existing relationship;
- the objective of mediation is to alleviate the social situation that has been disturbed by the offender;
- a mediation session is arranged only with the consent of both victim and offender;
- the victim obtains financial and emotional restitution quickly and in an informal way;
- there is also greater community involvement, which is supposed to have a positive impact on deterrence;
- if the victim is taken as the focal point for mediation, the distinction between juvenile and adult offenders would be superfluous;
- the framework of restorative justice can best be described as a combined emphasis on the following programming priorities: restoration, accountability, community protection and competency development.

But, there are also references to mediation and restorative justice in other parts of the Handbook. One of the tasks for victim support programmes is "to arrange for victim-offender services, such as victim-offender dialogue and mediation, victim education classes

⁷⁷ See <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#declarations> and <http://www.un.org/esa/socdev/enable/disovlf.htm#overleg2> (consulted on 09.03.2007).

⁷⁸ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 96th plenary meeting of the General Assembly of the United Nations, 29 November 1985, A/RES/40/34.

⁷⁹ The General Assembly of the UN is one of the five principal organs of the UN (next to the UN Security Council, the UN Economic and Social Council, the UN Secretariat and the International Court of Justice). It is the main deliberative body of the UN, and is made up of all UN member states. It meets in regular yearly sessions under a president elected from among the representatives. As the only organ in which all members are represented, the Assembly serves as a forum for members to discuss issues of international law and to make decisions regarding the functioning of the organisation. See: <http://www.un.org/ga/61/background/background.shtml> (consulted on 09.03.2007).

⁸⁰ UNODCCP, *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power*, New York, United Nations, 1999.

⁸¹ UNODCCP, *Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power*, New York, United Nations, 1999.

and victim impact panels” (p. 20). Police training in dealing with victims in practical situations should ensure that police officers, amongst other things, can arrange mediation, where necessary, between victim and offender (p. 61). Prosecutors from their side should continue, when possible, to assist the victim after the conviction of the offender. Where applicable and appropriate in the jurisdiction, the prosecutor should, with the assistance of NGOs, amongst other things, coordinate victim-offender mediation (p. 68). The judiciary is recommended to allow, wherever possible under the law, victims to participate and, where appropriate, to give input through the prosecutor or to testify in all stages of judicial proceedings, including through victim-offender mediation, where appropriate (p. 71). Finally, regarding victim involvement in decision-making and in the enforcement of probation, the roles and responsibilities of probation officials in relation to victims should include supervising the probationer’s involvement in any victim-offender programming, such as victim impact classes or panels, or victim-offender mediation or conciliation, in which victims choose to participate on a strictly voluntary basis (p. 73).

From the Handbook it becomes clear that the concept of victim-offender mediation, and certainly of restorative justice, was not entirely clear at that time, at least when compared to the more recent understanding of these concepts in restorative justice literature. It is possible to detect a very strong focus on the victim, which almost conceives the response to the offender simply as a means of benefiting the victim.

*b) Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*⁸²

Although the Tokyo Rules do not specifically refer to mediation or restorative justice, they can be considered to apply to restorative justice practices. One of their general principles is very reminiscent of some of the basic principles of restorative justice, namely: “1.2. The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society”. Also relevant is that “1.4. When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention”. There is a strong case for optimising the number of cases that are referred to restorative justice practices in the pre-trial stage: “5.1. Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of the victim”.

*c) Resolution on ‘Development and implementation of mediation and restorative justice measures in criminal justice’*⁸³

On 28 July 1999, the United Nations Economic and Social Council (ECOSOC)⁸⁴ adopted a resolution on ‘Development and implementation of mediation and restorative justice measures in criminal justice’. In this resolution, ECOSOC sees mediation and restorative justice as interesting responses to minor offences, which can lead to victim satisfaction and prevention of further illicit behaviour. They can represent a viable alternative to short terms of imprisonment and to fines. Member States should consider promoting a culture favourable

⁸² *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, adopted by General Assembly resolution 45/110 of 14 December 1990.

⁸³ ECOSOC Resolution 1999/26 on “Development and implementation of mediation and restorative justice measures in criminal justice”, adopted on 28 July 1999.

⁸⁴ ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It is responsible for promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms. See: <http://www.un.org/docs/ecosoc/> (consulted on 09.03.2007).

to mediation and restorative justice among law enforcement, judicial and social authorities, as well as local communities, and consider the provision of appropriate training for those involved in the implementation of such processes. The different organs of the UN are asked to help countries exchange information on these practices, to undertake activities to assist Member States in developing mediation and restorative justice, and to consider the desirability of formulating UN standards in the field of mediation and restorative justice.

*d) Resolution on 'Basic principles on the use of restorative justice programmes in criminal matters'*⁸⁵

On 24 July 2002, ECOSOC adopted a resolution encouraging Member States that are implementing restorative justice programmes to draw on a set of 'Basic principles on the use of restorative justice programmes in criminal matters'.⁸⁶ These were developed by an Expert Group, on the request of the governments of Canada and Italy⁸⁷, based on prior work of a Working Party on Restorative Justice^{88, 89}

The first part of the Basic principles provides definitions of 'restorative justice programmes', 'restorative processes', 'restorative outcomes', 'parties' and 'facilitator'.

Part II deals with the use of restorative justice programmes. It is mentioned that:

- they may be used at any stage of the criminal justice system;
- they may be used only where there is sufficient evidence to charge the offender, and with the free and voluntary consent of the victim and the offender. Such consent can be withdrawn at any stage of the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations;
- victim and offender should agree on the basic facts of the case. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings;
- disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration when referring and when conducting a case;
- the safety of the parties should be taken into account when referring and when conducting a case;

⁸⁵ ECOSOC Resolution 2002/12 on "Basic principles on the use of restorative justice programmes in criminal matters", adopted on 24 July 2002.

⁸⁶ This means that ECOSOC did not adopt these *Basic Principles*, which is of course a major difference since it means that these *Basic Principles* do not by far have the same status as, for example, the *United Nations Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power* or the *United Nations Standard Minimum Rules for Non-custodial Measures*. The reason why the *Basic Principles* were not adopted lies in the preparatory work. At its Eleventh Session, the UN Commission on Crime Prevention and Criminal Justice discussed the adoption of a Canadian resolution on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. After much debate it became clear, however, that the members of the Crime Commission were not ready to adopt these standards. They felt that the document needed a line-by-line review, and there was no time to do this. Several delegations then suggested that, rather than approving the basic principles, the Crime Commission should recognise the work of the expert group that prepared the document and encourage countries to use the basic principles in developing guidelines for restorative justice programmes.

⁸⁷ In December 2000, the Secretary-General issued a note verbale inviting country comments on the Canadian-Italian resolution and its annexed draft elements. During the meeting of the Expert Group, a report of the Secretary-General on restorative justice, which detailed the comments of Member States and others to the draft elements of the basic principles circulated with the note verbale, was discussed in detail. See <http://www.unodc.org/pdf/crime/commissions/11comm/5e.pdf> for this report.

⁸⁸ Daniel W. Van Ness (s.d.) has described in detail the reasons why this Working Party on Restorative Justice was created and the progress of its work.

⁸⁹ In the process of the preparatory work, the contents of the initial proposal – as developed by the Working Party on Restorative Justice – has been changed considerably. There was a lot of resistance – amongst others from the USA which explicitly stated its opposition at a meeting of the UN Commission of Crime Prevention and Criminal Justice – to the development of a prescriptive or mandatory document on restorative justice. This resulted in a much more open and non-committal formulation of basic principles than in the initial draft. It would take us too far to make a line-by-line comparison.

- if a restorative process is not suitable or possible, the case should be referred to the criminal justice authorities who should take a decision on how to proceed with the case as soon as possible. Criminal justice officials should in this case encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of both offender and victim.

Part III deals with the operation of restorative justice programmes and suggest that:

- Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. These should respect the Basic Principles and address, amongst others: the conditions for referral of cases; the handling of cases when they have gone through a restorative process; the qualifications, training and assessment of facilitators; the administration of restorative justice programmes; standards of competence and rules of conduct;
- the processes should be subject to fundamental procedural safeguards: right to legal counsel, right to translation and/or interpretation, right to assistance of a parent or guardian for minors, right to be informed of their rights, the nature of the process and the possible consequences of their decision before agreeing to participate, no coercion when accepting to participate or accepting an outcome;
- discussions during the restorative process are confidential, and cannot be disclosed except with the agreement of the parties or as required by national law;
- the elements of an agreement should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments, having the same status as any other judicial decision or judgment. There may be no prosecution in respect of the same facts;
- if no agreement is reached, the case should be referred back to the criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent proceedings;
- if an agreement is not implemented, the case should be referred back to the restorative programme or to the criminal justice process if the latter is required by national law. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings;
- facilitators should subscribe to the principles of impartiality and respect for the dignity of the parties. They should ensure that the parties act with respect towards each other and enable the parties to find a solution among themselves;
- facilitators should have a good understanding of local cultures and communities and should, where appropriate, receive initial training before taking up their duties.

Part IV, finally, deals with the continuing development of restorative justice programmes and encourages:

- Member States to consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities;
- regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices;
- Member States, in cooperation with civil society where appropriate, to promote research on and evaluation of restorative justice programmes. The results of research and evaluation should guide further policy and programme development.

e) *Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power*⁹⁰

In December 2005, the World Society of Victimology and the International Victimology Institute, meeting in Tilburg with representatives from different regions, decided to prepare a draft of a convention on victims rights, including some provisions on restorative justice. More specifically, article 9 of the draft Convention deals with restorative justice. It states: “(1) States Parties shall endeavour, where appropriate, to establish or enhance systems of restorative justice, that seek to represent victims’ interests as a priority. States shall emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim.

(2) States Parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims’ dignity, compassion and similar rights and services to those described in this Convention”.

It is clear that this document is exclusively focussed on victims’ rights. However, the 16th Session Commission on Crime Prevention and Criminal Justice, held in April 2007, was not supportive of the idea of a Victims’ Rights Convention⁹¹, and hence it is not clear whether this text will ever be adopted. And, even if support for adopting such a convention would exist, it would need to be discussed and revised by a much broader group of people and organisations first.

2.3. OVERVIEW OF OTHER RELEVANT INITIATIVES

a) *The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*⁹²

The Vienna Declaration of 2000 encouraged the “development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties” (para. 27). It also mentioned that the Member States of the United Nations decided “to introduce, where appropriate, national, regional, and international action plans in support of victims of crime, such as mechanisms for mediation and restorative justice” (para. 28).

The plans of action for the implementation of the Vienna Declaration include an action plan on restorative justice.⁹³ It recommends specific measures on a national and an international level.

At a national level, States, individually and collectively, will endeavour, as appropriate, to support the following actions:

- take into account the Basic principles when considering the desirability and the means of establishing common principles;
- deal with offences, especially minor offences, according to customary practice in respect of restorative justice, where available and appropriate, provided that this meets human rights requirements and that those involved agree to it;
- use amicable means as provided by national law to deal with offences, especially minor offences;
- promote a culture favourable to mediation and restorative justice among law enforcement, judicial and social authorities and local communities;

⁹⁰ Available from <http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>.

⁹¹ See <http://www.tilburguniversity.nl/intervict/undeclaration/>.

⁹² The *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/Res. 55/59.

⁹³ *Plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, in United Nations Office on Drugs and Crime, *Compendium of United Nations standards and norms in crime prevention and criminal justice*, New York, United Nations, 2006, 249-271.

- provide appropriate training for those involved in the development and implementation of restorative justice policies and programmes;
- promote the re-education and rehabilitation of juvenile offenders by encouraging, where appropriate, the use of mediation, conflict resolution, conciliation and other methods of restorative justice as alternatives to judicial proceedings and custodial-based sanctions;
- develop and implement restorative justice policies and programmes, taking into account existing international commitments with respect to victims, in particular the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- promote cooperation between government and civil society, including relevant NGOs, to implement restorative justice programmes and to ensure public support for the use of restorative justice principles.

At an international level, the Centre for International Crime Prevention should, in cooperation with other relevant international and regional organisations:

- exchange information on experiences and proven practices in the implementation and evaluation of programmes for restorative justice;
- assist the Commission on Crime Prevention and Criminal Justice in considering the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters;
- convene a meeting of experts to examine proposals for further action in relation to restorative justice, including mediation.

b) The declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders⁹⁴

In 2005, the declaration of the Eleventh Congress on the Prevention of Crime and the Treatment of Offenders urged Member States to “recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution, thereby avoiding possible adverse effects of imprisonment, helping to decrease the caseload of criminal courts and promoting the incorporation of restorative justice approaches into criminal justice systems, as appropriate”.

c) Handbook on Restorative Justice Programmes

In 2006, the UNODC published its ‘Handbook on Restorative Justice Programmes’.⁹⁵ This handbook provides an introduction to restorative justice programmes and processes, and is directed towards a number of different audiences, coming from a multitude of legal, social and cultural backgrounds. Its main purpose is “to help those involved in the implementation of participatory and restorative justice programmes make informed decisions about programme design, implementation and evaluation” (UNODC, 2006: 2). In doing so, it is drawing on experiences from every part of the world, thereby attempting to accommodate the diversity of practices while making recommendations. By making a clear link between restorative justice and indigenous and customary justice forums in, amongst others, Uganda, the Philippines and Bangladesh, this Handbook draws the readers’ attention to practices beyond the more ‘traditional’ restorative justice practices such as victim-offender mediation, family group conferencing and sentencing circles. The fact that it goes beyond this more traditional scope also means that there – inevitably – is a high level of generalisation in the recommendations it makes. This should, however, not necessarily be seen as a negative thing. Combined with the fact that the Handbook is available for free on the website of the UNODC, it makes the concept of restorative justice more accessible to all peoples of the world. Moreover, the fact that the UNODC published a handbook on restorative justice can contribute to the credibility of the concept in the eyes of the political and judicial world.

⁹⁴ The *Bangkok Declaration – Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005.

⁹⁵ UNODC, *Handbook on Restorative Justice Programmes*, New York, United Nations, 2006, 105 p.

2.4. THE INITIATIVES OF THE UN: A SHORT EVALUATION

Although the number of initiatives in the restorative justice field is much lower than in the framework of the Council of Europe, one should not underestimate their importance. The context of the UN is clearly a very different one from that of the Council of Europe and the European Union. With its 192 Member States, the UN gathers both the most and least developed countries of the world, also in terms of development of their criminal justice system. The fact that restorative justice is a recurrent topic at the UN Crime Congresses certainly helps to provide credibility to restorative justice and to promote it in parts of the world where it is not well-known yet. The 2006 Handbook will also contribute to this.

Whereas initiatives by the Council of Europe initially focused on the technique of victim-offender mediation, the UN has almost immediately paid attention to the broader restorative justice framework. This has, more than likely, to do with the difference in geographical coverage of the organisation. Indeed, victim-offender mediation is the main restorative justice practice used in Europe. But, outside Europe, other restorative practices, like (family) group conferencing and sentencing circles, received equal or more attention. In many aboriginal communities (in Canada and the USA for example), traditional forms of conflict resolution have much in common with restorative practices. For them the use of restorative practices is a way to assert their autonomy within a federal state that otherwise has ownership of the criminal justice response to offending. In South Africa, restorative justice principles have been linked to the truth and reconciliation processes. This broader approach of the UN, as compared to the initial initiatives of the Council of Europe, has two advantages in our view. First, it reminds people in Europe that they have to stay open – also in the field of restorative justice – to experiences in the rest of the world. Much can be learned from studying initiatives that strive for the same aims while using different techniques and approaches. Second, it reflects the fact that restorative justice still means different things to different people across the world.⁹⁶ It is important to be aware of this and to take this into account when discussing restorative justice in an international context.

The fact that so many countries, with such different social, economic, legal and cultural backgrounds agree to the promotion of restorative justice shows that in justice systems all around the world there is a need for a more sensible way of doing justice for victims, offenders and communities.

⁹⁶ This variation is well illustrated by the focus of two other handbooks that appeared in 2006. The *Handbook of Restorative Justice*, edited by Van Ness and Johnstone, contains essays that centre on a more traditional understanding of restorative justice. The focus of the second, edited by Sullivan and Tifft, is revealed in its subtitle, *Handbook of Restorative Justice: A Global Perspective* and in its stated purpose, to show “the healing dimension of restorative justice: a one-world body”. Here, restorative justice is explicitly linked to an agenda for transformative justice.

3. THE EUROPEAN UNION

3.1. THE EUROPEAN UNION'S MISSION IN THE FIELD OF CRIMINAL JUSTICE

Since part IV of this report will be devoted entirely to the EU's mission in the field of criminal justice, it should suffice here to say that the EU's objective in this field is to create a European area of freedom, security and justice. The next paragraphs will serve to explore which place restorative justice has already found in EU initiatives. In the course of this, it will already become clear that action in the field of restorative justice is for different reasons more difficult in the framework of the EU than in the framework of the Council of Europe or the UN.

3.2. OVERVIEW OF RELEVANT LEGAL INSTRUMENTS

a) *Framework Decision on the Standing of Victims in Criminal Proceedings*

1. Presentation

The Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings⁹⁷ was made on the initiative of the Portuguese Republic. It states in Article 10, entitled 'Penal mediation in the course of criminal proceedings', that:

“1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account”.

In Article 1, mediation in criminal cases is defined as “the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person”. According to Article 17, each Member State shall bring into force laws, regulations and administrative provisions to comply with Article 10 before 22 March 2006.

2. Interpretation and comments

These provisions have been criticised by many for being too vague. What, for example, is meant by 'promoting' mediation in criminal cases? What happens if a Member State finds that mediation is not appropriate for any type of offences? Who should be regarded as being 'competent' to mediate? If an agreement is to be taken into account, by whom then and to what effect? The text of Article 10 leaves an enormous scope of discretion and interpretation to the Member States. The fact that the article is included in a framework decision is of course also relevant since a framework decision has no direct effect. It is binding on the Member States only as regards the results to be achieved, while leaving the national authorities the choice of forms and methods. The Commission cannot bring an action before the Court of Justice to force a Member State to transpose a framework decision.⁹⁸

Despite this criticism, we feel that the text has already come a long way from the initial wording proposed by the Portuguese Republic.⁹⁹ This stated the following:

⁹⁷ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, OJ L 82/1 of 22.3.2001.

⁹⁸ It is possible though for the European Court of Justice to hear a case concerning a disagreement between two Member States on the interpretation or implementation of a framework decision.

⁹⁹ On the other hand, Vera van der Does (2006: 25-26) finds that the final wording is less restrictive and far-reaching than the proposed text. This difference, we think, is due to a different interpretation of the two versions of the texts. For example, she feels that the use of the word 'can' in the second paragraph of article 10 in the adopted version implies that mediated agreements do not need to be taken into account. We interpret it in the sense that if there is an agreement, the Member States should make sure that the mechanisms are available for taking it into account.

“Article 10. Dispute settlement through mediation

1. Where deemed appropriate, Member States shall ensure that mediation forms part of the measures available under their system of criminal procedure.
2. Where deemed appropriate, Member States shall ensure that mediated out-of-court settlements between victims and defendants are taken into account, with victims’ agreement, in subsequent criminal proceedings, subject to compliance with the conditions laid down for that purpose”.¹⁰⁰

The main difference lies in the second paragraph. First, in the final wording the words ‘where deemed appropriate’ have been left out at the beginning of the second paragraph. This means that, as a general rule, national policy makers/legislators have to ensure that agreements made in the course of such a process can be taken into account. Of course they are left with a huge discretion as to the interpretation of ‘can be taken into account’. This was, in contrast, more clearly formulated in the original version of this article which made it clear that the agreement could be taken into account “in subsequent criminal proceedings, subject to compliance with the conditions laid down for that purpose”. Second, the condition that victims should agree with the fact the agreement would be ‘taken into account’ has been taken out. We feel that this is a positive step since it would give undue power to the victim on the one hand, and put too much pressure on them on the other hand. Good restorative justice practice prescribes that the mediator/facilitator informs the parties, including the victims, of the possible effects of their participation on the criminal proceedings. Depending on the legal context, victims are to be informed that if an agreement is reached, this will be communicated to the referring agent who may take it into account when deciding on how to proceed with the case.¹⁰¹ The final decision on the influence of the agreement, however, does not lie with the victim. It should also be noted that in the initial initiative, the concept of ‘dispute settlement through mediation’ was not defined.

The adoption of this framework decision has not been self-evident. The European Parliament, which has to give an opinion on initiatives taken within the ‘third pillar’ of the European Union, questioned the legal basis of this initiative. In the report drawn up by the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs¹⁰², it was mentioned that the initiative lacked a legal basis both in the Treaty establishing the European Community and in the Treaty on European Union (TEU). Article 31(e) TEU, which was the legal basis referred to in the initiative, only refers to “progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts”. “However”, the report continued, “the initiative as a whole is not concerned with *substantive* criminal law but with *procedural* criminal law. It would, therefore, seem questionable whether the adoption of a framework decision is permissible. If the Portuguese initiative were adopted simply as a Council recommendation, the reservations concerning the legal basis would be less serious”.¹⁰³ It would have been interesting to know how the Council has received this comment and what reasoning it used to accept that there was a legal basis as this would have been useful in our analysis of the role of the European Union in the field of criminal justice. According to Vera

¹⁰⁰ Initiative of the Portuguese Republic with a view to adopting a Council Framework Decision on the standing of victims in criminal procedure, 2000/C243/02, OJ C 243 of 24.8.2000, p. 4.

¹⁰¹ However, in Belgium, for example, an mediation agreement can only be transferred to the referring agent with the express consent of both victim and offender.

¹⁰² When the European Parliament is to formulate an opinion, the President of the Parliament forwards the initiative for consideration to three of the Parliament’s Committees. One of these Committees is appointed as the responsible Committee, in this case the Committee on Citizens’ Freedoms and Rights, Justice and Freedom. The two other Committees in which the initiative was discussed were the Committee on Legal Affairs and the Internal Market and the Committee on Women’s Rights and Equal Opportunities. Mrs Carmen Cerdeira Monterero was appointed as rapporteur.

¹⁰³ European Parliament, Report on the initiative of the Portuguese Republic with a view to adopting a Council Framework Decision on the standing of victims in criminal procedure, 24 November 2000, FINAL A5-0355/2000, p. 41.

van der Does, it was a non-restrictive interpretation of Article 29, third indent¹⁰⁴ and Article 34(2)(b)¹⁰⁵ of the TEU which enabled the adoption of the framework decision. She mentions that the aim was “to give practical expression to the political intention, made explicit at the Tampere Council” (van der Does, 2006: 21). Others have said that the fact that the framework decision finally was adopted was the result of a kind of ‘trick’ which consisted in saying that approximation in criminal proceedings was needed in order to ensure an equal treatment of European travellers and tourists who became a victim of a crime in a Member State of the European Union other than their own. Victims should have the right to an effective administration of justice and an adequate level of legal safeguards, independent of where they found themselves. Of course, it was clear that most of the proposals in the framework decision would also – and even in the first place – benefit victims who were victimised in their own country (Groenhuijsen and Reynaers, 2006: 16).

It is unclear what the impact has been of Article 10 in the Member States of the European Union. From informal contacts we know that a number of countries have taken initiatives in the field of restorative justice due to the pressure exerted by the framework decision (for example Bulgaria and Portugal). It would be useful, however, to make a thorough assessment of the influence. On 16 February 2004, the Commission published a report in which an evaluation was made of the measures taken in the Member States to comply with the articles for which the deadline for implementation had already expired.¹⁰⁶ Since such an evaluation report is to be made within a year after the expiration of the deadline for implementation, more information about the implementation of Article 10 should have become available by 22 March 2007. However, at the moment of finalising this report (June 2008), such a report had not been made available.¹⁰⁷

Vera van der Does set about – in 2006 – to evaluate the implementation of Article 10. She did this by sending a questionnaire to representatives in 24 of the then 25 Member States. 17 of the questionnaires were completed, mostly by officials working within the Ministry of Justice of the concerned Member State. From the analysis of the questionnaires, it seemed that the effect of Article 10 was minimal.¹⁰⁸ Most countries already had legislation that went far beyond the scope of Article 10. In other countries, proposals were already under development (van der Does, 2006: 58). This seems to indicate that the explanation of Groenhuijsen and Reynaers (2006) of the question why the framework decision was so easily adopted by the Member States, is correct, at least for this article of the framework decision.

In their article, Groenhuijsen and Reynaers (2006) make a critical analysis of the history of the creation of the framework decision and the process of implementing the provisions thereof. They say that the reason why the process of adopting the framework decision went so

¹⁰⁴ Article 29, third indent TEU states that one way of achieving the Union’s objective of providing citizens with a high level of safety within an area of freedom, security and justice, is to approximate rules on criminal matters in the Member States.

¹⁰⁵ Article 34(2)(b) TEU states that the Council, acting unanimously on the initiative of any Member State or of the Commission, may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

¹⁰⁶ Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Brussels, 16.02.2004, COM(2004)54 final/2.

¹⁰⁷ The Portuguese Association for Victim Support (APAV), on behalf of Victim Support Europe, is assessing the implementation of the Framework Decision in the Project Victims in Europe (VinE), for which they have received a grant from the European Commission. They are doing this with the help of two surveys. One survey aims to understand the degree of implementation in a legal sense. The other one is focused on gathering information about the implementation at the organisational level.

¹⁰⁸ It should be noted, however, that at the time the research was conducted the deadline for complying with Article 10 of the framework decision had not expired yet. Hence, it is possible that some countries undertook action after they had filled in the questionnaire.

smoothly is that the Member States did not expect that it would result in having them to change their national systems in any significant way. They have two explanations for this collective self-confidence of the Member States. The first is that a good number of the officials who were entrusted with the negotiations about the framework decision had received clear instructions not to agree with any provisions that would be incompatible with the existing national provisions. The second explanation is that where considerable changes to the national provisions could be foreseen, definitions of concepts were just deleted. One example of this is what happened to the subject of compensation by the State in the framework decision. In a first version of the framework decision, reference was made to national compensation schemes for victims of violent crimes. This was quickly deleted when it became clear that one could expect legal and financial consequences from this (Groenhuijsen and Reynaers, 2006: 18). Whereas the Member States might not have succeeded in limiting the consequences of the framework decision in respect to certain articles focused on victims, they certainly succeeded in doing so in respect to article 10 (Groenhuijsen and Pemberton, 2007: 73).

We would agree with Van der Does (2006: 57) in that the inclusion of article 10 in a text which is otherwise entirely devoted to the more ‘traditional’ rights of victims (such as the right to be treated with respect for their dignity, the right to provide and receive information, the right to protection and to compensation) is a bit strange. The preamble is not making any link between mediation and victim rights; hence, it is not clear why exactly this article was included in the text. Unfortunately it is not possible to find an answer to this question since the development-process of EU legislative instruments is quite untransparent. Also, it might be considered uncommon that, in a document of which the overall objective is to harmonise and approximate national laws in order to provide assistance to victims and guarantee a minimum level of protection throughout the EU, this objective is not reflected in article 10. The vagueness of the formulation of article 10, and especially the use of the word ‘promote’, is rather at odds with the general objective of the framework decision. Van der Does (2006: 40) seems to suggest that the inclusion of article 10 was the result of a political compromise. It is indeed not unthinkable that representatives of countries in which, at that time, there was a very positive political climate vis-à-vis restorative justice, have pushed this article through. It is of course also possible that the fact that the Council of Europe and the United Nations had already acted in this field, exerted some kind of pressure. Or, was it just the fact that mediation has become a fashionable concept *tout court?*

3.3. OVERVIEW OF OTHER RELEVANT INITIATIVES

a) *The Communication on Crime Victims in the European Union – Reflections on Standards and Action*

The ‘Communication on Crime Victims in the European Union – Reflections on Standards and Action’¹⁰⁹ of 14 July 1999 was formulated in preparation of the Tampere European Council. It states that victim-offender mediation could be an alternative solution to long and discouraging criminal procedures, as well as in the interest of victims, making possible compensation or the recovery of lost property outside the normal criminal procedure (p. 8). Since the communication is focusing on people who have become a victim of a crime in a Member State other than their own, the document only mentions possible advantages for foreign victims, namely: 1) mediation can be done (by the police or the prosecutor) before the victim leaves the country, and 2) if the victim leaves the country, he or she can appoint a third party (a representative, a lawyer or an organisation) to act on his or her behalf in the mediation sessions (p. 9).¹¹⁰

¹⁰⁹ Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee on Crime Victims in the European Union – Reflections on Standards and Actions, COM(1999)349 final, of 14 July 1999.

¹¹⁰ These two points show that the knowledge of victim-offender mediation was very limited. The principle of neutrality of the mediator is one of the main principles underlying the practice of victim-offender mediation. The police and the prosecutors can hardly be seen as neutral persons.

The Commission further suggests considering doing additional research and experiments in victim-offender mediation with evaluation of the particular interests of victims, as well as practical arrangements for mediation (p. 9).

b) Tampere European Council of 15 and 16 October 1999

On 15 and 16 October 1999, in Tampere, the EU leaders agreed on steps to make the Union a unique area of freedom, security and justice, an objective laid down in the Treaty of Amsterdam. This resulted in the Council adopting an Action Plan (1999-2004) setting out policy guidelines and practical objectives. The Commission, at the request of the European Council, drew up a scoreboard to review progress every six months.

In this Action Plan, one of the conclusions (no. 30) states that Member States should create alternative, extra-judicial procedures. This is one of the ways mentioned to improve access to justice. Conclusion 32, referring to the abovementioned Communication, stated that “minimum standards should be drawn up on the protection of the victims of crime”.¹¹¹

The European Parliament has followed-up the achievements of the guidelines and objectives of the Action Plan, based on the scoreboard developed by the Commission. From the overview they have composed, it becomes clear that conclusion no. 30 has been narrowed down to extra-judicial settlement for civil and commercial disputes, disputes in the field of financial services, and disputes caused by the misapplication of internal market law by public authorities. The possible contribution of alternative, extra-judicial procedures in criminal cases has been ignored completely.¹¹²

c) European Crime Prevention Network

The European Crime Prevention Network (EUCPN) was set up in May 2001 by an EU Council Decision¹¹³ to promote crime prevention activity in Member States across the EU, and to provide a means through which good practice in preventing crime could be shared. Although covering all types of criminality, the Network pays particular attention to juvenile, urban and drug-related crime, three priorities defined in Tampere. The Network consists of a nominated national representative from each EU Member State, a substitute representative, and other crime prevention experts including practitioners and academics.

In its work programme for the period July 2001-December 2002, the EUCPN identified restorative justice (i.e. mediation) as a top priority subject to be studied in relation to juvenile crime. An objective identified in this work programme was to continue with studying restorative justice practices.¹¹⁴ Both in the 2001 and 2002 annual reports¹¹⁵, no reference is made to activities in the field of restorative justice. In its second work programme (covering the period January 2003-December 2004), restorative justice was again mentioned as a top priority subject to be studied in relation to juvenile crime. Two of the objectives which they wanted to achieve in this period were: 1) making an inventory on methods and procedures of crime preventive aspects of restorative justice and mediation and exchange of experience and

¹¹¹ Tampere European Council, 15 and 16 October 1999, Presidency conclusions, available from: http://www.europarl.europa.eu/summits/tam_en.htm.

¹¹² See http://www.europarl.europa.eu/comparl/libe/elsj/scoreboard/justice/default_en.htm#1 for an overview of progress in the creation of an area of freedom, security and justice (consulted on 09.03.2007).

¹¹³ Council Decision of 28 May 2001 setting up a European Crime Prevention Network, 2001/427, JHA, OJ L 153 of 08.06.2001, 1-3.

¹¹⁴ European Crime Prevention Network, First Programme, Setting Priorities and Objectives for the period July 2001 – December 2002, accessible by clicking on the “Archive Material” link on the “Key Papers” section of their website: <http://www.eucpn.org/key-papers/index.asp> (consulted on 09.03.2007).

¹¹⁵ Accessible by clicking on the “Archive Material” link on the “Key Papers” section of their website: <http://www.eucpn.org/key-papers/index.asp> (consulted on 09.03.2007).

information; and 2) publishing a report on practices of mediation in Member States.¹¹⁶ Both the 2003 and 2004 annual reports¹¹⁷ make little reference to activities undertaken to meet these objectives. The subgroup on juvenile crime that was created from among the Network national representatives devoted one meeting (on 13 March 2003 in London) to the subject of restorative justice. The EUCPN further requested the Commission to issue a call for tenders for a study on restorative justice (see further, point f). Since then, the topic of restorative justice has died a silent death in the work programmes of the EUCPN.

d) Initiative of the Kingdom of Belgium with a view to adopting a Council Decision setting up a European network of national contact points for restorative justice

In the preparatory phase of the Belgian Presidency of the Council in the second half of 2001, the idea arose to take an initiative in the field of restorative justice. In consultation with the European Forum for Restorative Justice, the Belgian Ministry of Justice set about taking an initiative to strengthen networking at policy level in this field.

In order to test the idea and to see whether there would be any support for it from other countries, the Belgian Ministry organised an informal meeting on 26 October 2001 with representatives of a limited number of Member States: the then troika of the EU (Sweden, Belgium and Spain), and a few countries with experience or interest in the field of restorative justice: the Netherlands, France, Austria, the UK, Germany and Finland. The European Commission and representatives of the European Forum for Restorative Justice were also invited to the seminar.

All present liked the idea of a more permanent and institutionalised position for restorative justice at a European level because there was a clear need for more permanent exchange of information and expertise between the Member States. However, it was absolutely unclear how this should happen. Many representatives were not much in favour of creating yet another organ that would need to be supported financially. Some representatives suggested integrating the network in the European Crime Prevention Network. Others strongly opposed this idea, including the Belgian Ministry and the European Forum for Restorative Justice. The main reason for this opposition was that this would create the risk that restorative justice would be narrowed to a preventative tool. Most representatives agreed that the aims and objectives of such a network could just as well be met by the European Forum for Restorative Justice. They noticed that the European Forum had already been doing these things, albeit on a limited scale. However, when confronted with the fact that in order to do this in an efficient and effective way, the European Forum would need structural funding, no clear solutions were brought forward. So, although the general undertone of the meeting was relatively positive, it did not really help in clarifying what concrete steps could be taken.

On 30 January 2002, representatives of the Belgian Ministry of Justice and of the European Forum met with the then head of the Unit on Judicial Cooperation in Criminal Matters of the European Commission to discuss the Belgian proposal again. Although the meeting was quite positive, on 13 February 2002 a letter was received in which the Commission informed the Belgian Ministry that, albeit the initiative was an interesting one, they could not support it.

The Belgian Minister of Justice nevertheless decided to go ahead with the idea, and to introduce a proposal for a Council Decision setting up a European network of national contact points for restorative justice.¹¹⁸ This network would contribute to developing, supporting and promoting the various aspects of restorative justice within the Member States

¹¹⁶ European Crime Prevention Network, Second work programme, Setting priorities and objectives for the period January 2003 – December 2004, accessible by clicking on the “Archive Material” link on the “Key Papers” section of their website: <http://www.eucpn.org/key-papers/index.asp> (consulted on 09.03.2007).

¹¹⁷ Accessible by clicking on the “Archive Material” link on the “Key Papers” section of their website: <http://www.eucpn.org/key-papers/index.asp> (consulted on 09.03.2007).

¹¹⁸ Initiative of the Kingdom of Belgium with a view to the adoption of a Council Decision setting up a European network of national contact points for restorative justice, OJ C 242 of 08.10.2002, 20-23.

as well as at European Union level. An important instrument in this effort is the objective, legislative and logistic support to criminal justice authorities (Art. 3).

For the purpose of this decision, restorative justice was to be understood as “a comprehensive view of the criminal justice process, in which the needs of the victim are prioritised and offender accountability is emphasised in a positive manner”. It “covers a body of ideas that is relevant to various forms of sanctioning and conflict handling in the successive stages of or in connection with the criminal justice process” (Art. 2).

The network would consist of maximum three contact points designated by each Member State, amongst which at least one representative from the national authority competent for restorative justice. Other national contact points could be researchers, restorative justice practitioners or other actors in the restorative justice field. The Commission and candidate countries would also be allowed to designate a contact point (Art. 6).

The network would have the following tasks (Art. 4):

- 1) Being an information point that collects, analyses and evaluates information and data on existing restorative justice practices and on their development in the Member States, in order to contribute to the development of standards of best practice, to support future national and European initiatives, and to assist the Council and Member States with questionnaires on restorative justice practices.
- 2) Develop mechanisms to distribute this information and data to authorities on a national, regional, European and international level and to other governmental and non-governmental organisations.
- 3) Facilitate mutual exchange of information, experience and contacts between European, regional, national and local authorities, institutions, agencies, groups, networks and individuals.
- 4) Promote research on the topic of restorative justice.
- 5) Contribute to identify and develop the main areas for training and evaluation.
- 6) Organise conferences, seminars, meetings and other activities to promote restorative justice practices and to stimulate and improve the exchange of experience and best practice.
- 7) Develop cooperation with applicant countries, third countries and international organisations and bodies.
- 8) Provide its expertise to the European Parliament, the Council and the Commission.
- 9) Report to the Council on its activities each year.

The concrete interpretation, fulfilment and development of these tasks and activities would be subject to and dependent on the voluntary contributions of the Member States. In performing its tasks, the network would cooperate and stimulate exchange with NGOs working in the restorative justice field. To achieve its aims, it could even decide to call upon the know-how and experience of such NGOs and even decide to cooperate in a more structured way (Art. 5).

The network would meet at least once every 6 months on the invitation of the country holding the Presidency. It would decide on its priorities and the specific actions to be taken (Art. 7).

No clear financing structure was foreseen for the network. The text says, in Art. 7, that the financing of the network may be subject to a decision of the Council.

After its publication in the Official Journal of the European Communities, the proposal was passed on to the European Parliament which had to formulate an advice on it. The proposal was first studied in three Committees of the European Parliament: the Committee on Legal Affairs and the Internal Market (LIBE), the Committee on Culture, Youth, Education, the Media and Sport, and the Committee on Women’s Rights and Equal Opportunities. A report was made by a rapporteur of the LIBE Committee in which 54 amendments were

proposed.¹¹⁹ These were mainly technical and the report was in general very positive. However, basic problems were identified: the network had no legal personality and no clear provisions on the budget and the secretariat. Important was however that the rapporteur followed the Belgian initiator in saying that such a network would require a permanent secretariat. It was suggested to create a separate network, with a secretariat being located within the secretariat of the European Crime Prevention Network, but as a separate entity.

The European Parliament approved the report of the rapporteur in its plenary session of 7 till 10 April 2001. After this, the initiative was sent back to the Council where it is still waiting to be dealt with. Due to other priorities of the respective EU Presidencies and due to the lack of clear support by a majority of the Member States, the initiative was never discussed in the Council.

e) *Communication from the Commission on mutual recognition of final decisions in criminal matters*¹²⁰

Point 9.4 of this Communication deals with alternative sanctions. The Commission sees two kind of difficulties in relation to alternative sanctions: “The first is linked to the fact that alternative sanctions are often characterised by a *restorative* element” (p. 15, emphasis added). The problem this creates is described as follows: “For example, the offender is obliged to take action beneficial to the community as a whole or to do something for the benefit of the victim(s) of the offence. With regard to this, there is a need to balance the potential benefit for the community or individual victim against whom the offence was directed with the benefit of permitting the offender to render the service in the Member State where he or she is socially integrated. Executing a community service in another Member State would not help the community against whose values the offence was directed. On the other hand, having to perform community service far from one’s home would make for a much harsher penalty” (p. 15). Without wanting to go into the details of the reasoning made by the Commission, what becomes clear is that the European Commission recognises that there could be cross-border issues in relation to alternative sanctions with a restorative aspect. The second problem they see is that “... some Member States have developed alternative measures to a lesser degree and may not have the appropriate social environment and monitoring bodies: transferring the implementation of the measure there may not achieve the intended educational effect. Given this potential difficulty, it might be preferable to start a comparative analysis with a view possibly at a later stage to put in place a cooperation mechanism, which could facilitate an agreement between the Member States concerned” (p. 15).

The conclusion from the Commission is that, whereas in principle mutual recognition of alternative sanctions should follow the same guidelines as that of custodial or pecuniary penalties, it seems legitimate to leave more discretion to the Member States concerned because of the wide range of types and modalities of measures that could fall within the category of alternative sanctions. The suggestion is that each of the Member States could ask for the transfer, but that the requested Member State would not be obliged to consent.

¹¹⁹ E. Klamt, *Report on the initiative of the Kingdom of Belgium with a view to the adoption of a Council Decision setting up a European network of national contact points for restorative justice*, FINAL A5-0084/2003 of 24 March 2003.

¹²⁰ Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final of 26.7.2000.

f) *Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*¹²¹

The issue of alternative sanctions was taken up again by the Commission in the Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. The purpose of this Green Paper¹²² was to analyse whether the existence of different justice systems across the EU raises problems for judicial cooperation between the Member States, and to identify barriers to the implementation of the mutual recognition principle.

In this Green Paper, mediation (or restorative justice) is dealt with under the heading of ‘alternative sanctions’ which are defined as “penalties imposed on natural persons or accepted by them in the course of a mediation or out-of-court settlement procedure which are not custodial penalties (or their implementing rules) or fines, confiscations or disqualifications” (p. 21). Alternative sanctions are considered to play an important role in crime prevention because they are much better than custodial sanctions at promoting the successful rehabilitation of offenders. “According to Art. 29(2) of the TEU, the EU’s objective of providing citizens with a high level of safety within an area of freedom, security and justice will be achieved by preventing crime. The rehabilitation of offenders contributes directly to the prevention of re-offending” (p. 32).

The Green Paper states that there is no European Union legislation relating to alternative sanctions. It is mentioned that the main difficulty in approximating them is the fact that there are considerable differences regarding their function and their legal nature in the different Member States (p. 20-21). In terms of obstacles to mutual recognition of alternative sanctions, the differences in function and legal nature are also mentioned, on top of the fact that there is a great variety of alternative measures and that not all measures exist in all countries (p. 42-43). An interesting point in terms of equal treatment of EU citizens is raised as well: “Even if the Member States’ legislation seeks to avoid overt discrimination, the fact is that in practice the national courts do not pass suspended sentences combined with rehabilitation measures where convicted offenders have their habitual residence in another Member State. Since the sentencing State cannot carry out supervision measures in the State where the offender has his habitual residence, the offender is liable to be sentenced to actual imprisonment even for a minor offence, with the result that the offender is punished more severely than if he had committed the same offence in his Member State of residence” (p. 43).

The Commission is wondering, in relation to alternative sanctions, which measures should be taken at European level to promote – or even to impose – alternative sanctions for certain offences. Which alternative sanctions should be encouraged? And what steps should be taken to promote these penalties?

With regard to mediation in criminal cases, question 15 of the Green Paper asks: “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?

¹²¹ Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final of 30.04.2004.

¹²² A green paper released by the European Commission is a discussion document intended to stimulate debate and launch a process of consultation, at European level, on a particular topic. A green paper usually presents a range of ideas and is meant to invite interested individuals or organisations to contribute views and information. It may be followed by a white paper, an official set of proposals that is used as a vehicle for their development into law (source: Wikipedia, http://en.wikipedia.org/wiki/Green_paper, consulted on 27.09.2007)

- the mediation procedure?
- the status of mediators, including the extent of their independence from the court?
- training and conditions of eligibility for mediators?" (p. 55).

The Green Paper also deals with the question of what decisions should be eligible for mutual recognition between the Member States. It states that: "The Commission's view is that the establishment of a genuine area of freedom, security and justice demands recognition of all criminal penalties, including alternative sanctions and measures and arrangements emerging from criminal mediation and settlement procedures. It would be quite unacceptable for alternative sanctions to be available in practice only for residents and not for people who live in another Member State" (p. 59).

It continues to wonder if measures and arrangements emerging from criminal mediation and settlement procedures require the offender to compensate for the damage or pay the victim damages, these can be treated as equivalent to agreements covered by civil law. If so, their recognition in other Member States would be governed by the rules described in the Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial law. Further, the question is raised whether agreements emerging from criminal mediation and settlement procedures are enforceable and whether there is a need for European Union rules. The above paragraph is summarised in question 19 of the Green Paper: "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?" (p. 60).

In all, very few responses were received on the questions dealing with mediation. The ones received did not provide a clear-cut image. Some Member States answered that they did not see a need to go beyond Article 10 (for example Finland and Scotland), some because they feared that EU measures would restrict the variety of existing approaches in this area. Others (for example Belgium) stated that there is indeed a need to regulate this further, but that it would not be possible to do this in a short period of time and that it was not a priority. Still others referred to the principle of subsidiarity (for example Italy) and also rejected to go beyond Article 10.

g) Call for tenders for a study on restorative justice initiatives in Europe

In 2004, the Commission issued a call for tenders for a study on 'Review of different restorative justice/mediation initiatives in the European Union'.¹²³ This study had been requested by the European Crime Prevention Network.¹²⁴ The purpose of this study was to give an up-to-date review of different restorative justice/mediation initiatives in the European Union, including the new Member States.

The general objectives of the review were the following:

- To provide an inventory of 1. existing restorative justice/mediation policies/initiatives; 2. the various terms, expressions and vocabulary used in its context; 3. available studies and reports in this field in the 25 EU Member States.
- To describe the various solutions of restorative justice/mediation in the different fields of crime within the 25 Member States, especially 1. the important and innovative elements of the various restorative justice/mediation approaches; 2. criminal or civil procedural conditions that exist in order to support these policies/initiatives; 3. implementation and maintenance characteristics (contexts, partnerships, mechanisms); 4. accompanying measures adopted.

¹²³ Call for tenders "Study - review of different restorative justice/mediation initiatives in the European Union", published in the Official Journal of the European Communities no. 2004/S 200-170328 of 13/10/2004.

¹²⁴ European Crime Prevention Network, *Annual Report 2004*, Brussels, European Crime Prevention Network, 2005, 13.

- To gather up available recent (3 years) statistical data concerning the situation in the field of restorative justice/mediation initiatives in the 25 EU Member States and outside the EU.
- To synthesise the existing empirical evidence on the crime preventive and crime reducing effects of restorative justice/mediation.
- To provide concrete proposals or recommendations to improve the current situation or to better promote these instruments.

The contractors were to make concrete proposals or recommendations to improve the situation in the field of restorative justice/mediation or to better promote these instruments by ways of:

- Identifying good practices and promising approaches.
- Supporting the development of restorative justice/mediation policies.
- Producing knowledge or evidence based policies to support a range of innovative restorative justice/mediation initiatives.
- Providing information on what works to replicate effective programmes successfully.
- Implementing processes (contexts, partnerships, mechanisms).
- Raising awareness among policy makers and mobilising restorative justice practitioners/mediators to apply good practices.
- Documenting not only what works and what does not, but also how programmes are implemented and maintained.

The contractors would be given 8 months to complete this work.

As far as we know, this call was only answered by one organisation. The project was never awarded. In our view, this is really a pity since such a broad study – if done in a thorough way – would have been a very interesting source of information. It would have pointed the Commission’s attention to the many needs that exist on the field. However, one can question whether any organisation would have been able to do this gigantic amount of work in 8 months time.

b) Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union

On 15 March 2006, the European Economic and Social Committee¹²⁵ had adopted an opinion on ‘The prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union’.¹²⁶ This document calls for the framing of a Community policy on juvenile delinquency and the juvenile justice system. In point 3.4, the paper states that because of increased attention to the victim, the justice system has begun to shift from a retributive one to a reparative or restorative one. The paper stresses the importance of restorative justice as an “ideal model for the juvenile justice system since it produces little stigmatisation, is highly educational and is less punitive” (point 4.4). In the description of restorative justice, prevention of re-offending and cutting the costs of criminal proceedings are mentioned as aims of restorative justice, next to the generally more accepted aims of recognising harm done to the victim and trying to provide redress.

¹²⁵ The European Union’s European Economic and Social Committee (EESC) is the consultative assembly of European social and economic partners (mainly representatives of business, employers and trade unions). It can formulate opinions on, inter alia, social policy, social and economic cohesion, environment, education and health.

¹²⁶ Opinion of the European Economic and Social Committee on The prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union, 2006/C 110/13.

i) Funding programmes in the area of freedom, security and justice

The EU Council adopted the first funding programme concerning the area of freedom, security and justice in December 1996. Since then, several calls have included restorative justice-related topics. The European Forum for Restorative Justice has, for example, been granted projects under the following funding programmes: Grotius¹²⁷, AGIS¹²⁸ and Victims of Terrorism: pilot projects¹²⁹. Also under the new Criminal Justice Programme, possibilities for projects dealing with restorative justice are available.

The fact that projects on restorative justice could be introduced under these funding programmes has provided clear support to the development of restorative justice in Europe and to mutual cooperation and help across the national borders of the EU Member States.

3.4. THE INITIATIVES OF THE EUROPEAN UNION: A SHORT EVALUATION

In comparison to the number of initiatives taken within the framework of the Council of Europe, the European Union's activities in the restorative justice field are rather limited. With only one very vague paragraph in a legislative text and a number of (mainly unfulfilled) steps in the direction of taking further action, the European Union has not taken many initiatives in the field yet. As we will see later, in Part IV and V, this has a lot to do with the (perceived or real) limitations of what the European Union can do in the field of 'traditional' or 'mainstream' crime (i.e. not organised crime, terrorist activities, drug and human trafficking, etc.). The questions which will, therefore, be dealt with in the next parts of this report are: What is the European Union's role in the field of criminal justice? Does it fall within the remit of the European Union to deal with restorative justice? And if so, what can it do and what should it do?

But first we will make an additional exercise by comparing the three main international instruments in the field of restorative justice.

¹²⁷ Project No. 98/GR/104 on 'The European Forum for Victim-Offender Mediation and Restorative Justice' which had as its objective to create a forum for the exchange of information, knowledge and experience and for consultation and discussion concerning victim-offender mediation in the framework of a restorative approach of criminal justice. Strictly speaking this project was not awarded to the European Forum (but to the Catholic University of Leuven), but resulted in the creation of the European Forum.

¹²⁸ Project JAI/2003/AGIS/129 on 'Working towards the creation of European training models for practitioners and legal practitioners in relation to restorative justice practices', project JAI/2003/AGIS/088 on 'Meeting the challenges of introducing victim-offender mediation in Central and Eastern Europe', the current project JLS/2006/AGIS/147 on 'Restorative justice: an agenda for Europe' and project JLS/2007/JPEN/233 on 'Building social support for restorative justice'. For more information on each of these projects, please consult following website: <http://www.euforumrj.org/projects.htm>.

¹²⁹ Project JLS/2006/VICT/004 on "Developing standards for assistance to victims of terrorism", which will also look at the possible role of restorative justice principles in dealing with victims of terrorism. For more information, please consult: <http://www.euforumrj.org/projects.htm>.

4. COMPARISON BETWEEN THE THREE MAIN INTERNATIONAL INSTRUMENTS IN THE FIELD OF RESTORATIVE JUSTICE

In what follows, we will compare the three main international instruments in the field of restorative justice, i.e. the Council of Europe Recommendation concerning mediation in penal matters, the United Nations Basic principles on the use of restorative justice programmes in criminal matters, and the European Union's Framework Decision on the position of the victim in criminal proceedings (and more specifically articles 1, 10 and 17 thereof).

In a first step, we will look at the status of these documents. Second, we will look at the subjects covered and definitions used. Lastly, the provisions of the different instruments will be compared.

4.1. STATUS AND LEGAL EFFECT

Amongst the three documents, the Framework Decision is the only one to have any legal effect as framework decisions are binding as to the results to be achieved. Both the Council of Europe Recommendation and the UN Basic principles have 'only' moral force and may provide practical guidance to states when taking initiatives in the field of restorative justice. This is not to say, though, that in practice the Framework Decision has exerted the most influence. Because of the vagueness of Article 10, and because of the discretion of the Member States in the implementation of the provisions, it might be that the two other instruments (and mainly the Council of Europe Recommendation) with their more detailed approach, have exerted much more influence. Also, it would be wrong to assume from the outset that binding legislation has a greater effect on policy developments in Member States than do non-binding initiatives.¹³⁰ However, to determine which instrument had the most influence would be a subject for an entirely different study.

4.2. SUBJECTS COVERED AND DEFINITIONS USED

Both the Recommendation and the Framework Decision seem to be limited to the practice of mediation in criminal matters. The Basic principles, on the other hand, have a much broader perspective since they provide for basic principles on the use of restorative justice programmes in criminal matters. Restorative processes may include mediation, but also conciliation, conferencing and sentencing circles, and may involve, next to victim and offender, also other individuals or community members affected by a crime. In the Explanatory Memorandum of the Recommendation, however, it is mentioned that "mediation in penal matters takes a great many forms", amongst which victim-offender mediation, but also family and community group conferences and reparation negotiation schemes are mentioned. This means that both the Council of Europe and the United Nations documents have kept the perspective open for newly developing restorative justice practices, whilst the EU Framework Decision is strictly only dealing with mediation. It could have been useful if this more open perspective would have been incorporated in the EU document as well in order to allow for more flexibility in the choice of 'technique' through which to put restorative justice into practice and in order to stimulate innovation in developing restorative justice.

The definitions used in the Recommendation and the Framework Decision respectively are revealing of the importance given to certain basic restorative justice principles. According to the Framework Decision, mediation in criminal cases is "the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person".¹³¹ The Council of Europe Recommendation

¹³⁰ See part V for a more detailed discussion of the role and value of non-binding initiatives versus binding initiatives.

¹³¹ Art. 1 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, OJ L 82/1 of 22.3.2001.

defines mediation in penal matters as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”.¹³² When comparing these two definitions, one can see how much further the Recommendation – be it in its Explanatory Memorandum – is going than the Framework Decision. It explicitly mentions some basic principles of restorative justice, whereas these are not included in the Framework Decision: free consent of the parties to participate, active participation of the parties, and impartiality of the mediator. It is not clear why these very basic principles of mediation were not included in the definition provided in the Framework Decision.

Rather than defining restorative justice or mediation, the UN Basic principles describe a number of terms that are used¹³³:

- ““Restorative justice programme” means any programme that uses restorative processes and seeks to achieve restorative outcomes”.
- ““Restorative process” means any process in which the victim and the offender, and where appropriate, any other individual or community member affected by the crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles”. From this it becomes clear that the Basic principles focus on a much broader array of practices than just mediation. It is not clear, however, what the function of the word ‘generally’ is in the first sentence. Does it mean that according to the Basic principles a facilitator is not always needed? We cannot find an answer to this based on the rest of the text. Also, the impartiality of the facilitator is not stressed here, but this is covered by the description of the word ‘facilitator’ (see below).
- ““Restorative outcome” means any agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the integration of the victim and the offender”. Here, the results to be achieved by and the aims of restorative processes are being explained. These are not mentioned by either the Framework Decision or the Recommendation, at least not in the body of the legislative text. The Explanatory Memorandum with the Recommendation, however, describes mediation in penal matters, and its possible outcomes, in much more detail.
- ““Parties” means the victim, the offender and other individuals or community members affected by a crime who may be involved in a restorative process”. The fact that the possible involvement of other individuals or community members is mentioned is a consequence of the broader field of application of the Basic principles. Both the Recommendation and the Framework Decision only talk about the victim and offender/author of the offence as parties.
- ““Facilitator” means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process”. The use of the word ‘facilitator’ instead of ‘mediator’ is again due to the fact that the UN Basic principles apply not only to mediation. The Framework Decision talks about a competent person, whereas the Recommendation mentions “an impartial third party (mediator)”.

There are three broad lessons that we can learn from these different approaches to the subject of restorative justice, and which we also see in the more detailed differences on which we comment in section 4.3.

First, they reflect the underlying lack of agreement among restorative justice (and victim-offender mediation) philosophers and practitioners as to what constitutes its goals. In broad terms these range along a continuum from a minimalist conception in which restorative justice substitutes in appropriate cases the conventional criminal justice responses to

¹³² Point I of Recommendation No. R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, adopted on 15 September 1999.

¹³³ Point I of the annex to ECOSOC Resolution 2002/12 on “Basic principles on the use of restorative justice programmes in criminal matters”, adopted on 24 July 2002.

offending behaviour, to a maximalist conception in which restorative justice principles inform and guide all human decision-making.

Second, even where there is a working consensus on how restorative justice might be understood and its precepts accepted as applicable to a state's criminal justice arrangements, all decisions affecting the design and delivery of those arrangements are intensely political. By definition these are decisions on which consensus across states will be difficult to achieve, and will rely on hard won compromise and on an acceptance of the least contentious statements of approval if all states are to sign up.

And finally, even where there is political consensus, the means by which that consensus is to be given legal effect is also a politically contentious matter. In essence, the question is whether states are prepared to subject their criminal justice officials either to the imposed (or recommended) guidance contained in binding (or advisory) statements as to how they should act, or to the possibility of their being subject to a supervisory jurisdiction beyond the national courts.

4.3.A COMPARISON OF THE PROVISIONS OF THE THREE INSTRUMENTS

In what follows, we present a schematic overview of the different provisions of the three instruments. This allows us to make a more detailed comparison and analysis of the differences between them. In order to build up this analysis, we have grouped the provisions in the three documents under five headers: general principles, legal basis and legal rights, the relationship with criminal justice, the operation of restorative justice services and the continuing development of restorative justice.

From the schematic analysis, two things become clear immediately. One, whilst the Council of Europe Recommendation and the UN Basic principles deal with restorative justice practices in more detail, the EU Framework Decision only wants to promote the practice, whilst leaving the regulation of it to the Member States. Second, the Council of Europe Recommendation and the UN Basic principles have much in common.¹³⁴

In terms of general principles, the main difference is that the UN Basic principles do not stress the importance of restorative justice services being generally available¹³⁵, and having sufficient autonomy within the criminal justice process. They do provide a possibility for non-confidential discussions in restorative justice processes. This is probably due to the broader scope of the UN Basic principles in terms of practices covered. In sentencing circles, for example, representatives of the community of both victim and offender are invited to participate in the process. One of the ideas behind inviting representatives of the community is to allow these people to communicate with the rest of the community about what went on in the process. In the UN Basic principles, the availability at all stages of the criminal justice process is made subject to national law. A last difference is that the prohibition to disclose discussions held in a restorative process is made subject to the requirements of national law. It is not clear to us what the drafters of the UN Basic principles had in mind when they introduced this limitation.

As regards the legal basis and legal rights, the UN Basic principles make the right to legal counsel and the right to translation or interpretation subject to national law, whereas the Council of Europe Recommendation does not. The Recommendation, on its side, mentions the importance of applying special regulations and legal safeguards for minors also in restorative justice processes.

¹³⁴ This should not come as a surprise since the Council of Europe Recommendation was used as a basis for drafting the UN Basic principles.

¹³⁵ This is one example of a point that was originally included in the draft prepared by the Working Party on Restorative Justice, but which was subsequently deleted by the Expert Group which prepared the UN Resolution. For the original draft, see Van Ness (s.d.).

Although there are quite a number of differences between the UN Basic principles and the Council of Europe Recommendation in terms of how they see the relationship with criminal justice, most of these are not considerable. The most important difference is that the UN Basic principles state that one of the pre-conditions for starting up a restorative justice process is that there is sufficient evidence to charge the offender. This is not required by the Recommendation, which only states that the basic facts of a case should be acknowledged by both parties. The UN Basic principles, on their side, foresee more safeguards in case of failure to reach an agreement or failure to implement an agreement. Whereas the Recommendation only states that in those cases the criminal justice authorities should take a decision as to how to proceed without delay, the UN Basic principles add that: failure to reach an agreement should not be used in subsequent legal proceedings; failure to implement an agreement (other than a judicial decision or judgement) should not be used as justification for a more severe sentence in subsequent legal proceedings; if the agreement is not implemented, the case should be referred back to the restorative justice service, or to the criminal justice authorities if this is required by national law. The UN Basic principles also state that even if a restorative process is not suitable or possible, the criminal justice authorities could be guided by restorative justice principles in the way they deal with victims and offenders.

There are a number of differences with respect to the referral of cases to restorative justice services. The Council of Europe Recommendation states that the decision to refer a case should be taken by criminal justice authorities, whilst the UN Basic principles stay silent about who can refer cases. The latter suggest that cultural differences and the safety of the parties are elements to be taken into account when referring a case, whilst the Recommendation only mentions disparities leading to power imbalances (which is also mentioned by the UN Basic principles). An element referred to by the Recommendation and not by the UN Basic principles is that the main parties should be able to understand the meaning of the process. The Recommendation mentions that a reasonable time-limit should be given within which the criminal justice authorities should be informed of the state of the process. The UN Basic principles do not foresee such a requirement. A final difference is that it seems that the Recommendation states that judicial decisions incorporating mediated agreements can only have the effect of a discharge, whilst this does not seem to be the case for the UN Basic principles.

The main difference between the UN Basic principles and the Council of Europe Recommendation in terms of the operation of restorative justice services lies in the importance given to the training of facilitators. This is probably due to the broader scope (both in terms of practices covered, as in terms of geography) of the UN Basic principles. One can indeed wonder whether one should expect from, for example, a respected elder in an aboriginal community who has been responsible for solving conflicts in his small community for a long time already, to follow an organised training programme to be allowed to facilitate a circle sentencing process. If this would be appropriate, as the UN Basic principles foresee, training would be advisable. However, if it is not appropriate, one should not require formal training. Again it should be mentioned that the Council of Europe Recommendation stresses that services should have sufficient autonomy, whilst the UN Basic principles stay silent about this. The Recommendation also foresees that services be monitored by a competent body. Compared with the UN Basic principles, the Recommendation pays more attention to the relationship between facilitators and criminal justice authorities. It explicitly mentions that the facilitators should report on the steps taken and the outcome of the process, but that this report should not disclose the contents of the sessions, nor express any judgement on behalf of the parties' behaviour. Also, the authorities should provide all relevant facts of the case and all necessary documents to the facilitator before the start of the process. The Recommendation also explicitly mentions that the facilitator's obligation to treat the discussions as confidential must be broken if any information about imminent serious crimes comes to light in the course of the process. This is not mentioned in the UN Basic principles.

Finally, with regard to the continuing development of restorative justice, the UN Basic principles deal with this in much more detail than the Council of Europe Recommendation.

Whilst the latter mentions only that there should be regular consultation between the authorities and restorative justice services to develop common understanding, the UN Basic principles add some goals for this regular consultation. And, whereas both documents encourage countries to promote research on, and evaluation of, restorative justice practices, the UN Basic principles set out the goals for research and evaluation, and what should be done with the results. The UN Basic principles also urge countries to consider the development of national strategies and policies aimed at the development of restorative justice and a culture favourable to it.

The purpose of the above comparison is not to make a normative statement on the contents of these three leading international/supranational instruments in the field of restorative justice. It is rather to show the difference in degree of detail and the different accents that are being placed on particular aspects. One question that arises from this comparison is how much detail is helpful. At one end of the spectrum we find the Council of Europe Recommendation and the UN Basic principles, and at the other end the Council Framework Decision with its open-ended provisions (or even silence). We will address this question in Part V.

	Council of Europe Recommendation	United Nations Basic principles	European Union Framework Decision
General principles			
Free consent of the parties needed	X	X	
Consent can be withdrawn at any moment during the process	X	X	
Confidentiality of discussions	X	X, unless conducted in public	
Discussions may not be used or disclosed subsequently, except with the agreement of the parties	X	X, or as required by national law	
A generally available service	X		
Available at all stages of the criminal justice process	X	X, subject to national law	X, prior to or during criminal proceedings
Sufficient autonomy for services in their relation to the criminal justice system	X		
Legal basis and legal rights			
Legislation should ... the use of restorative justice services	facilitate	govern ¹³⁶	promote, for offences which the Member State considers appropriate ¹³⁷
Need for guidelines defining the use of restorative justice practices	X	X	
Guidelines should address, amongst others:			
- the conditions for the referral of cases	X	X	
- the handling of cases afterwards	X	X	
- the qualifications, training and assessment of facilitators		X	
- the administration of services		X	
- standards of competence and rules of conduct		X	
Fundamental procedural safeguards should apply	X	X	
Right to legal counsel for the parties	X	X, subject to national law	
Right to translation/interpretation for the parties	X	X, subject to national law	
Right to parental assistance for minors	X	X	
Special regulations and legal safeguards governing minors' participation in legal proceedings should also apply	X		

¹³⁶ The text mentions “guidelines and standards, with legislative authority when necessary”.

¹³⁷ Strictly speaking, the text states that “Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure”. This should be done by bringing into force the necessary laws, regulations and administrative provisions.

	Council of Europe Recommendation	United Nations Basic principles	European Union Framework Decision
The relationship with criminal justice			
The decision to refer a case should be taken by criminal justice authorities	X		
The outcome should be assessed by a criminal justice authority	X		
Before agreeing to participate, parties should be fully informed of:			
- their rights	X	X	
- the nature of the process	X	X	
- the possible consequences of their decision	X	X	
Pre-conditions for starting up the process:			
- no coercion or inducement by unfair means to accept to participate	X	X	
- the main parties should be able to understand the meaning of the process	X		
- the basic facts of a case should be acknowledged by both victim and offender	X	X	
- there should be sufficient evidence to charge the offender		X	
Elements to be taken into account when referring a case:			
- disparities leading to power imbalances	X	X	
- cultural differences		X	
- the safety of the parties		X	
Participation should not be used as evidence of admission of guilt in subsequent legal proceedings	X	X	
Agreements should, where appropriate, be incorporated into judicial decisions or judgements		X, or be judicially supervised	X ¹³⁸
Failure to reach an agreement alone shall not be used in subsequent legal proceedings		X	
Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings		X	
A reasonable time-limit should be given within which the criminal authorities should be informed of the state of the process	X		

¹³⁸ The text reads: “Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account”.

	Council of Europe Recommendation	United Nations Basic principles	European Union Framework Decision
Judicial decisions incorporating mediated agreements: - should have the same status as judicial decisions or judgements - should preclude prosecution in respect of the same facts	X, but only referring to discharges X, but only referring to discharges	X X	
When no agreement can be reached, or the agreement is not implemented, criminal justice authorities should take the decision as to how to proceed without delay	X	X	
If the agreement is not implemented, the case should be referred back to the service, or where required by national law, to the criminal justice authorities		X	
When a restorative process is not suitable or possible, criminal justice authorities should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community		X	
The operation of restorative justice services			
Services should be governed by recognised standards	X	X	
Standards should address, amongst others: - the conditions for the referral of cases - the handling of cases afterwards - the qualifications, procedures for the selection, training and assessment of facilitators - the administration of services - standards of competence and rules of conduct/ethical rules	X X	X X X X X	
Services should have sufficient autonomy	X		
Services should be monitored by a competent body	X		
Facilitators should: - be recruited from all sections of society - possess good understanding of local cultures and communities - be able to demonstrate sound judgement and interpersonal skills necessary to practice - receive initial training before taking up mediation duties - receive in-service training	X X X X X	X X, where appropriate	

	Council of Europe Recommendation	United Nations Basic principles	European Union Framework Decision
Training of facilitators should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders, and basic knowledge of the criminal justice system	X		
Before the process starts, the facilitator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities	X		
Mediation should be performed: <ul style="list-style-type: none"> - in an impartial manner - based on the facts of the case - based on the needs and the wishes of the parties - with respect for the dignity of the parties - efficiently, but at a pace that is manageable for the parties - <i>in camera</i> 	X X X X X X	X X	
Facilitators should: <ul style="list-style-type: none"> - ensure that the parties act with respect towards each other - take into account disparities leading to power imbalances - take into account cultural differences - take into account the safety of the parties - provide a safe and comfortable environment - be sensitive to the vulnerability of the parties - enable the parties to find a relevant solution among themselves - convey any information about imminent serious crimes, which may come to light in the course of the process, to the appropriate authorities or to the persons concerned - report to the criminal justice authorities on the steps taken and on the outcome of the process 	X X X X X	X X X X X	
Agreement should: <ul style="list-style-type: none"> - be arrived at voluntarily - contain only reasonable and proportionate obligations 	X X	X X	
The facilitator's report should not reveal the contents of sessions, nor express any judgement on the parties' behaviour during the process	X		

	Council of Europe Recommendation	United Nations Basic principles	European Union Framework Decision
Continuing development of restorative justice			
There should be regular consultation between criminal justice authorities and restorative justice services to: <ul style="list-style-type: none"> - develop common understanding - enhance the effectiveness of processes and outcomes - increase the extent to which services are used - explore ways in which restorative approaches might be incorporated into criminal justice practices 	X	X X X X	
Member States should promote research on, and evaluation of, restorative justice practices	X	X, in cooperation with civil society where appropriate	
The goals of research and evaluation are to assess the extent to which restorative justice practices: result in restorative outcomes, serve as a complement or alternative to the criminal justice process, provide positive outcomes for all parties		X	
Evaluation must inform modification of restorative justice practices		X	
The results of research and evaluation should guide further policy and programme development		X	
Countries should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.		X	

5. CONCLUSIONS

In this part we have studied what the Council of Europe, the United Nations and the European Union have done in the field of restorative justice. Clearly the Council of Europe has been the most active in this matter. However, the fact that the other two institutions have taken less initiatives should not necessarily be attributed to a lack of interest. The fact that in the framework of the United Nations any legislative initiative should take into account the interests of 192 countries with very different backgrounds is a major stumbling block. For the European Union then, legislative initiatives can have a legally more persuasive character than in the Council of Europe or the United Nations. Hence, there is more reluctance among the Member States to act. This reluctance will be explored, amongst other things, in the next part (IV) of this report.

PART IV: THE ROLE OF THE EUROPEAN UNION IN THE FIELD OF CRIMINAL JUSTICE

In order to determine what could be the role of the European Union in the further development of restorative justice in Europe it is important to first of all explain its role in the field of criminal justice in general.

For readers who are not very familiar with the EU we begin by identifying some key points in its development over the past 50 years. This will be followed by an examination of the EU's mandate in the field of criminal justice and its framework for action in this field. This will allow us to, in Part V, describe the possibilities for further action in the field of restorative justice.

It is important to note that it is also possible for the EU to influence restorative justice developments outside the realm of criminal justice, for example through policies and instruments related to youth, education and civil society, and through policies and instruments adopted in the framework of the common market. An example can clarify this. The Hungarian Central Office of Justice, Probation Service Methodology Department, which is responsible for the implementation of victim-offender mediation in Hungary, was informed by the Hungarian Ministry of Justice that victim-offender mediation should comply with the Directive of 2006 on services in the internal market.¹³⁹ This Directive aims to ensure the free movement of services within the European Union, and contains regulations designed to remove barriers to the freedom of establishment for service providers in Member States. In Hungary, victim-offender mediation is a free service of the state, provided to victims and offenders by state-employed probation officers. Since 2008, the law in Hungary has been amended to the effect that lawyers can also work as mediators in criminal matters, provided that they have taken appropriate training and have a contract with the Office of Justice. Lawyers will then be paid by the case. The Office of Justice had sought to limit the number of contracted lawyers to 50. However, according to the Hungarian Ministry of Justice, under this Directive, the provision of victim-offender mediation should be regarded as delivering a service, which means that liberalisation should take place in this field. Continuing this reasoning, in the future only professional requirements could be used to limit access to the 'profession' of mediator. It would not be possible to limit the delivery of mediation services to probation officers or lawyers, and certainly not to limit the number of lawyers (or any other group).¹⁴⁰ To say whether the Hungarian Ministry of Justice's interpretation of the Directive is correct lies beyond our expertise. However, it is clear that the potential for the EU to influence restorative justice developments outside the purely criminal justice related provisions exists.¹⁴¹ Where it is useful, reference will be made to these perspectives in part V of this report.

¹³⁹ Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market.

¹⁴⁰ Information provided by Edit Törzs of the Central Office of Justice in an e-mail of 16 June 2008.

¹⁴¹ Another example of the reach of Community Law in criminal justice matters is provided by Directive 2004/80/EC relating to compensation to crime victims. This requires Member States to ensure that the victim of a 'violent intentional crime' committed in a Member State in which the victim is not habitually resident has the right to submit an application for 'compensation' in that State. It arises from a decision of the European Court of Justice that tourism fell within free movement of persons, and that the absence of a state scheme to compensate victims when injured constituted a restriction to the free movement.

1. THE EMERGENCE AND EVOLUTION OF THE EUROPEAN UNION¹⁴²

1.1. FROM PARIS TO LISBON

The European Union is based on the three European Communities, which were established by treaty: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom or EAEC).

The ECSC Treaty was signed in Paris on 18 April 1951 between Belgium, France, Germany, Italy, Luxembourg and the Netherlands and established a common market in the then crucial industries of coal and steel.¹⁴³ By signing the Treaty, these six countries agreed to transfer the administration of these industries to an independent supranational institution.

The success of the ECSC initially led to plans also to bring political matters, such as defence and foreign policy, under the umbrella of a supranational organisation. However, this plan failed due to the resistance of France and resulted in a re-orientation to a more realistic economic and social approach to European integration. The EEC Treaty, which was signed on 25 March 1957 between the same six countries, aimed to establish a common market and the progressive approximation of the Member States' economic policies. It was based on four economic freedoms: the free movement of goods, persons, services and capital.

At the same time as the EEC Treaty, the Treaty establishing the EAEC was signed. Its aim was to create the conditions necessary for the speedy establishment and growth of nuclear industries.

Since its signing, the EEC Treaty has been supplemented by different treaties. The Single European Act (1986) conferred new competences on the Community but did not change its general objectives. The 1992 Treaty on European Union (TEU) extended the sphere of action of the Community to such an extent that the title 'European Economic Community' was replaced by 'European Community' (EC). The competences of the Community were considerably enlarged, also outside the economic sphere, and the so-called 'pillar' structure was created (see 1.4. of this Part). It also, for the first time, extended the actual objectives of the Community. The 1997 Treaty of Amsterdam further supplemented its objectives and conferred some new areas of competence on the Community. In addition, each of these Treaties reformed the institutional framework of the Community, work that was continued by the 2001 Treaty of Nice.

In a declaration annexed to the Nice Treaty it was agreed to perform an in-depth evaluation of the Union's institutions and to propose appropriate reforms in the wake of the enlargement of the European Union. For that purpose, a Convention on the future of Europe was convened. Its tasks were to: determine the aim of European integration; clarify the distribution of competences between the European Union, the Member States and the regions; simplify the Treaties and draft a Constitution of the European Union; integrate the Charter of Fundamental Rights; and define the role of national parliaments. The Convention formulated a draft Treaty establishing a Constitution for Europe, which was discussed by the representatives of the national governments during an Intergovernmental Conference. These discussions culminated in the unanimous adoption of the draft Constitution on 18 June 2004, and in the signing of the European Constitution in October 2004. However, in 2005, both the people of France and the Netherlands rejected the Constitution in a referendum, bringing the process to a standstill.

¹⁴² The next paragraphs are largely based on Part I and Part III, Chapter 10 of Lenaerts and Van Nuffel (2005).

¹⁴³ The ECSC Treaty was signed for a period of 50 years and came to an end in 2002.

On the occasion of the 50th anniversary of the signature of the Treaties of Rome, the process of modernising the European Union was rekindled. The Heads of State or Government declared that they were aiming to place the European Union on a renewed common basis before the European Parliament elections in 2009. On 23 June 2007, the leaders of the European Union agreed on a mandate for an Intergovernmental Conference which was to draw up a new Treaty on institutional reform by the end of 2007. The final text as developed by this Intergovernmental Conference was approved during an informal European Council in Lisbon on 18-19 October 2007 and was signed by the Member States on 13 December 2007 at a summit in Lisbon. The Treaty of Lisbon amending the Treaty on European Union on the Treaty establishing the European Community (Treaty of Lisbon, also known as the Reform Treaty), was due to come into force in 2009, in time for the 2009 European elections, and would carry out most of the reforms previously proposed in the rejected European Constitution. However, it first has to be ratified by all EU Member States. Because of the Irish ‘no’ in the referendum organised about the Treaty of Lisbon, it is – at the time of writing – unclear what is to happen.

1.2. FROM 6 TO 27

The number of Member States of the Communities has been enlarged six times beyond the initial six, which were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. In 1973, Denmark, Ireland and the United Kingdom joined. In 1981, Greece acceded to the European Communities, to be followed by Portugal and Spain in 1986. Austria, Finland and Sweden joined in 1995. In 2005 a total of 10 new Member States joined: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and the Slovak Republic. Finally, in 2007, Bulgaria and Romania brought the total number of Member States to 27.

In the meanwhile, a number of other countries are knocking on the EU door. Croatia applied for EU membership in 2003, and accession negotiations were opened on 3 October 2005. It is likely that Croatia will accede to the EU between 2010 and 2012. The former Yugoslav Republic of Macedonia applied to become an official candidate in 2004. Its candidature was accepted at the end of 2005, but no date has yet been set to start negotiations. The status of Turkey with regard to the EU is a matter of considerable controversy. It has been an associate member of the European Union since 1964 following the signing of the EEC-Turkey Association Agreement. It formally applied for full membership in 1987, but 12 years passed before it was recognised as a candidate country at the Helsinki Summit in 1999. Membership negotiations were officially opened on 3 October 2005, but it is not clear what will result from this. Albania, Bosnia and Herzegovina, Serbia and Montenegro are considered ‘potential candidate countries’.

1.3. SUPRANATIONAL VERSUS INTERGOVERNMENTAL

What makes the European Communities so different from such other international organisations as the Council of Europe and the United Nations is the supranational character of Community law.

- (a) The Communities are of course also international organisations since they have been created based on treaties concluded between sovereign States. As subjects of law, the Communities act vis-à-vis non-member countries in accordance with the rules of international law. However, the relations *between* Member States, as long as they relate to fields covered by Community law, are no longer governed by international law. “Community law governs the whole set of relationships between Member States, Community institutions and individuals in a ‘supranational’ context, of which the principal characteristics are as follows: the Community has institutions which act independently of the Member States in terms of their composition and manner of operation;
- (b) the Community may take decisions by majority, yet they will bind all Member States;

- (c) the institutions of the Community implement those decisions or are responsible for supervising that they are properly implemented by the Member States; and,
- (d) the founding treaty and decisions of the Community may give rise to rights and obligations on the part of individuals which are directly enforceable by courts in the Member State, even in the presence of conflicting provisions of national law” (Lenaerts and Van Nuffel, 2005: 12).

In contrast, intergovernmental organisations generally operate on the basis of the voluntary participation of government representatives. They have no independent institutions and cannot bind a State against its will (no majority voting, reservations can be made). Decisions taken by intergovernmental organisations do not in principle have the force of law within national legal systems unless they are specifically adopted therein and generally do not confer any rights on individuals.

1.4. INTERGOVERNMENTAL COOPERATION WITHIN THE EUROPEAN UNION

Since the start, the Member States of the European Union also cooperated at an intergovernmental level in matters that did not (yet) fall within the competence of the Communities. At the beginning of the 1970s, the wish to expand the area of activity of the Communities was voiced. In addition, the Member States wanted to bring together their activities of a supranational nature and the purely intergovernmental cooperation under the roof of one *European Union*. This resulted in the signing of the 1992 Treaty on European Union, which established a legal link between the Communities and the intergovernmental policies and forms of cooperation. Since then the European Union is based on three pillars. The first one is the Community pillar of the European Union. It builds further on the EC, ECSC and EAEC. The other two, which are common foreign and security policy (second pillar) on the one hand, and police and judicial cooperation in criminal matters (third pillar; initially: justice and home affairs) on the other hand, are of a more intergovernmental nature. This means that, in contrast to the first pillar where decision making is in the hands of the Community institutions, in the second and third pillar decisions are taken by the national governments collectively.¹⁴⁴

If the Treaty of Lisbon will come into force, this pillar structure will vanish again since the European Community is to be fully absorbed into the European Union, and the three pillars of the EU are to be merged into a single structure.

1.5. A SINGLE INSTITUTIONAL FRAMEWORK¹⁴⁵

In order to ensure consistency and the continuity of the activities carried out in order to attain the objectives of the European Union, a single institutional framework has been created. This institutional framework consists of the European Council and the institutions of the Communities (the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors). Each institution performs a different function according to whether it is dealing with Community matters or with matters related to the supplementary policies and forms of cooperation (second and third pillars).

The *European Council* is composed of the Heads of State or Government of the Member States and the President of the European Commission, assisted by the Ministers of Foreign Affairs of the

¹⁴⁴ One should note, however, that also in the second and third pillar certain Community institutions have a role to play. For example, the European Parliament has the right to be consulted on measures dealing with police and judicial cooperation in criminal matters.

¹⁴⁵ The Lisbon Treaty will make considerable changes to the institutional framework but since it is unclear whether it will enter into force, it is preferable to describe the current context only. Moreover, even if the Lisbon Treaty would eventually enter into force, many changes will only take effect progressively.

Member States and a member of the Commission. It meets twice a year to provide the Union with the necessary impetus for its development and to define the general political guidelines. It takes decisions by consensus.

The *Council of the European Union* (the Council) consists of a representative of each Member State at ministerial level, authorised to commit the government of the State. Depending on the subject-matter of the meeting, the Council can meet in different configurations (for example the General Affairs and External Relations Council, the Justice and Home Affairs Council, etc.). It makes the policy choices necessary to attain the objectives set out in the Treaties. Each Member State holds the Presidency of the Council in rotation for a period of six months. The Council, together with the European Parliament, is the highest legislative body within the Union in respect of Community competences. Decision making in the second and third pillar falls almost exclusively to the Council. Together with the European Parliament it has substantial budgetary powers. The Council has the power to coordinate the Member States' economic policies and may even impose sanctions. Depending on the subject matter, voting in the Council will be by simple majority, qualified majority or unanimity.

The *European Parliament* is the voice of the European citizens. The 732 members of the European Parliament (MEPs) are elected by direct universal suffrage for a period of five years. The number of MEPS per Member State reflects the population size of each country. The European Parliament is entitled to give advice on any questions concerning the Communities and to adopt resolutions on such questions. It may also participate in the adoption of Community instruments in a number of ways (co-decision, cooperation, assent or advice), depending on the matter at hand. It has significant powers in the field of the Union's external relations, in particular in connection with the conclusion of international agreements by the Community. Together with the Council, the European Parliament is the budgetary authority of the Union. Finally, it also supervises the work of other European Union institutions and bodies. As such, it has the right to censure the European Commission.

The *European Commission* is the European executive. It consists of a college of 27 Commissioners and an administrative body composed of Directorates-General which each deal with a specific area of policy. The European Commission is responsible for proposing legislation, implementing decisions, upholding the Treaties and the general day-to-day running of the Union.

The *Court of Justice* and the *Court of First Instance* ensure that in the interpretation and application of the Treaties the law is observed. An in-depth description of its different tasks and instruments would take us too far. It should suffice here to say that in respect of the non-Community field of police and judicial cooperation in criminal matters its powers are limited. In the next paragraphs, reference will be made to the European Court of Justice's role in this field.

The *Court of Auditors*, finally, examines the accounts of all revenue and expenditure of the Community.

Besides these institutions, there are a number of bodies established by or pursuant to the Community Treaties and a large number of non-Community bodies.

2. CRIMINAL JUSTICE: A RELATIVELY NEW POLICY AREA

2.1. FIRST COOPERATION AND AGREEMENTS

It was not until the Maastricht Treaty (TEU) of 1992 that police and judicial cooperation were brought within the remit of the European Union. This does not mean, however, that there was no cooperation in this field before that date. Countries already had the experience of working together on these issues on a voluntary basis within the structure of the Council of Europe. Intergovernmental cooperation between ministerial departments of the Member States of the European Communities with regard to cross-border aspects of justice and home affairs was, at the beginning, rather fragmentary, concentrating on terrorism and drug-related crime (Elsen, 2007: 14). For example, in December 1975, the European Council approved the initiative of ministers from the Member States to set up the Trevi Group. This Group would meet twice a year to discuss questions of law and order, such as terrorism and other forms of international lawlessness (Lenaerts and Van Nuffel, 2005: 36).

Cooperation in this field was increased under the influence of the agenda of the European Communities. Most noticeably, the internal market programme, which looked forward to the abolition of checks on persons at the internal frontiers of the Community by the end of 1992, made cooperation in the sphere of customs control and combating criminality matters of essential importance (Lenaerts and Van Nuffel, 2005: 37). As Bogensberger and Troosters state, “Hand in hand with the shaping of a Europe without internal borders, the EU had to face an increased vulnerability regarding its internal security, as the four basic freedoms (free movement of persons, capital, goods and services) have also provided an advantageous environment for criminals” (Bogensberger and Troosters, 2006: 333). Nevertheless, willingness to cooperate in this field varied strongly from country to country.¹⁴⁶ This is shown, for example, by the Schengen cooperation that established, amongst other things, free movement of persons without checks at internal borders and stepped up checks at external borders of the Schengen countries (Lenaerts and Van Nuffel, 2005: 38). This Schengen cooperation developed in the period 1985-1990 outside the framework of the European Union, on an intergovernmental basis, and was initially limited to five Member States.

2.2. THE MAASTRICHT TREATY

As mentioned earlier, the Maastricht Treaty allowed the institutions of the Union to pursue policies outside the scope of the Communities in two areas: common foreign and security policy (second pillar) and cooperation in the fields of justice and home affairs (third pillar). Cooperation in the fields of justice and home affairs was dealt with under Title VI of the TEU and listed a number of matters of common interest to the Member States. It provided a framework for dialogue, mutual assistance, joint effort and cooperation between the police, customs, immigration services and justice departments of the then 15 Member States of the EU. Cooperation between justice administrations covered cooperation in civil and criminal matters.

The advantage of bringing these matters under the EU roof was that it allowed for more coherent action than in the past, involving all the European actors: the European Commission (which shared the right of initiative with the Member States), the European Parliament (which had to be consulted), the Council and its Secretariat, and the European Court of Justice (which received

¹⁴⁶ The United Kingdom, for example, is notorious for its resistance towards cooperation in, amongst others, the criminal justice field.

limited jurisdiction¹⁴⁷). However, according to Charles Elsen¹⁴⁸, the third pillar showed some inherent weaknesses: “the legal instruments were to some extent inappropriate, the working structures in the Council were cumbersome, the objectives described in the Treaty as ‘matters of common interest’ (including judicial cooperation in criminal matters and police cooperation), were not clearly defined and the unanimity rule was a severe handicap” (Elsen, 2007: 15).

2.3. THE AMSTERDAM TREATY

With the Amsterdam Treaty, a more decisive step was taken in the development of police and judicial cooperation. It brought judicial cooperation in civil matters and immigration and asylum policy within the sphere of the EC Treaty¹⁴⁹, and Title VI was renamed ‘provisions on police and judicial cooperation in criminal matters’ (instead of cooperation in the fields of justice and home affairs). More effective legal instruments were created and judicial and democratic review extended by increasing the roles of the European Court of Justice and the European Parliament.¹⁵⁰ Most importantly, however, the aim of the third pillar was extended to cover the provision of a high level of freedom, security and justice for citizens. “Maintaining and developing the Union as an Area of Freedom, Security and Justice” was added as one of the objectives of the European Union by the Amsterdam Treaty, and hence police and judicial cooperation “ceased to be matters merely of ‘common interest’ and became main objectives of the European Union” (Elsen, 2007: 15).

2.4. OPERATIONALISATION OF THE TREATY ARTICLES

It is the European Council that determines the priorities for action in the field of police and judicial cooperation in criminal matters. In the wake of the adoption of the Treaty of Amsterdam, the Justice and Home Affairs Council adopted an ‘Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice’.¹⁵¹ This Action Plan, often referred to as the Vienna Action Plan, set out priorities and measures to be taken in order to achieve the area of freedom, security and justice within the EU.

¹⁴⁷ This jurisdiction was limited to conventions adopted within the framework of the third pillar. However, this possibility was never used as no such conventions entered into force under the aegis of the Maastricht Treaty.

¹⁴⁸ Former Director General at the Council of the European Union.

¹⁴⁹ Although these items were thereby brought under the first pillar of the EU, not all of the first pillar procedures were made applicable.

¹⁵⁰ The Amsterdam Treaty in fact considerably enlarged the jurisdiction of the Court of Justice. It was given jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission, to rule on any dispute between Member States regarding the interpretation or the application of third pillar acts, and to rule on any dispute between Member States and the Commission regarding the interpretation or the application of third pillar conventions. A Member State can now also accept the Court’s jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, the interpretation of conventions and the validity and interpretation of measures implementing them (Bogensberger and Troosters, 2006: 335; Lenaerts and Van Nuffel, 2005: 447-448). Twelve of the first fifteen Member States (all except the UK, Ireland and Denmark) gave their national courts permission to send references to the Court of Justice, as have two of the new Member States (the Czech Republic and Hungary). Of the 14 Member States accepting the jurisdiction of the Court, 12 have decided that all their courts can send questions to the Court of Justice, whilst two have opted to limit that power to the final courts only (Spain and Hungary) (Peers, 2007b).

¹⁵¹ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, O.J. C19/01 of 23.1.1999.

In Tampere, on 15 and 16 October 1999, the European Council held a special meeting on the creation of an area of freedom, security and justice. The presidency conclusions provided further political guidelines and concrete objectives for action that had to be achieved within the following five years.¹⁵² The European Commission developed a scoreboard to review progress every six months. At the Tampere European Council, the principle of mutual recognition was adopted as the cornerstone principle of police and judicial cooperation in criminal matters. In fact, competences in this field have been exercised in three main ways. First, through the adoption of legislation intended to approximate laws and regulations of the Member States. Second, through the adoption of measures based on the principle of mutual recognition of judicial and extra-judicial decisions. And third, through the facilitation of executive measures promoting operational cooperation between relevant national judicial and police authorities, either directly or through agencies such as Europol and Eurojust. But, it is the second way – mutual recognition – that has been in favour since Tampere.

At the European Council of 4 and 5 November 2004, a new multi-annual programme, the Hague Programme, was adopted for the period 2005-2009.¹⁵³ The Hague Programme was later translated into ten priorities by the European Commission.¹⁵⁴

It would take us much too far to study all these documents in detail. However, even a quick glance tells us that attention in the field of police and judicial cooperation in criminal matters has focused primarily on: organised crime, terrorism and drug trafficking; police cooperation through Europol or otherwise in organised or cross-border crime; and, the elimination of obstacles to the mutual recognition and enforcement of judicial decisions. There seems to be little or no attention given to more traditional forms of crime, even though its impact on the daily life of European citizens and its cost for society in general is certainly as important, if not more, than the impact of organised forms of crime.

2.5. RELUCTANCE TO LEGISLATE

The field of police and judicial cooperation in criminal matters is not the favourite area of policy makers for EU activity. This has to do with the nature of the subject matter itself. The national sensitivities and divergences in respect of criminal justice policy – divergences which have even increased since the enlargement of the EU – raise tensions as to the precise scope of EU level action and intervention required in the field. There is considerable reluctance on behalf of the Member States to relinquish national sovereignty in this field. As Vervaele remarks, “States do

¹⁵² Tampere European Council, 15 and 16 October 1999, Presidency conclusions, http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 15.10.2007).

¹⁵³ Brussels European Council, 4 and 5 November 2004, Annex 1 to the Presidency conclusions, http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf (consulted on 15.10.2007). It should be mentioned that the implementation of the Hague Programme is seriously hampered by the fact that it build further on the assumption that the Constitutional Treaty would enter into force.

¹⁵⁴ Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005) 184 final of 10.5.2005. The ten priorities are the following: 1) Fundamental rights and citizenship: creating fully-fledged policies; 2) The fight against terrorism: working toward a global response; 3) A common asylum area: establish an effective harmonized procedure in accordance with the Union's values and humanitarian tradition; 4) Migration management: defining a balanced approach; 5) Integration: maximizing the positive impact of migration on our society and economy; 6) Internal borders, external borders and visas: developing an integrated management of external borders for a safer Union; 7) Privacy and security in sharing information: striking the right balance; 8) Organised crime: developing a strategic concept; 9) Civil and criminal justice: guarantee an effective European area of justice for all; 10) Freedom, Security and Justice: sharing responsibility and solidarity.

consider their *ius puniendi* and the full exercise of it as essential to their sovereignty” (Vervaele, 2005a: 10-11). Balzacq and Carrera add that the issues under the heading freedom, security and justice are “probably the most dynamic, sensitive and hotly contested” and that “forming an essential part of the traditional concept of national sovereignty, these areas are fraught with national fears, rival ideologies and competing political sensitivities” (Balzacq and Carrera, 2006: 1). Vervaele wrote that “[d]espite the substantial Europeanisation of criminal law, many criminal lawyers are defending the achievements and typicalities of their national criminal law like never before. EU initiatives are assessed from the perspective of the national agenda and national achievements. We are still too far removed from a European criminal law policy that is both European and enjoys national support” (Vervaele, 2005b: 1-2). This is shown, for example, by the reluctance with which Member States have established the right for national courts to direct requests for preliminary rulings to the Court of Justice in third pillar matters (Bogensberger and Troosters, 2006: 336, footnote 3). Also the preference for the principle of mutual recognition, above the principle of approximation, is an expression of this reluctance, as is the maintenance of the unanimity rule in the decision making process.

And yet, despite all this reluctance and resistance, by the end of the 1990s, justice and home affairs had become one of the busiest areas of policy initiative. For example, by 1997 they had easily become the largest single area for which the Council Secretariat serviced meetings, amounting to a third of the meetings convened and over 40% of the papers circulated; the figures for legislative or quasi-legislative initiatives and for institutional modification and proliferation have been just as remarkable (Den Boer and Wallace, 2000: 503). The fact that – despite the reluctance – this policy area has not come to a standstill has much to do with the threat posed by serious cross-border crime, and more recently, by such prominent security events as terrorist attacks. All Member States recognise that they cannot deal with these threats on their own. Some have argued that this had led to a mainly reactive policy response, prioritising security issues over freedom and justice (see for example Balzacq and Carrera, 2006).

3. THE EU'S MANDATE IN THE FIELD OF CRIMINAL JUSTICE

3.1. SCOPE OF POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

As mentioned above, Title VI TEU provides the framework for police and judicial cooperation in criminal matters. The first article of Title VI states: “Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia” (Art. 20, first para., Title VI TEU). In the second paragraph of Art. 29 the scope of the actions to be undertaken is clarified: the objective can be attained “by preventing and combating crime, organised *or otherwise*, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud” (emphasis added). This shows that, although all forms of crime are targeted, special attention is being paid to those forms of crime that traditionally have a more organised and cross-border nature. The choice for the words, ‘preventing and *combating* crime’ could be seen as an indication of the preferred type of reaction to the occurrence of crime. Whereas ‘preventing and *dealing with* crime’ is a more neutral expression, *combating* crime may suggest that a rather offensive and repressive mentality lies at the base of these Treaty articles.

Art. 29, para. 2, Title VI TEU continues to state the means by which this objective is to be achieved, namely through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States;
- closer cooperation between judicial and other competent authorities of the Member States;
- approximation, where necessary, of rules on criminal matters in the Member States.

Art. 30 Title VI TEU deals with common action in the field of police cooperation and is not immediately relevant for our purposes, except for the possibility of organising cooperation and joint initiatives in training.¹⁵⁵

Art. 31 Title VI TEU deals with common action in the field of judicial cooperation. Relevant here is the statement that common action on judicial cooperation in criminal matters “shall *include*:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;
- (b) facilitating extradition between Member States;
- (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
- (d) preventing conflicts of jurisdiction between Member States;
- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and illicit drug trafficking” (Art. 31, para. 1, Title VI TEU, emphasis added).

The open-ended formulation of possible matters for common action (*shall include*) and points (a) and (c) of the above list are especially relevant for our purposes.

The Council is the main body responsible for actions in this field. It is within the Council that the Member States shall consult and inform one another with a view to coordinating their actions (Art. 34(1) Title VI TEU). On the initiative of the European Commission or of any Member State, and acting *unanimously*, the Council shall take measures and promote cooperation, using one of the following forms of action (Art. 34(2) Title VI TEU):

- *common positions*, defining the Union’s approach to particular matters.¹⁵⁶
- *framework decisions* for the purpose of approximation of laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the results to be achieved, but leave the national authorities the choice of form and methods. They do not have direct effect, which means that individuals cannot rely on them directly against the state. Nonetheless, they may have some form of ‘direct applicability’ under certain circumstances, following the Court’s judgement in the Pupino case (see 4.4. of this part).
- *decisions*, and *measures implementing them*, for any other purpose than the approximation of legislation. Decisions are binding upon the Member States but do not entail direct effect.¹⁵⁷
- *conventions*, which the Council shall then propose for adoption to the Member States.¹⁵⁸

In addition to these actions, it is also possible for the Council to make recommendations¹⁵⁹, resolutions¹⁶⁰ and Directives¹⁶¹ in this field. Furthermore, EU Council Conclusions are an important means by which the Council identifies priority topics for European action.

¹⁵⁵ It deals with operational cooperation, cooperation in terms of exchanging information and liaison officers, the evaluation of investigative techniques, etc. in addition to cooperation through Europol.

¹⁵⁶ An example of such a common position is the Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP).

¹⁵⁷ An example of this is the Council Decision of 28 May 2001 setting up a European Crime Prevention Network (2001/427/JHA).

¹⁵⁸ An example is the Council Act of 29 May 2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01).

The Council also has the possibility of concluding agreements with non-member countries and with international organisations (Art. 38 Title VI TEU).

Before adopting a framework decision or a decision, and before establishing a convention or an implementing measure, the Council must consult the European Parliament, which will give a non-binding opinion (Art. 39(1) Title VI TEU).

Article 35 Title VI TEU gives the Court of Justice jurisdiction to give rulings on the validity and interpretation of framework decisions, decisions and implementing measures, and on the interpretation of conventions in so far as the Member State concerned accepts the Court's jurisdiction.

Articles 40a and 40b Title VI TEU, finally, establish the conditions and procedures under which Member States may establish enhanced cooperation among themselves, making use of the institutions, procedures and mechanisms laid down by the Treaties.

3.2. THE LIMITING EFFECT OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

Any concrete action based on the above articles is, however, limited by two of the main principles of the European Union: subsidiarity and proportionality.

The *subsidiarity* principle was introduced in the EC Treaty by the TEU to safeguard against the increasing power of the Community (Lenaerts and Van Nuffel, 2005: 101). It is contained in the second paragraph of Article 5 of the EC Treaty, which states that: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

A protocol on the application of the principles of subsidiarity and proportionality has formulated the following guidelines to assess whether the conditions of the subsidiarity principle are met:

- (1) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- (2) actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortions of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; and
- (3) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.¹⁶²

According to Lenaerts and Van Nuffel, "Community action will conflict with the principle of subsidiarity only where it can be shown that the objective sought can be achieved just as much in

¹⁵⁹ Like the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups (1999/C 373/01).

¹⁶⁰ For example the Council Resolution of 21 June 1999 concerning a handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with international football matches (1999/C 196/01).

¹⁶¹ For example Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

¹⁶² Protocol (No. 30), annexed to the EC Treaty, on the application of the principle of subsidiarity and proportionality ([1997] O.J. C340/105), point 5, first paragraph, quoted in Lenaerts and Van Nuffel, 2005: 103.

all Member States either by individual action or by co-operation between the Member States concerned” (Lenaerts and Van Nuffel, 2005: 104).

The principle of *proportionality* is contained in Article 5, paragraph 3 of the EC Treaty which states that “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”. This principle restricts the authorities in the exercise of their powers by requiring them to maintain a balance between the means used and the intended aims. In order for an action to be proportionate, it must be appropriate (capable of attaining the intended objectives) and indispensable (it cannot be replaced by another action which would have equal effectiveness having regard to the intended aim and be less detrimental to another aim or interest protected by Community law) (Lenaerts and Van Nuffel, 2005: 109).

The second paragraph of Article 5 EC Treaty also refers to the principle of proportionality in stating that the Community can act only ‘in so far as’ the objectives cannot be sufficiently achieved by the Member States. Here the powers of the Member States are protected. It means that the Community may only act if it is appropriate and indispensable to supplement the insufficient capabilities of the Member States (Lenaerts and Van Nuffel, 2005: 110-111).

The Protocol on the application of the principles of subsidiarity and proportionality demands that the form of Community action be as simple as possible and that preference is given to Directives over regulations, and to framework directives over detailed measures. Community measures must leave as much scope for national decision as possible (Lenaerts and Van Nuffel, 2005: 113).

The European institutions are responsible for ensuring compliance with the principles of subsidiarity and proportionality, which may mean their own compliance. If the European Commission makes a legislative proposal, it has to state the reasons on which it is based, with a view to justifying compliance with these two principles; it is the role of the European Parliament and the Council to consider whether the proposal is indeed consistent with them.

Once the Treaty of Lisbon enters into force (if at all), the control of and responsibility for the principles of subsidiarity and proportionality will be stepped up considerably. All Commission proposals or other draft legislative acts, as well as any positions taken by the European Parliament and the Council, will have to be sent to the national parliaments for review. Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represents at least one-third of all the votes allocated to the national parliaments¹⁶³, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 61 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice (the current Art. 29 Title VI TEU). After this review, the European Commission could decide to maintain, amend or withdraw the initiative. Lastly, the Court of Justice can review whether the principle of subsidiarity and proportionality are complied with in any case before it. National parliaments can ask their Member State to bring an action for annulment against a legislative act on grounds of the infringement of the principle of subsidiarity, as can the Committee of the Regions¹⁶⁴ in the subject matters on which it has to be consulted.¹⁶⁵

¹⁶³ Each national parliament shall have two votes. In the case of a bi-cameral parliament, each of the two chambers will have one vote.

¹⁶⁴ The Committee of the Regions is the political assembly that provides local and regional authorities with a voice in the European Union. Established in 1994, it was set up to address two main issues. Firstly, to provide local and regional representatives with a say in the development of new EU laws since. Secondly, to provide a bridge between the citizens of the EU and the EU itself by involving the elected level of government closest to the citizens. The Treaties oblige the European Commission and the Council to consult the Committee of the Regions whenever a new proposal is made in areas that have repercussions at regional or local level. The Maastricht Treaty set out five such areas: economic and social cohesion, trans-

3.3. CHANGES UNDER THE TREATY OF LISBON

On 13 December 2007, EU leaders signed the Treaty of Lisbon, thus bringing to an end several years of negotiation about institutional issues. The Treaty of Lisbon amends the current EU Treaty and the EC Treaty (which is renamed the Treaty on the Functioning of the European Union), without replacing them. The current EC Treaty (first pillar) will form part of the Treaty on the Functioning of the European Union, as will the EU Treaty area of freedom, security and justice (third pillar). The field of foreign and security matters (second pillar) will form part of the amended version of the Treaty of the EU.

The Treaty of Lisbon makes, amongst others, the following changes (Duff, 2008; Kurpas, 2007; Peers, 2007):

- a strengthened role for the European Parliament through the increase of the co-decision procedure in policy making, which becomes the 'ordinary legislative procedure'.
- a greater involvement of national parliaments, in particular through a mechanism to check that the Union only acts where results can be better attained at EU level (subsidiarity). National parliaments will have eight weeks in which to scrutinize draft laws. One third of national parliaments may object to a draft legislative proposal on the grounds of a breach of subsidiarity. The European Commission will then reconsider it. In addition, if a simple majority of national parliaments continue to object, the European Commission will refer the reasoned objection to the Council and the European Parliament, which will then decide the matter.
- a stronger voice for citizens, amongst others through the Citizens' Initiative by which one million citizens from a significant number of Member States can ask the European Commission to take a specific initiative.
- a clearer and more precise delimitation of competences conferred on the Union by Member States. The Union enjoys three categories of competence: exclusive, shared or complementary, and supporting or supplementary. EU competences are in any case limited to those expressly conferred by the Treaties, and, in non-exclusive areas, their use is governed by the principles of proportionality and subsidiarity.
- a possibility for a Member State to withdraw from the Union (for the first time!).
- qualified majority voting becomes the general rule in the Council – defined as a double majority of 55% of states representing 65% of the population (while a minimum number of four states is needed to constitute a blocking minority). This new system will only come into force in 2014.
- a more stable and streamlined institutional framework: a President of the European Council will be elected for 2.5 years, a smaller European Commission and a new composition for the European Parliament.
- a new High Representative for the Union in Foreign and Security Policy, supported by a new European External Action Service. This person will also be the Vice-President of the European Commission.

European infrastructure networks, health, education and culture. The Amsterdam Treaty added another five: employment policy, social policy, the environment, vocational training and transport. Outside these areas, the European Commission, the Council and the European Parliament have the option to consult the Committee on issues if they see important regional or local implications to a proposal. The Committee can also draw up an opinion on its own initiative, which enables it to put issues on the EU agenda. Source: <http://www.cor.europa.eu> (consulted on 10.03.2008).

¹⁶⁵ Protocol on the application of the principles of subsidiarity and proportionality as established by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01).

- the jurisdiction of the European Court of Justice is expanded to all the activities of the Union with the express exception of common foreign and security policy.
- the Union gains a single legal personality in international law across its whole competence.
- a new hierarchy of norms is established which distinguishes between legislative acts, delegated acts and implementing acts.
- the Charter of Fundamental Rights¹⁶⁶ becomes binding and has the same legal value as the Treaties.¹⁶⁷

Major changes are contemplated by the Treaty of Lisbon with regard to the field of police and judicial cooperation in criminal matters (Carrera and Geyer, 2007; Duff, 2008; Kurpas, 2007; Peers, 2007a and 2007b):

- Because the Union will gain a single legal personality, the ‘third pillar’ will disappear entirely after a five year transition, with common policies in the area of freedom, security and justice, including Schengen, assimilated within the ‘first pillar’ or Community method. This means that the former ‘third pillar’ loses its intergovernmental nature, which will be limited to matters dealing with common foreign, security and defence policies (‘second pillar’). The former Title VI TEU on police and judicial cooperation in criminal matters will be integrated into Title IV of the Treaty on the Functioning of the European Union¹⁶⁸, where the provisions of the already ‘communitarised’ parts on justice and home affairs (e.g. visa, asylum, immigration) are located. The ‘merger’ with the first pillar will mean that first pillar

¹⁶⁶ This Charter of Fundamental Rights of the European Union (2000/C 364/01), signed on 7 December 2002, deals with justice in Chapter VI. It states the following:

Art. 47. Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Art. 48. Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Art. 49. Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Art. 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

¹⁶⁷ Britain and Poland have negotiated opt-outs from the Charter that exclude its application by national and European Courts when this would contradict national laws or practices (Kurpas, 2007: 3).

¹⁶⁸ Title IV of the Treaty on the Functioning of the European Union will consist of five chapters: 1. General provisions; 2. Policies on border checks, asylum and immigration; 3. Judicial cooperation in civil matters; 4. Judicial cooperation in criminal matters; 5. Police cooperation.

instruments, such as Directives, decisions and regulations will become applicable to third pillar issues.

- Decisions in the field will now follow the 'ordinary legislative procedure' (so co-decision between the Council and the European Parliament and qualified majority voting), considerably increasing the European Parliament's input in this field and moving away from unanimity.
- Instead of unanimity, decisions can now be taken by qualified majority voting in most areas of criminal law and policing.¹⁶⁹
- The Commission's right of initiative in justice and interior affairs is shared with one quarter of Member States.¹⁷⁰
- The Court of Justice will have full jurisdiction concerning all justice and home affairs areas, with one exception.¹⁷¹ Member States will no longer be able to opt out of the Court's jurisdiction¹⁷², and all courts or tribunals in any Member State will be able to send questions to the Court of Justice on home affairs matters.¹⁷³
- The UK and Ireland have specific protocols which allow them to either opt into or opt out of EU common policies concerning Schengen and the area of freedom, security and justice. But they may exercise this privilege only according to terms, conditions and timetables to be established in each case by the Council and the European Commission. The UK may not opt in at the beginning of a legislative procedure and, then, at the end, opt out. Nor may it stick with an existing policy if the others wish to revise it. Also it may not continue to participate in existing common policies if, after a transitional period of five years, it refuses to accept the new powers of the European Commission, European Parliament or European Court of Justice.

The Treaty of Lisbon confirms mutual recognition as the main principle in EU criminal law. In Article 69 A, it stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and that it should include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of the same article. Art. 69 A, first paragraph, continues as follows: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;

¹⁶⁹ In the field of operational police cooperation, unanimity in the Council and mere consultation of the European Parliament will remain. Unanimity also remains a requirement as regards, for example, the establishment of a European Public Prosecutor.

¹⁷⁰ Currently, the European Commission shares its right of initiative with a single Member State. The requirement that four Member States need to cooperate in order to launch an initiative means that it will no longer be possible for a single presidency to submit proposals in line with national priorities.

¹⁷¹ The European Court of Justice will not have jurisdiction to review the validity and proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

¹⁷² Currently they can opt-out in relation to references from national courts in the area of policing and criminal law.

¹⁷³ This will apply to all countries. However, because the UK, Ireland and Denmark can opt-out of legislation on policing and criminal law, in practice the Court's jurisdiction will only be relevant to them if they have opted in to the legislation. In any case, a transitional period of five years will apply to the extended jurisdiction of the European Court of Justice over policing and criminal law matters.

- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions”.

Art. 69 A, paragraph 2, states that, to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. The provision then sets out a list of areas within the EU's competence to legislate such as mutual admissibility of evidence between the Member States, the right of the individual in criminal procedure and provisions regarding the rights of the victim. Furthermore, the article contains a so called 'general clause' in stating that any other specific aspects of criminal procedure which the Council has identified in advance by decision (although unanimity would apply here) can be the subject of such minimum rules. Finally, the article states that the adoption of such minimum rules should not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Art. 69 B, paragraph 1, deals with the regulation of substantive criminal law. It stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime having a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The provision sets out a list of crimes in which the EU shall have legislative competence, such as terrorism, organised crime and money laundering. It also states that the Council may, based on developments in crime, adopt a decision identifying other areas of crime that meet the criteria of cross-border nature and seriousness. Paragraph 2 of this article states that it is possible to approximate criminal laws and regulations if that proves essential to ensure the effective implementation of a Union policy in an area that has already been subject to harmonisation measures. In such case, the same ordinary or special legislative procedure shall apply as the one followed for the adoption of the harmonisation measure in question.¹⁷⁴

Art. 69 C, finally, states that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

The changes that will be made to the field of police and judicial cooperation in criminal matters when the Treaty of Lisbon enters into force have both a facilitating and inhibiting side.

The move towards more qualified majority voting should make it easier to reach agreements in the field. In the past, because unanimity was required, proposals were often discussed time and time again, resulting in a much weaker text than was initially intended.¹⁷⁵ By introducing qualified majority the number of countries with which a compromise must be sought is reduced. However, in issues related to the establishment of minimum rules in criminal law (with the exception of matters concerning the principle of mutual recognition), the mechanisms of the so-called 'emergency brake' and of 'enhanced cooperation' will be available. The 'emergency brake' procedure means that should a Member State consider that a legislative proposal jeopardises 'fundamental aspects of its criminal justice system', it can ask for the matter to be referred to the

¹⁷⁴ Ester Herlin-Karnell (2008: 5-6) provides an interesting analysis of the possible implications of the fact that the seriousness and cross-border requirements are not reiterated in paragraph 2 of Art. 69 B.

¹⁷⁵ Charles Elsen described the process as follows: "Tant qu'un seul Etat membre peut opposer son veto à une mesure proposée, les progrès deviennent difficiles à atteindre. La recherche de compromis réussis, faisant finalement accepter le ou les Etats récalcitrants – aboutit souvent à vider le texte proposé d'une grande partie de sa substance" (Elsen, 2008 : 8).

European Council, thereby suspending the ordinary legislative procedure. The European Council then has four months in which to decide and come to a consensus decision about sending the matter back to the Council so that the procedure can continue. If the dispute cannot be settled during that four month period, 'enhanced cooperation' can automatically be initiated in the matter, after simple notification of the European Parliament, the Council and the European Commission, on the basis of the legislative proposal in question, if nine Member States (one third of the total of Member States) are in favour. This may result, as is shown by the example in footnote, in less compromised solutions, in more 'enhanced cooperation' and could limit the European Commission's role in the whole legislative process (Carrera and Geyer, 2007: 5).¹⁷⁶ It remains to be seen how frequent these mechanisms will be used, but considering the reluctance with which Member States have adopted legislative instruments in the field up till now, the exception might well become the norm. "Differentiation as a product of 'enhanced cooperation' in all these areas may lead to the instauration of various Areas of Freedom(s), Security(ies) and Justice(s). It may put an end to the political project of having a sole and unique Area where a common level of Freedom, Security and Justice is guaranteed. Yet it is this common level that provides the justification for EU-specific supranational (as opposed to mere international) cooperation and provides the basis for the establishment of mutual trust, necessary, for instance for the application of the EU principle of mutual recognition" (Carrera and Geyer, 2007: 7-8). Differentiation may further also impair the effectiveness of policies in the field since "national officials will – in every single case – have to assess which possible cooperation partner belongs to which flexible group of member states. In the end, ever changing 'flexibility' can reach a degree of complexity that may paralyse the everyday cooperation of national authorities" (Carrera and Geyer, 2007: 8). Carrera and Geyer continue by saying that "it will be mainly for the European Commission, Parliament and the ECJ [European Court of Justice] to keep a careful eye on the common interest" (Carrera and Geyer, 2007: 9).

The stronger involvement of national parliaments will of course increase the democratic level of decision making in this field. However, there are concerns "that national parliaments will focus too strongly on the role of a defensive 'emergency brake' for EU-legislation, instead of becoming more pro-active contributors in the European decision-making process" (Kurpas, 2007: 4).

¹⁷⁶ Carrera and Geyer give an interesting example of the possible ramifications of these mechanisms: "A group of seven member states (i.e. the necessary quarter, cf. III-264) present a proposal on minimum rules related to criminal law, which they know will never obtain the necessary majority in the Council. The European Commission may have been working on a similar or related issue, trying to find a more consensual position. Yet, because of the difficulties of reaching a consensus among member states and the requirement to draft an extensive impact assessment – something member states are not obliged to do when tabling a draft – the Commission has not been able to present its own draft ahead of the 'avant-garde' group. The member states' proposal reaches the Council and suffers – as expected – the 'emergency brake' by at least one member state. The ordinary legislative procedure is suspended and the European Council is unable to find a solution within four months. Following the new mechanism introduced by the IGC Mandate, the European Council can no longer request the initiating party to come up with a new, more balanced proposal. This is what the seven have been waiting for. They have managed in the meantime to convince two more member states to join their proposal and the minimum number of nine member states for the enhanced cooperation mechanism is achieved. The only thing left for them to do is to notify the EP, the Council and the Commission about their wish to establish enhanced cooperation among themselves. According to the modified rules, the normally required authorization is hence "deemed to be granted". In this way, thanks to the new 'emergency brake' and enhanced cooperation mechanisms, the seven member states have succeeded in putting through an initially hopeless and unbalanced proposal with only the obligation to notify the EU institutions" (Carrera and Geyer, 2007: 5-6).

We will discuss whether these changes to the provisions on police and judicial cooperation in criminal matters will affect the possibility to adopt measures in the field of restorative justice in Part V of this report. We will now first assess the impact of the European Union on national criminal policy till today, and the resistance to Europeanisation in this field.

4. ASSESSMENT OF THE EU'S ROLE IN THE FIELD OF CRIMINAL JUSTICE

According to Joutsen (2006: 7), there are three common opinions of the impact of the European Union on criminal justice. One opinion is dismissive, regarding the work of the European Union in this field as the fine-tuning of legal details of instruments that have only a small impact on everyday life. A second opinion is that the European Union is evolving into a kind of super-state that wants to harmonise both criminal and procedural law in the Member States. The third is that the European Union is working hand in hand with law-and-order adherents, and that it is focusing on controlling crime whilst favouring a more punitive criminal policy. His own view is that "EU criminal justice can be seen to be national criminal justice taken to a new level, with much the same goals and inner tensions as in any and all of the Member States" (Joutsen, 2006: 7).

The first opinion is rather an outdated one. A quick overview of the realisations of the last few years (see for example Joutsen, 2006: 10-29) makes it clear that the initiatives taken cannot in the least be considered to be mere fine-tuning. The two other opinions will be dealt with below. We will also look at the discussion about harmonisation versus mutual recognition, and at the role of the European Court of Justice, as certain recent judgments have had major consequences for the way in which the EU's role in the area of criminal justice should be perceived.

4.1. THE EUROPEANISATION OF CRIMINAL LAW

Since the mid-1990s, more and more scholars have become interested in understanding the domestic impact of Europe. "Today", as Börzel and Risse state, "the study of Europeanization has become quite a cottage industry" (Börzel and Risse, 2006: 483). However, some policy areas have received more attention than others, and the field of justice and home affairs is one of the policy areas receiving the least attention in Europeanisation research (Börzel and Risse, 2006: 486).

Nevertheless, since the entry into force of the Maastricht Treaty, the area of justice and home affairs has evolved into one of the main areas of EU legislation. The fact that so many instruments are being implemented in the national legal systems has an unmistakable Europeanisation of criminal law as a consequence.¹⁷⁷ The influence of European law is felt in two ways: through the regulating effect of the case law of the Community Courts (entailing both the Court of Justice and the Court of First Instance), and through legislation (Vervaele, 2005b: 3).

The fact that the power to enforce Community law lies, in principle, with the Member States, does not mean that they may exercise it with complete freedom. First of all, the Court of Justice may review whether the enforcement of Community law follows the principle of sincere cooperation.¹⁷⁸ The Member States must choose and use an enforcement regime that is effective, proportionate and deterrent in nature, and is able to attain the result sought. In addition, they

¹⁷⁷ According to Vervaele (2005b: 3) it would be more correct to speak about the harmonisation of national enforcement law.

¹⁷⁸ The principle of sincere or loyal cooperation is laid down in Article 10 of the EC Treaty, and requires Member States to "take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community" (first paragraph) and, at the same time, to "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty" (second paragraph).

need to comply with the assimilation principle, which means that they are not allowed to discriminate between equivalent national and European interests (Vervaele, 2005b: 3-4) (see 4.4. for more on the role of the Court).

Next to the regulating effect of case law, national enforcement is substantially being harmonised by the definition of normative standards and by the prescription of obligations with respect to controls and penalties. And, although the community harmonisation of national enforcement does not yet truly include the harmonisation of criminal (procedural) law, Community law indirectly harmonises national criminal law and national criminal procedural law. This process of indirect harmonisation has two sides to it: negative integration and positive integration. Negative integration means that national criminal (procedural) law needs to be modified because of its incompatibility with Community law. Positive integration takes place when national (procedural) law is adapted in order to allow for effective enforcement of Community law (Vervaele, 2005b: 5-7).

Whether there is a legal basis in the EC Treaty for direct harmonisation in the field of criminal law has been, and still is, a topic of intense debate. In the past, the European Commission has repeatedly attempted to oblige the Member States, through Directives, to implement direct measures of criminal law harmonisation, for example in relation to money laundering. However, the Council always intervened to ensure that the Member States kept their discretion in relation to enforcement regimes. In strict legal terms, the introduction of the third pillar did not affect the first pillar and hence did not affect the possible legal basis for direct criminal law harmonisation within the first pillar. "In short, the powers under the third pillar may not be exercised at the expense of the powers under the first pillar and the third pillar also serves to enforce Community policy" (Vervaele, 2005b: 8). But, Vervaele continues, "... in the Amsterdam EC Treaty an express legal basis was laid down for harmonisation with a view to protecting the financial interests of the EC and for customs cooperation" (Vervaele, 2005b: 8). And, it seems that in the meanwhile the Legal Service of the Council has joined the European Commission and the European Parliament in their view that the EC Treaty indeed includes a legal basis for direct criminal law harmonisation, albeit – in the view of the Legal Service – it is limited to laying down prohibitions or prescriptions (offence descriptions) and the duty to impose penal sanctions¹⁷⁹.

According to Vervaele, the possibility of the direct harmonisation of criminal (procedural) law became quite explicit with the entry into force of the Treaty of Amsterdam. Title VI foresees the possibility of the "approximation, where necessary, of rules on criminal matters in the Member States" (Art. 29, para. 2, 3rd indent) (Vervaele, 2005b: 15). However, the introduction of this 'approximation-option' in the TEU also opened the discussion of harmonisation versus mutual recognition (see next point).

Following the entry into force of the Treaty of Amsterdam, the European Council at the Tampere summit in October 1999 gave a very strong signal for the Europeanisation of criminal law. At this summit the Heads of State or Government identified a large number of political guidelines and concrete objectives for action to be achieved in order to realise the area of freedom, security and justice. A further impulse to the Europeanisation of criminal law was provided by the terrorist attacks of 11 September 2001. "There is no doubt that the decision making process concerning the European arrest warrant and the harmonisation in the field of terrorist offences has been considerably accelerated by this ..." (Vervaele, 2005b: 17).

¹⁷⁹ The Council has, for example, approved a framework decision which obliges Member States to penalise certain intentional and culpable environmental offences, and to provide custodial sentences for the more serious ones (Vervaele, 2005b: 9).

Opinions on whether the ongoing harmonisation of European criminal law and procedure is a positive development differ. Some, like Perron, say that it is inevitable, that we have to overcome the differences between the European legal systems “if we want to realize an area of freedom, security and justice with citizens trusting European institutions” (Perron, 2005: 19). However, the principle of mutual recognition is embraced by Member States and EU institutions as the leading principle in EU cooperation in the field of criminal justice. This means that the claim that the EU is a kind of super-state that seeks to harmonise criminal and procedural law in all the Member States does not hold true. Joutsen writes that “... there are strong institutional and other factors that limit the extent to which the Member States are prepared to harmonize their criminal and procedural law. Many Member States emphasize that their interest in greater cooperation extends only to serious forms of cross-border crime; they are not prepared to approximate legislation on forms of crime that usually do not have cross-border implications” (Joutsen, 2006: 41).

4.2. HARMONISATION VERSUS MUTUAL RECOGNITION

According to Joutsen, there are two ways to overcome the national differences in law between the Member States: “either require that all states have more or less the same laws (*harmonisation*), or have the states agree to enforce decisions and judgements made in another state (*mutual recognition*). Those in favour of harmonisation argue that the laws defining the main forms of cross-border crime, as well as the basic elements of criminal procedure, should be the same as in all EU Member States. Those in favour of mutual recognition, in turn, argue that harmonisation is not necessary, as long as the courts and other authorities of each Member State are prepared to enforce decisions taken in other Member States” (Joutsen, 2006: 9).

In the conclusions of the Tampere European Council in 1999, the principle of mutual recognition was pushed to the forefront as the cornerstone of judicial cooperation. The same conclusions, however, recognise in paragraph 37 that a certain level of harmonisation of criminal procedural law will be necessary, namely the minimum standards that will enable mutual recognition, with respect for the fundamental legal principles of Member States. What is considered ‘necessary’ remains a continuous and contentious topic of debate.

The predominance of the principle of mutual recognition is, however, increasingly raising concerns, especially in relation to individual rights. In essence, the principle means one Member State accepting and, where necessary, enforcing judicial and extra-judicial decisions taken in another Member State. In order to do this, a minimum of trust in and respect for the criminal justice systems of other Member States is required. However, the extent of diversity in the standards of criminal procedure suggests that these basic conditions will not be met. The question, how can the protection of the rights of individuals in criminal procedure be guaranteed when criminal procedures vary so extensively across Member States, is not easily answered. According to the Commission, it is only by introducing common minimum standards in relation to certain aspects of criminal proceedings throughout the EU, and by ensuring high standards in the quality of its Member States’ criminal justice systems, that it is possible to appropriately safeguard the rights of suspects and defendants, and also of victims. But these criteria depend on the creation of appropriate conditions of trust that will enable the proper application of the principle of mutual recognition.¹⁸⁰ In the meanwhile the Commission has introduced proposals for legislation on minimum procedural safeguards for criminal suspects and defendants, alternatives to pre-trial detention, evidence and *ne bis in idem*. However, these proposals have not followed a smooth process of adoption. The proposal for a Council Framework Decision on certain procedural rights

¹⁸⁰ See, for example, page 11 of Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005) 184 final of 10.5.2005.

in criminal proceedings throughout the European Union, for example, has met considerable resistance (see, for example, Morgan, 2006; see also footnote 181).

4.3. THE EU AS A PROTAGONIST OF A MORE PUNITIVE CRIMINAL POLICY

One characteristic of the development of justice and home affairs is the extent to which it has taken the form of a *reaction* to current events or to secular trends. This is most prominently shown by the actions that have been taken following the 9/11 attacks. In the wake of the terrorist attacks in New York, the Belgian Presidency set aside completely its own work programme and concentrated instead on the Framework Decision on the European Arrest Warrant, in particular as it dealt with terrorist activities (Elsen, 2008: 5). These terrorist attacks, including those on European soil, resulted in measures being taken to ensure that people could be extradited more quickly, that information on the time and length of telephone calls and on who calls whom could be collected, and that the exchange of data between law enforcement agencies was simplified.

According to Asp, "... when it comes to substantive criminal law, progress is more or less defined as increased repression. This becomes evident if you pay attention to the fact that the principle of proportionality, according to which the least intrusive means to achieve a certain goal shall be chosen, is totally disregarded within the third pillar" (Asp, 2005: 33).

Of course, threat and the reaction to it has – to some extent – an objective valid basis in the area of freedom, security and justice. The very idea of internal security as a public good implies the containment within acceptable limits of risks and threats. However, there has been a tendency, according to some, to let the security imperative dominate the agenda, to the detriment of the areas of freedom and justice. Balzacq and Carrera, for example, write how, when comparing the guiding common values of the Tampere and the Hague Programmes, "the latter seems to shift the balance between 'freedom' and 'security' in a very critical way. ... In fact, the 'shared commitment to freedom based on human rights, democratic institutions and the rule of law', as set out in Tampere, is not a cornerstone of its successor. The Council now gives a high priority to security, meaning: 'the development of an area of freedom, security and justice, responding to a central concern of the peoples of the States brought together in the Union'. 'The central concern of the peoples of the States' is thus translated into a security-led approach which dominates the Programme. In other words, it is as if 'the security of the State' predates the liberty of the individual. ... It is also surprising that many security-related measures are found in the sections of 'strengthening freedom' (for instance border checks, the fight against illegal immigration, biometrics and information systems). By contrast, protection of fundamental rights, fair treatment of third country nationals, the role and powers of the newly proposed Fundamental Rights Agency and the role of the European Court of Justice are dealt with very briefly" (Balzacq and Carrera, 2006: 5-6).

As we have already mentioned above, the choice of words in the second paragraph of Art. 29 (stating that the area of freedom, security and justice can be attained by preventing and *combating* crime) could be indicative of an underlying offensive and repressive mentality. The way in which measures were taken after the terrorist attacks, and some of their contents, "have given rise to concerns that EU cooperation in criminal justice stresses the law-and-order approach and is moving toward a more punitive criminal policy", this to the detriment of attention for human rights and constitutional protections (Joutsen, 2006: 34-35).

According to Joutsen (2006: 35), the arguments given to support these concerns tend to follow three different lines. First, it is argued that the decision making process suffers from a 'legitimacy deficit' because of the lack of involvement of the European Parliament and the national parliaments in the decision making process, and because of the lack of transparency and insufficient respect for due process in a number of institutions and networks (such as Europol,

Eurojust and the European Judicial Network) set up by the EU. It is said that the EU has a tendency to emphasise efficiency of crime control at the expense of accountability. Joutsen, however, finds that this is an un-nuanced vision. Second, it is said that the topics of the EU decisions themselves tend to focus excessively on law-and-order themes as opposed to procedural safeguards, and that the decisions themselves do not sufficiently take into consideration the requirements of due process and constitutional protections. It is of course true that if one starts to count decisions dealing with, for example, improved cooperation between police forces and judicial authorities and the creation of new offence categories, as opposed to the number of decisions dealing with the protection of the rights of offenders and victims, the balance will be in favour of the first category. However, as Joutsen states, “such a count would overlook the primary purpose of the third pillar, which is to improve police cooperation and cooperation in criminal matters” (Joutsen, 2006: 38). The third argument for saying that the EU cooperation in criminal justice is leading towards a more punitive criminal policy is that the contents of decisions tend to follow the line of those Member States with a more punitive criminal justice policy. However, work on approximation has mainly focused on material penal law (instead of procedural criminal law), and especially on the constitutive elements of certain offences. The sanctions remain, on their side, largely untouched. Moreover, whether with regard to the definition of offences or of sanctions, work consists mainly in establishing minimum thresholds; even here important margins for manoeuvre are left to the states (Weyembergh, 2006: 187). As a result, only rarely do EU initiatives lead to the need in Member States to amend their national laws (Joutsen, 2006: 38). We could add that the continuing discussion as to whether there is competence for the Union to legislate on purely domestic proceedings or whether legislation should be devoted solely to cross-border cases further hampers the possibilities to move forward with regard to due process rights and rights for victims, as these will almost inevitably have their greatest impact on purely domestic cases. Keeping that in mind, one cannot underestimate the importance of the work being done to reach consensus on the Framework Decision on the standing of victims in criminal proceedings, and the work in progress on a framework decision on certain procedural rights applying in proceedings in criminal matters.¹⁸¹

4.4. THE ROLE OF THE EUROPEAN COURT OF JUSTICE

According to Bogensberger and Troosters, the limited jurisdiction of the Court of Justice in third pillar matters has fed “the impression that its legal acts are de facto “*soft law*” instruments – and this irrespective of their legally binding nature ...” (Bogensberger and Troosters, 2006: 334). Indeed, the European Commission cannot bring a Member State to the European Court of Justice

¹⁸¹ It should nevertheless be mentioned that the draft Framework Decision on certain procedural rights applying in criminal matters is encountering serious opposition. The initial draft by the European Commission, adopted on 28 April 2004 (COM(2004) 328 F of 28.04.2004) included a number of rights – most of which were already included in existing international conventions such as the European Convention on Human Rights – which according to the European Commission needed clarification and adaptation to the special circumstances required by mutual recognition. These were: the right to legal advice, the right to translation and interpretation, the right to specific attention for people not able to understand or follow the proceedings, the right to communication for detained persons, the right to consular assistance for foreign nationals, the right to be informed of one’s rights on arrest. Because of the opposition of some Member States, and because of the unanimity rule, the draft from the European Commission was withdrawn, and a new draft was prepared by the Austrian Presidency in May 2006. This new draft leaves out the right to specific attention for vulnerable persons, the right to communication for detainees and the right to consular assistance. It also leaves it open whether information on one’s rights is given in written form or orally. The new draft further extends the remaining rights to proceedings covered by the European Arrest Warrant. This compromise solution is nevertheless still being opposed by a number of countries who would prefer a non-binding resolution over a binding framework decision (Morgan, 2006: 308-310).

for insufficient implementation of a third pillar act since the Court does not have jurisdiction for actions for failure to fulfil legal obligations as it has for Community law. This means that "... the transposition of EU acts into national law and its application in practice depends largely on the good-will of the Member States" (Bogensberger and Troosters, 2006: 334).

But since the entry into force of the Amsterdam Treaty, a number of preliminary rulings¹⁸² and cases on third pillar matters have shown that the application of national criminal law has to take account of EU law in many ways, forcing a rejection of the 'soft law' analysis. According to Bogensberger and Troosters, the rulings of the Court of Justice on third pillar matters have strengthened "the fundamental right position of the accused across Europe with regard to the application of the transnational *ne-bis-in-idem* principle, they oblige the national courts to confirming interpretation on national criminal law and they identify an implicit criminal law competence of the Community, where criminal law measures are necessary in order to ensure that the Community rules are fully effective" (Bogensberger and Troosters, 2006: 333).

Until now, the majority of the cases that have been dealt with by the Court of Justice have dealt with the interpretation of the *ne bis in idem* principle. Further cases have dealt with the interpretation of provisions of the Framework Decision on the standing of victims in criminal proceedings and with clarifications of the Framework Decision on the European arrest warrant (Bogensberger and Troosters, 2006: 336).

Of particular importance for this report are the joined cases *Gözütok*¹⁸³ (C-187/01) and *Brügge*¹⁸⁴ (C-385/01). These both dealt with the question whether the *ne bis in idem* principle¹⁸⁵ prevents a Member State's jurisdiction from trying an accused on the same facts as those that led to the discontinuation of criminal procedures in another, following a financial settlement offered by the public prosecutor and accepted by the accused. "In other words: Can such a decision, which is neither a judgment nor handed down by a Court, be assimilated to a formal judgment regarding its effects and thus create a barrier for criminal proceedings in another Member State?" (Bogensberger and Troosters, 2006: 337).

¹⁸² Requests for preliminary rulings are addressed to the Court of Justice by the national courts of the Member States. They serve to clarify the concrete meaning of Community law. National courts may also address the Court of Justice a request to review the validity of an act of Community law. The judgments of the Court of Justice in these cases do not only bind the requesting national court, but all courts in the Member States that deal with the same issue. In third pillar matters, the Court has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions, decisions, conventions and their implementing measures. However, this jurisdiction is optional and the Member States can decide themselves at which level of national jurisdiction courts can pose these preliminary questions and whether this is optional or an obligation for the national court (Bogensberger and Troosters, 2006: 335-336).

¹⁸³ The *Gözütok* case concerned a man who had been acquitted by an order of the Dutch authorities for drug possession and confirmed that he could not be prosecuted for the same facts by the German authorities, despite the fact that they could, in principle, establish their jurisdiction over him.

¹⁸⁴ In the *Brügge* case it was established that Mr Brügge, who had been acquitted by an order of the Belgian prosecutor for causing bodily harm to a German lady, could face action in Germany, but only on the initiative of the victim herself and exclusively for awarding her damages.

¹⁸⁵ The *ne bis in idem* principle is contained in Article 54 of the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders. It reads as follows: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing Contracting Party".

In its judgment, handed down in 2003, the Court reasoned as follows:

- Since the Schengen acquis has been integrated in the framework of the EU by the Amsterdam Treaty, both the institutional context of this principle and its meaning has been changed. It now has to be interpreted in line with the respective Treaty objective, which is to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is assured.
- The application of the *ne bis in idem* principle is not made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred. The Member States need to have mutual trust in their criminal justice systems, and they have to recognise the criminal law in force in the other Member States even when the outcome would be different if its own national laws were applied.
- The fact that in such a procedure no court is involved and that the decision is not a formal judgment is only a procedural or purely formal matter which does not impinge on the effects of the procedure. Thus, in procedures where further prosecution is definitely barred, the person concerned must be regarded as someone whose case has been ‘finally disposed of’.
- The fact that the accused complies with certain obligations of the public prosecutor penalises the unlawful conduct, which satisfies the enforcement requirement of Article 54.

The Court therefore concluded that the *ne bis in idem* principle also applies to these types of decisions whereby further prosecution is barred (Bogensberger and Troosters, 2006: 337-338).¹⁸⁶ The judgement nevertheless also mentioned that this does not prevent the victims of criminal acts to seek compensation, in non-criminal proceedings, for the damage suffered (Hatzopoulos, 2007: 12).

This judgment of the Court clearly has important implications for restorative justice practices. First of all, it means that where an offender participates in a restorative justice practice of which the result is transmitted to the public prosecutor or the judge who subsequently dismisses the case, the offender should not be worried about being prosecuted for the same facts again, not in the country where the public prosecutor has dismissed the case, nor in any other country. It also points to the importance of giving some legal recognition to agreements reached in the course of restorative justice practices, since running these practices completely outside the criminal justice system would put the offender at risk of being held accountable for the same offence twice.

This last point is reinforced by the judgment in the *Miraglia* case (C-105/03). The question at hand was whether the *ne bis in idem* principle also applied to a decision of the judicial authorities of another Member State declaring a case to be closed without having examined its merits. According to Bogensberger and Troosters (2006: 339), one of the main consequences of that ruling is that an examination of the merits of the case, at least to some extent, is a precondition for the application of the *ne bis in idem* principle.¹⁸⁷

¹⁸⁶ The Council of Europe, in its Recommendation concerning mediation in penal matters, has explicitly made provision for this in article 17: “Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*)”.

¹⁸⁷ However, a later case, the *Gasparini* case (C-467/04) seems to suggest again that “all acquittals by a Court, which were made after criminal proceedings have been brought, do create a legal barrier for any further prosecution in the whole Schengen area” (Bogensberger and Troosters, 2006: 342). In this case, the need of having an acquittal based on a determination as to the merits of the case was not taken up by the Court again.

Another important judgment is the one in the *Pupino* case (C-105/03). The question raised here focused, in general, on a situation where a Framework Decision was not transposed appropriately into national law, and, in particular, on its practical effects for the application of national criminal law. In its judgment of 2005, the Court held that the principle of loyal cooperation is also binding in the area of criminal law. This principle requires that Member States take all appropriate measures to ensure fulfilment of their obligations under EU law. This has as a consequence that when national courts apply national law, they have to interpret that law as much as possible in a way that conforms to the wording and the purpose of the Framework Decision in order to ensure its effectiveness. This judgment makes it clear that Framework Decisions are not as ‘soft’ after all (Bogensberger and Troosters, 2006: 342-343). The *Pupino*-case has indeed affected the binding and enforceable character of a Framework Decision as a legislative instrument. In principle a Framework Decision has no direct effect. However, based on the judgement, it can be said that it is ‘binding’ on Member States in the sense that it has a bearing on the interpretation of national law. A national judge can (and should) now turn to the European Court of Justice for guidance on how to interpret national law in the light of a Framework Decision.

Presented above are a few cases that have a clear relevance for the present report. However, it is important to note that in other cases the judicial protection of third pillar matters has been increased considerably as well. For example, Court rulings have stated that Community law may overrule national criminal law with which it is incompatible. Also, a 2006 Court ruling identified an implicit, accessory, criminal competence in Community law, which means that the Community has a criminal competence when it is needed in order to achieve a given Community objective (in this case: in order to protect the environment).¹⁸⁸

5. CONCLUSION

Cooperation in the area of criminal law within the EU has undergone a substantial evolution from the purely intergovernmental cooperation before the Maastricht Treaty to the changes proposed in the Treaty of Lisbon, by which the normal legislative procedure becomes applicable (including qualified majority voting) and the Court of Justice assumes almost full jurisdiction. But the cooperation remains tenuous. As in other areas of EU policy, integration has been incremental, riddled with delicate compromises and reservations by Member States. Although the current Treaty articles are formulated in such a way that initiatives could be taken in virtually all fields of criminal law and criminal procedure, EU initiatives have been kept to a strict minimum, not least by the actions of those Member States who vigorously protect their national sovereignty in these matters. The clear preference for mutual recognition above harmonisation, the reluctance with which the Court of Justice is given jurisdiction in the field, the often less than optimal implementation of measures in the Member States, the many challenges of the legal base made by

¹⁸⁸ In the *Sanctions for the environment case* (C-176/03) the issue at stake was whether Framework Decision 2003/80/JHA which imposed penal sanctions for the protection of the environment had correctly been adopted by the Council within the third pillar, and not in the form of a Directive under article 175 EC on environmental policy. The Court, contrary to the opinion of the intervening Member States, has concluded that limited harmonisation of criminal law may take place in first pillar acts, where this is necessary for the achievement of Treaty objectives (Hatzopoulos, 2007: 7). After the judgment, the European Commission has issued a communication on the subject (Commission Communication to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03 *Commission v Council*), COM (2005) 583 final). In this communication, the Commission states that “When, for a given sector, the Commission considers that criminal law measures are required in order to ensure that Community law is fully effective, these measures may include: the actual principle of resorting to criminal penalties; the definition of the offence – that is, the constituent elements of the offence; and the nature and level of the criminal penalties applicable”.

Member States and the formulation of reservations vis-à-vis legislative proposals, and many other aspects show that police and judicial cooperation in criminal matters is a delicate matter for the Member States.

The focus on cross-border and organised crime, which is becoming even stronger under the Treaty of Lisbon, is, however, sometimes put aside. On – admittedly rare – occasions, a proposal such as the Framework Decision on the standing of victims in criminal proceedings passes the various rounds of negotiations. This shows that it is possible for the EU ministers to set aside their narrow and protectionist interpretation of the Treaty articles.

PART V:
**THE ROLE OF THE EUROPEAN UNION IN THE FURTHER DEVELOPMENT OF
RESTORATIVE JUSTICE IN EUROPE**

In a speech given to the Council of Europe Conference of Ministers of Justice on 7 April 2005 in Helsinki, former Vice-President Franco Frattini¹⁸⁹ stated that: “In the future, the social dimension of justice should receive an increased attention. Restorative justice, mediation (in criminal and civil matters), the treatment of offenders, in particular after they have served their prison sentence, to favour their reintegration into society, are all aspects to which we could devote our joint efforts”.¹⁹⁰ Two points are made here. First of all, restorative justice should receive increased attention. We could say that by stating this, the EU Commissioner responsible for Freedom, Security and Justice has recognised the potential of restorative justice to contribute to a more balanced system of criminal justice that is more responsive to the needs of victims, offenders and society as a whole. Second, the European Union and the Council of Europe could cooperate on this topic. In relation to this possible cooperation, the *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*¹⁹¹ (see also Part III, 1.3. e) adopted by the Council of Europe’s Commission for the Efficiency of Justice in December 2007, have already put forward following matters which should be tackled at an international level:

- 22. Member states should recognise the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.
- 23. As certain member states encounter problems where the quality of training of mediators is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for mediators and for mediation trainers (for example, a European training centre). This could be facilitated by the Council of Europe in cooperation with the European Union.
- 25. Member states should work together to examine, evaluate, and identify good practices in order to establish specific guidelines to the participation of minors in mediation in penal matters. This could be facilitated by the Council of Europe in cooperation with the European Union.
- 28. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that a special Code of Conduct shall be elaborated with respect to the particularities of mediation in penal matters.

These, and other, possible initiatives which could be taken to further the development of restorative justice in Europe, are the subject of the final part of this report. However, our focus will be on the role of the European Union in this matter. Indeed, the task at hand in this final part is to come to conclusions on following questions: *Is there a role for the European Union in the further development of restorative*

¹⁸⁹ Mr Frattini was the Commissioner responsible for Justice, Freedom and Security.

¹⁹⁰ F. Frattini, *There is no contradiction between granting people more security and respecting the fundamental rights*, speech given at the Council of Europe Conference of Ministers of Justice, Helsinki, 7 April 2005.

¹⁹¹ European Commission for the Efficiency of Justice (CEPEJ), *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*, CEPEJ(2007)13, 7 December 2007, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2007\)13&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6/](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2007)13&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6/).

justice in Europe, and if so, what should be regulated or provided for and by which instruments? In answering these questions, we will look not only at what is legally possible, but also at what the European restorative justice scene considers to be desirable.

In the first section of this part, we will look at whether there is a legal base for the European Union to act in the field of restorative justice, whether through legislation or through policy and other initiatives. Next, we will discuss whether there are reasons why the European Union should act in this field. Does it have legitimate reasons to act, and what are the advantages and risks related to EU action seen from the position of restorative justice actors? In a third section we look at the needs voiced by the European restorative justice scene, and link them to possible ways in which the European Union could respond to these. The final conclusions can be found in Part VI: General conclusions.

1. IS THERE A LEGAL BASE FOR THE EU TO ACT IN THE FIELD OF RESTORATIVE JUSTICE?

When answering the question whether there is a legal base for the European Union to act in the field of restorative justice, several steps have to be taken. A first step is to look at the Treaty articles in a strict sense. Because of the uncertainty of whether the Treaty of Lisbon will enter into force, we will consider both the current relevant legal bases, and the articles included in the Treaty of Lisbon. However, in order to better understand these legal texts, one also needs to look at the interpretation that is given to them by policy makers and courts. For this purpose, we will look at the way in which these Treaty articles have been understood by the institutions of the European Union, including the Court of Justice. We can do this by studying relevant passages of the subsequent Action Plans, Council Conclusions and Commission Communications, and by looking at rulings of the Court of Justice. A third step to be taken is to consider how legal texts can be given a broader meaning through political will, lobbying and other factors.

Rather than to take these steps in a strict chronological order, we have decided to discuss them for five possible entry points for restorative justice into regulation and policy making at the EU level, namely: victim rights, offender rights, crime prevention, mutual recognition and enforcement of decisions, and alternative disputes resolution.

We will conclude that, provided that Member States and European institutions are willing to reach a non-restrictive reading of the Treaty articles, there is a legal base for some action in the field of restorative justice.

1.1. VICTIM RIGHTS

a) The Council Framework Decision on the standing of victims in criminal proceedings

The only legislative provision concerning restorative justice that has currently been adopted by the European Union was included in an initiative aimed at the approximation of victim rights, namely Art. 10 on the promotion of victim-offender mediation in the 2001 Council Framework Decision on the standing of victims in criminal proceedings.¹⁹² The fact that this framework decision was adopted clearly indicates that the Treaty articles can, under certain circumstances, be open to a non-restrictive reading by EU policy makers. In fact, as was discussed in Part III, section 3.2. a) of this report, the legal base for the adoption of the framework decision was challenged by the European

¹⁹² Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, OJ L 82/1 of 22.3.2001.

Parliament.¹⁹³ Initially, the draft framework decision referred to Art. 31(e) TEU for its legal base (judicial cooperation in criminal matters shall include “progressively adopting measures establishing minimum rules to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking”). The European Parliament argued that since the proposal was not concerned with substantive law but with procedural criminal law, it was arguable whether the adoption of the framework decision was permissible. We would like to point out that the proposal was by no means limited to victimisation as a result of organised crime, terrorism or illicit drug trafficking. In order to solve this impasse, the framework decision was finally adopted on the basis of a non-restrictive reading of Art. 29, third indent TEU. This states that the objective of providing citizens with a high level of safety within an area of freedom, security and justice, may be obtained, inter alia, through the approximation, where necessary, of rules on criminal matters, in accordance with the provisions of Art. 31(e). A restrictive reading of Art. 29, third indent, would have run into the same problems as mentioned by the European Parliament since the third indent refers explicitly to Art. 31(e) TEU. This means that a restrictive reading would result in the following: the approximation of minimum rules on criminal matters is only possible where it concerns the constituent elements of criminal acts or penalties in the fields of organised crime, terrorism and illicit drug trafficking. This is certainly not so in the case of the Framework Decision.

A further element to support the claim that a non-restrictive reading of the Treaty articles is possible is shown by the fact that it is clear that the provisions in the Framework Decision on the standing of victims in criminal proceedings will first of all benefit victims who were victimised in their own country. According to Groenhuijsen and Reynaers, the adoption of the framework decision was the result of a kind of ‘trick’ which consisted in saying that approximation in criminal proceedings was needed in order to ensure an equal treatment of European travellers and tourists who became victims of a crime in a Member State of the European Union other than their own (Groenhuijsen and Reynaers, 2006: 16). However, the way the framework decision in itself is formulated leaves no doubt about the fact that Member States were well aware of the fact that the provisions would have their main effect on ‘domestic’ victims. Point 4 of the preamble to the framework decision states that “Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present”. This means that the high level of protection should be ensured for both ‘national victims’ and ‘visitors’. But even more indicative of the fact that the provisions relate mostly to domestic victims is that only two of the articles deal explicitly with cross-border matters, namely art. 11 (Victims resident in another Member State) and Art. 12 (Cooperation between Member States).

Another interesting matter in the framework decision is that point 6 states that the provisions are “not confined to attending to the victim’s interests under criminal proceedings proper. They also cover certain measures to assist victims before or after criminal proceedings, which might mitigate the effects of the crime”. This clearly goes beyond the framework set in the Treaty articles, which is limited to police and judicial cooperation in criminal matters.

A final remarkable element is that the preamble makes no reference to the principles of subsidiarity and proportionality.

How was it possible then that the framework decision was adopted without there being a clear and undeniable legal base in the Treaty articles? The issue of victim rights was put on the agenda in the

¹⁹³ Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Brussels, 16.02.2004, COM(2004)54 final/2, p. 41.

Vienna Action Plan¹⁹⁴ in 1998. Here, the Council and the Commission state in point 19 that “Procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case. In principle this function of adequate and comparable procedural guarantees is already achieved by the safeguards of the European Convention on Human Rights and Fundamental Freedoms and their dynamic interpretation by the European Court of Human Rights, in particular regarding the rights of the defence in criminal proceedings. It appears useful, however, to complement those basic principles by standards and codes of good practice in areas of transnational relevance and common concern (e.g. interpretation) which may also extend to certain parts of the enforcement of criminal decisions, including, for instance, confiscation of assets and to aspects of offender reintegration and victim support”. Point 51c then states that within five years of the entry into force of the Treaty on European Union, measures have to be taken to “address the question of victim support by making a comparative survey of victim compensation schemes and assess the feasibility of taking action within the Union”. In preparation for the Tampere European Council, the European Commission then issued its Communication on Crime Victims in the European Union.¹⁹⁵ In this it stated that “The situation and rights of the victims of crime has for too long been neglected. It is now time to put more focus on how their situation can be improved. If a Citizen’s Europe is to have relevance, measures must be taken to improve victims’ rights. ... The Commission is of the opinion, that the rights of victims of crime would only be partially addressed by dealing with the compensation issue in isolation. *Prevention of crime and the stages preceding victim compensation* – assistance to victims and *the standing of victims in the criminal procedure* – are equally important and need to be exhausted before the victim even comes close to the compensation system. ... The opportunity to address the crime victims’ issue at the Tampere European Council, 15-16 October 1999, would be properly seized only if these additional issues were included in the discussions. ... In compliance with the principle of subsidiarity, this Communication focuses only on the special problems of people falling victim of crime in a Member State other than their own, *but the approach is equally relevant for domestic victims*” (p. 1-2, emphasis added). In these few sentences, the European Commission succeeded in opening up the Council’s initial focus on victim compensation schemes to the whole field of victim assistance and crime prevention, and communicated to Member States the relevance of the Communication for the way they deal with all victims, whether habitual residents of their country or not! It is useful to mention that this Communication was prepared by the Commission assisted by a group of experts in the field of crime victim issues, based on the information provided through a project funded under the GROTIUS programme. This means that outside expertise has to a great extent shaped the content of the Communication.

In point 32 of the Tampere Conclusions,¹⁹⁶ the European Council took notice of the direction provided by the European Commission by stating that: “Having regard to the Commission’s communication, *minimum standards* should be drawn up on the protection of the victims of crime, in particular on crime victims’ access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims”.

¹⁹⁴ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, O.J. C19/1 of 23.1.1999.

¹⁹⁵ Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee on Crime Victims in the European Union – Reflections on Standards and Actions, COM(1999)349 final, of 14 July 1999.

¹⁹⁶ Tampere European Council, 15 and 16 October 1999, Presidency conclusions, available from: http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 15.10.2007).

All of the above have contributed to the possibility that the Framework Decision could be adopted in the absence of a clear legal basis in the Treaty articles. These factors have shaped an atmosphere in which the Treaty articles could be given a broader interpretation. This was of course supported by an effective lobby from victim organisations throughout Europe, and by the fact that in most, if not all, Member States victim issues were high on the political agenda.

In the meanwhile, the Treaty of Lisbon contemplates the integration of certain tasks for the European Union in relation to victim rights in paragraph 2 of Art. 82. This states that “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern ... (c) the rights of victims of crime ...”. It is doubtful whether a restrictive reading of this new text would have allowed the adoption of the 2001 Framework Decision on the standing of victims in criminal proceedings. If one wants to play ‘the devil’s advocate’, one might argue that the adoption of minimum rules concerning victim rights is by no means necessary either to facilitate mutual recognition of judgments and judicial decisions, or to facilitate police and judicial cooperation in criminal matters having a cross-border dimension. However, with regard to the necessity of providing equal access to justice (i.e. not only equal access to court proceedings, but also to a wider understanding of the concept of justice), as well as from a humanistic point of view in general, it is undeniable that the European Union has a role to play in establishing minimum rights for victims. We will deal with this in more detail in section 2.

b) The Council Directive relating to compensation to crime victims

Since the Council Directive relating to compensation to crime victims¹⁹⁷ deals with setting up a system of cooperation to facilitate access to compensation to victims of crime in cross-border situations, which should operate on the basis of Member States’ schemes on compensation to victims of violent intentional crime, it has no immediate content-wise relevance for restorative justice. This is an interesting document because of the legal basis and the reasoning on which it was adopted.

The first point in the preamble states: “One of the objectives of the European Community is to abolish, as between Member States, obstacles to the free movement of persons and services”. Point 2 continues as follows: “The Court of Justice held in the Cowan Case that, when Community law guarantees to a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. Measures to facilitate compensation to victims of crimes should form part of the realisation of this objective”. Point 9, finally, reads as follows: “Since the measures contained in this Directive are necessary in order to attain objectives of the Community and the Treaty provides for no powers other than those in Article 308 thereof for the adoption of this Directive, that Article should be applied”. Article 308 of the Treaty establishing the European Community mentions that “If action by the Community should provide necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.

The above raises two issues. First it is not clear why the ‘construction’ of a legal base, as took place for the adoption of the 2001 Framework Decision, was not repeated here; or conversely, why this residual power in Art. 308 EC Treaty was not used to adopt a Council Directive on the standing of victims in

¹⁹⁷ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 216/15 of 6.8.2004.

criminal proceedings. It is arguable that the adoption of the Directive under Art. 308 EC Treaty is, from a strict legal point of view, more correct. Second, the adoption of this Directive, using this reasoning, opens interesting perspectives. Even if the Treaties have not foreseen the necessary powers, the Council may act in order to attain – in the course of the operation of the common market – one of the objectives of the Community. One of these objectives is to abolish obstacles to the free movement of persons. The equal protection of people visiting a Member State from harms, as compared to the protection provided to nationals and persons residing in a Member State, is a corollary of that freedom of movement. Measures to facilitate compensation to victims of crime should form part of the realisation of this objective. Can we then state that, since restorative justice seeks, amongst others, to provide a way for the victim to come to terms with the offence and to reach an agreement with the offender on how to deal with the aftermath of the crime (regularly including forms of compensation), measures to facilitate access to restorative justice form part of the realisation of the objective of the free movement of persons? From such a perspective, access to restorative justice can (and has to) be seen as one form of access to justice for victims.

In order to complete this reasoning, a cross-border element should still be introduced. In its Communication on Crime Victims in Europe¹⁹⁸, the European Commission has already provided some indication of the relevance of victim-offender mediation in cross-border cases. It stated on p. 8-9 of the Communication that “Long criminal procedures may also in general discourage victims from seeking justice. Victim-offender mediation could therefore be an alternative solution, in the interest of victims, making possible the compensation of damages or the recovering of lost property outside a normal criminal procedure. For foreign victims mediation has two advantages. Firstly, the immediate use of mediation, by the police or the prosecutor. This ideally solves the problem – e.g. to get back (part of) stolen property or reimbursement of its value before leaving the country concerned – before it is even reported as a crime. It can of course only be done when the offender is caught during the time the victim stays in the country. Secondly, third party mediation, i.e. where an intermediary person acts on the victim’s behalf in an effort to reach a mediated agreement, is of benefit when the victim already has returned to his/her home country. This is probably only relevant when property crime is involved and then only in the case where the offender has been caught and has sufficient means to give a mediation prospects of success. If a third party – a representative of the victim, a lawyer or an organisation – can start or continue an attempted mediation between offender and victim, the victim will not have to assist in a criminal procedure, nor will he have to seek justice at a distance”. Some qualifications should be made about the Commission’s reasoning. First, it is unlikely that people who become victims of crime during a short stay in a Member State other than their own, will be referred to restorative justice practices; the referring agent will probably doubt whether it is feasible to complete the process before the victim leaves the country. It could be useful, however, to adopt measures in order to ensure that victims have equal access to restorative justice practices, whether they are habitually resident in the country or not, so as to avoid discrimination based on nationality. Second, there are several possibilities in which a restorative process can be conducted without a personal encounter. In Canada, where distances are great, there is experience in conducting restorative processes via, for example, video conferencing. Also indirect mediation, where communication between victim and offender happens via the intermediary of one (or in this case probably two) mediators, is a possible avenue. From the point of view of the restorative potential it makes no difference if a ‘surrogate encounter’ or an (indirect) ‘shuttle diplomacy’ is conducted because of the desire of a victim not to be confronted with the offender in a face-to-face setting, or because he or she (or the offender for the same matter) has already gone back to his or her own Member State. In addition, contrary to what the European Commission

¹⁹⁸ Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee on Crime Victims in the European Union – Reflections on Standards and Actions, COM(1999)349 final, of 14 July 1999.

stated, there is no principled reason why these possibilities should be limited to property crime. International research clearly shows that most categories of crimes are suitable for restorative justice.

Whether the adoption of a Council Directive relating to restorative justice would be opportune and if so, with what it should deal, will be dealt with in section 3. However, the above shows that – provided that the political will exists – one could argue for a Council Directive, using a similar reasoning as the one used to adopt the Council Directive relating to compensation to crime victims.

c) *The future for initiatives on victim rights*

In its assessment of the Tampere programme¹⁹⁹, the European Commission provided a new angle to the question why the European Union should act in the field of victim rights. Page 12 of the report states that one of the priorities for the area of freedom, security and justice should be to strengthen mutual trust by assuring all European citizens of a high-quality system of justice based on common values. “A series of measures to ensure mutual trust between national judicial authorities should cover: the definition of fundamental guarantees, the conditions for the admissibility of evidence and measures to strengthen the protection of victims”.

In the Hague Programme²⁰⁰, adopted by the European Council on 5 November 2004, the only explicit mention of victims can be found on p. 21 where the European Council stresses the need to ensure adequate protection and assistance to victims of terrorism. However, the new angle introduced by the European Commission is taken up in point 3.2., without an explicit reference to victims: “Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality”.

In the Action plan from the Commission to implement the Hague Programme²⁰¹ only brief reference is being made to crime victims. Under the heading ‘Fundamental rights and citizenship: creating fully-fledged policies’ it is stated that “Furthermore, the Commission will, in collaboration with member States, pursue its efforts to ... provide support to victims” (p. 7). It even seems that the new angle that the Commission brought to the fore in the assessment of the Tampere programme is now geared more strongly to offenders than to victims: “A European area of justice is more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions. To this end, the Union must envisage not only rules on jurisdiction, recognition and conflict of laws, but also measures which build confidence and mutual trust among Member States, creating minimum procedural standards and ensuring high standards of quality of justice systems, in particular as regards fairness and respect for the rights of defence. Mutual understanding can be further pursued through the progressive creation of a “European judicial culture” that the Hague Programme calls for, based on training and networking” (p. 11). This is of course not to say that victim issues have

¹⁹⁹ Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientation, COM(2004) 401 final, of 2.6.2004.

²⁰⁰ Brussels European Council, 4 and 5 November 2004, Annex 1 to the Presidency conclusions, http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf (consulted on 15.10.2007).

²⁰¹ Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005) 184 final of 10.5.2005.

disappeared from the EU agenda. As stated above, the Treaty of Lisbon foresees an explicit mention of victim rights as a matter on which minimum rules may be adopted.

1.2. OFFENDER RIGHTS

As opposed to the adoption of victim rights, the adoption of offender rights has encountered much stronger resistance.

In July 1998, the Commission set out its vision for the area of freedom, security and justice.²⁰² This document states that the ambition of the area of freedom, security and justice should be to give citizens a common sense of justice throughout the Union. A minimum standard of protection for individual rights was considered to be the necessary counterbalance to judicial cooperation measures that considerably enhanced the powers of prosecutors, courts and investigating officers. Point 19 of the Vienna Action Plan²⁰³ stated that “Procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case. In principle this function of adequate and comparable procedural guarantees is already achieved by the safeguards of the European Convention on Human Rights and Fundamental Freedoms and their dynamic interpretation by the European Court of Human Rights, in particular regarding the rights of the defence in criminal proceedings. It appears useful, however, to complement those basic principles by standards and codes of good practice in areas of transnational relevance and common concern (e.g. interpretation) which may also extend to certain parts of the enforcement of criminal decisions, including, for instance, confiscation of assets and to aspects of offender reintegration and victim support”. In the Conclusions, the principle of mutual recognition was endorsed as “the cornerstone of judicial cooperation” and went on to say that “enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights”. In point 37 of the Tampere Conclusions, the European Council asked the Council and the Commission to, in its programme of measures to implement the principle of mutual recognition, also launch work “on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States”. The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters²⁰⁴, in its introduction, states that “Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders. Moreover, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions contributes to legal certainty in the European Union”.

In order to take a first step in the process of adopting minimum safeguards for suspects and defendants in criminal proceedings, the European Commission published a Green Paper.²⁰⁵ At p. 11, the Commission argued why, in view of the subsidiarity principle, it was nevertheless acceptable to adopt measures to approximate individual rights. “The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizens and that, if action is taken at the Community

²⁰² Communication from the Commission, Towards an Area of Freedom, Security and Justice, COM(1998) 459 final of 14.7.1998.

²⁰³ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, O.J. C19/1 of 23.1.1999.

²⁰⁴ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12 of 15.1.2001, 10-22.

²⁰⁵ Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final of 19.2.2003.

level, it is justified, having regard to the options available at national, regional or local level. This means that the EU should not take action unless to do so would clearly be more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaty. The Commission considers that in this area, only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied with their fair trial obligations, deriving principally from the ECHR, on a national basis and this has led to discrepancies in the levels of safeguards in operation in the different Member States. ... such discrepancies may prevent the process of mutual recognition to be fully developed in practice” (emphasis in original).

The Hague Programme²⁰⁶, adopted by the European Council, mentioned in point 3.3.1. that “The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005”.

As was already mentioned above, the Action Plan from the Commission to implement the Hague Programme²⁰⁷ states under the heading ‘Civil and criminal justice: guaranteeing an effective European area of justice for all’, that “A European area of justice is more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions. To this end, the Union must envisage not only rules on jurisdiction, recognition and conflict of laws, but also measures which build confidence and mutual trust among Member States, creating minimum procedural guarantees and ensuring high standards of quality of justice systems, in particular as regards fairness and respect of the rights of defence. Mutual understanding can be further pursued through the progressive creation of a “European judicial culture” that the Hague Programme calls for, based on training and networking”.

The establishment of minimum rules as regards the rights of individuals in criminal procedure is now also explicitly included in the Lisbon Treaty. Art. 82, paragraph 2 reads: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (b) the rights of individuals in criminal procedure”.

In June 2003, the Commission held a public hearing on the subject of safeguards. All those who had replied to the Green Paper, or manifested an interest in it, were invited. At this meeting, a great deal of support for the Commission’s proposal was received from legal practitioners and non-governmental organisations. Support from the representatives of Member States was, however, divided. Those that were opposed to the idea invoked five reasons: 1) the subsidiarity principle, 2) concerns over legal basis, 3) the fear that ‘common minimum standards’ could result in a general lowering of standards, 4) the argument that common minimum standards have already been set by the ECHR and that no further

²⁰⁶ Brussels European Council, 4 and 5 November 2004, Annex 1 to the Presidency conclusions, http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf (consulted on 15.10.2007).

²⁰⁷ Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005) 184 final of 10.5.2005.

action is needed, and 5) fears were expressed that implementing these proposals would be technically difficult.²⁰⁸

Based on its Green Paper, the European Commission adopted a draft Framework Decision on certain procedural rights applying in criminal matters on 28 April 2004.²⁰⁹ This initial draft included a number of rights – most of which were already included in the existing international conventions such as the European Convention on Human Rights – which according to the European Commission needed clarification and adaptation to the special circumstances required by mutual recognition. These were: the right to legal advice, the right to translation and interpretation, the right to specific attention for people not able to understand or follow the proceedings, the right to communication for detained persons, the right to consular assistance for foreign nationals, and the right to be informed of one's rights on arrest. Because of the opposition of some Member States, and because of the unanimity rule, the draft from the European Commission was withdrawn and a new draft was prepared by the Austrian Presidency in May 2006.²¹⁰ The new draft leaves out the right to specific attention for vulnerable persons, the right to communication for detainees and the right to consular assistance. It also leaves it open whether information on one's rights is given in written form or orally. The new draft further extends the remaining rights to proceedings covered by the European Arrest Warrant. This compromise solution is nevertheless still being opposed by a number of countries who would prefer a non-binding resolution over a binding framework decision (Morgan, 2006: 308-310). The dividing line between the delegations that can accept the text and the delegations that cannot has been the question whether there is competence for the European Union to legislate on purely domestic proceedings or whether the legislation should be devoted solely to cross-border cases. A compromise solution was proposed to have the proposal at least cover the proceedings of the European Arrest Warrant, and to, in addition, give an optional choice to cover all criminal proceedings. It remains to be seen what will happen with this proposal.

The European Council and the European Commission have given a strong impetus for the adoption of this decision. Nevertheless, it remains blocked at the level of discussions between delegations. This might point in the direction that Heads of State or Government, in the European Council, are less worried about the protection of national sovereignty than policy makers 'on the floor'.

It is also striking that the major stumbling block, which is the principle of subsidiarity, is so difficult to overcome in relation to minimum rights for suspects and defendants, whilst it was clear that the Framework Decision on the standing of victims in criminal proceedings would also have its main impact on national victims. According to Groenhuijsen and Reynaers, the reason why the process of adopting the latter framework decision went so smoothly is that the Member States did not expect that it would result in having them to change their national systems in any significant way (Groenhuijsen and Reynaers, 2006: 18). Maybe the fact that the opposition remains firm in relation to the Framework Decision on certain procedural rights in criminal proceedings means that the Member States foresee that it will have a major impact on their national systems, something that they would prefer to avoid. However, what does this say about the current level of compliance with the European Convention on Human Rights and Fundamental Freedoms, and with the Member States' respect for the Charter of Fundamental Rights of the European Union? The Commission stated in its proposal that "the final outcome for this proposal should not lead to an intolerable burden for Member States since the

²⁰⁸ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final of 28.04.2004, 5-6.

²⁰⁹ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final of 28.04.2004.

²¹⁰ Council of the European Union, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 10287/07 of 5.6.2007.

substance of the provisions essentially confirms existing rights under the ECHR and relevant case-law”.²¹¹ Maybe the Commission was too optimistic in stating this?

1.3. CRIME PREVENTION

Crime prevention is one of the main axes, next to combating crime, through which the European Union seeks to achieve the objective of providing citizens with a high level of safety within an area of freedom, security and justice (Art. 29 TEU). This also becomes clear in Art. 2 TEU, which states the objectives of the Union as a whole, one of which is “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”. The importance of crime prevention as a task for the European Union is maintained in the Treaty of Lisbon. Art. 67, third paragraph states that “The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime ...”.²¹² Art. 84 envisages the possibility for the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

The Vienna Action Plan²¹³ called for developing cooperation and concerted measures on matters relating to crime prevention within five years of the entry into force of the Treaty (point 51b). In the Tampere Conclusions²¹⁴, the European Council called “for the integration of crime prevention aspects into action against crime as well as for the further development of national crime prevention programmes. Common priorities should be developed and identified in crime prevention in the external and internal policy of the Union and be taken into account when preparing new legislation” (point 41). Also, “The exchange of best practices should be developed, the network of competent national authorities for crime prevention and cooperation between national crime prevention organisations should be strengthened and the possibility of a Community funded programme should be explored for these purposes. The first priorities for this cooperation could be juvenile, urban and drug-related crime”.

In response to this call for the exchange of best practices and for increased networking, the European Crime Prevention Network was established through a Council Decision of 28 May 2001.²¹⁵ As was mentioned in Part III, section 3.3. c) restorative justice (mediation) was identified as a top priority subject to be studied in relation to juvenile crime in both the first and second work programme of the European Crime Prevention Network. However, no concrete actions have been undertaken in this field.

²¹¹ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final of 28.04.2004, 5-6.

²¹² The reasons underlying the choice of the words ‘high level of security’ in the Treaty of Lisbon as opposed to ‘high level of safety’ in the current version of the Treaty on European Union would be an interesting matter for further research.

²¹³ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, O.J. C19/1 of 23.1.1999.

²¹⁴ Tampere European Council, 15 and 16 October 1999, Presidency conclusions, available from: http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 15.10.2007).

²¹⁵ Council Decision of 28 May 2001 setting up a European crime prevention network, 2001/427/JHA, OJ L 153 of 8.6.2001, 1-3.

In the Communication from the Commission assessing the Tampere Programme²¹⁶, stronger action for crime prevention was called for. With regard to the prevention of general crime, five fields of actions were prioritised: a more precise definition of the priority forms of crime; an inventory of good practice; a common methodology to implement and evaluate practical actions and to allow standardised comparison between the States; stronger monitoring and evaluation, and better comparability of statistics. It is also mentioned that crime prevention should continue and be supported by a financial instrument (p. 15).

In its Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions²¹⁷, the Commission has recognised that alternative sanctions (i.e. non-custodial penalties and measures, including mediation) offer a more creative and humane way of dealing with the issue of crime and punishment, and that these “play an important role in crime prevention because they are much better than custodial sanctions at promoting the successful rehabilitation of offenders” (p. 32). In the Opinion of the European Economic and Social Committee on “The prevention of juvenile delinquency”²¹⁸, restorative justice is seen as an “ideal model for the juvenile justice system since it produces little stigmatisation, is highly educational and is less punitive” (point 4.4). In the description of restorative justice, prevention of re-offending and cutting the costs of criminal proceedings are mentioned as aims of restorative justice, next to the aims of recognising harm done to the victim and trying to provide redress.

The above shows that crime prevention, in relation to both juvenile and adult crime, may be seen to be possible entry point for undertaking action in the field of restorative justice at the level of the European Union. The European Forum for Restorative Justice is a partner in a European Commission co-funded project run by the Italian Juvenile Justice Department, in which the contribution of restorative justice to crime prevention is being studied. It would be useful if the conclusions of this project (expected towards the end of 2009) would consider possible avenues for further EU action.

1.4. MUTUAL RECOGNITION AND ENFORCEMENT OF DECISIONS

The topic of mutual recognition and enforcement of decisions has relevance, in several ways, for the subject of restorative justice. Although it is clear that most cases which are dealt with through restorative justice processes will involve two parties of the same Member State, and although we have noted earlier that it is unlikely that prosecutors or judges will refer a case to a restorative justice process if one of the parties is not habitually resident in the Member State concerned, it is theoretically possible to conceive of cases with a cross-border character. Moreover, one could say that, following the principle of equal access to justice, it would be problematic if parties did not receive an equal chance to take part in a restorative process based on nationality. In addition, as brought forward by the Commission in its Communication on Crime Victims in the European Union²¹⁹ (see also section 1.1. b of this part), several advantages could be seen in applying restorative processes to cross-border cases. First, if the offender is apprehended before the victim goes back to his or her own Member State, restorative processes may provide an opportunity to deal with the matter more quickly than traditional

²¹⁶ Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 401 final of 2.6.2004.

²¹⁷ Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final of 30.04.2004.

²¹⁸ Opinion of the European Economic and Social Committee, The prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union, 2006/C 110/13.

²¹⁹ Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee on Crime Victims in the European Union – Reflections on Standards and Actions, COM(1999)349 final, of 14 July 1999.

criminal proceedings. For this purpose, mediation at the police stage, as it exists for example in Belgium, is probably the best option. Second, it is also possible to conduct a mediation process after the victim has returned to his or her Member State. Although this practice, as far as we know, does not yet exist in Europe, cooperation between two mediation services in providing an indirect mediation to victim and offender is certainly not unthinkable. However, this type of cross-border indirect mediation would require at least that mediation services adhere to some common basic principles and that provision be made for following up the agreement resulting from the restorative process.

The Treaty on European Union does not explicitly mention the term ‘mutual recognition’. Art. 31 (1)(a) TEU provides that common action on judicial cooperation in criminal matters shall include “facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States ... in relation to proceedings and the enforcement of decisions”. The Cardiff European Council²²⁰ on 15 and 16 June 1998 first mentioned the concept of mutual recognition, which was borrowed from the single market, and asked the Council to determine to what extent it should be extended to court decisions of the Member States (point 39). The Vienna Action Plan²²¹ (point 45f) called for the initiation, within two years, of a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters. The idea was taken up by the Tampere European Council²²², which felt that it should be the cornerstone of judicial cooperation in both civil and criminal matters within the Union (points 33 tot 37). The Tampere Conclusions state: “Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights”.

Whereas the term ‘mutual recognition’ did not appear in the Treaty on European Union, the Treaty of Lisbon foresees, on the other hand, the integration of the concept of ‘mutual recognition’ in its text and re-affirms its status as cornerstone for judicial cooperation. Art. 67, paragraph 3, states that “The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws”. Also Art. 82, first paragraph reflects the predominant position that is being given to mutual recognition: “Judicial cooperation in criminal matters in the Union shall be 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 83”.

a) Programme of measures to implement the principle of mutual recognition of decisions in criminal matters

In point 37 of the Tampere Conclusions²²³, the European Council asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. This programme of measures²²⁴ is worth looking into as it contains a reference to penal mediation. In point 1.1. (Ne bis in idem), dealt with under the first heading (“Taking account of final criminal judgments already delivered by the courts in another Member State”), the application of

²²⁰ Cardiff European Council Presidency Conclusions, SN 150/1/98 REV 1.

²²¹ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, O.J. C19/1 of 23.1.1999.

²²² Tampere European Council, 15 and 16 October 1999, Presidency conclusions, available from: http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 15.10.2007).

²²³ Tampere European Council, 15 and 16 October 1999, Presidency conclusions, available from: http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 15.10.2007).

²²⁴ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C/12 of 15.1.2001, 10-22.

the *ne bis in idem* principle to decisions taken in a State following penal mediation was suggested for further consideration. In the absence of an explanation in the introduction it is not clear why specific reference to penal mediation was made in this document and not to alternative measures in general. One can consider the matter to have been solved in the meanwhile by the Court of Justice, which ruled in the Gözütok/Brügge and Miraglia cases that the *ne bis in idem* principle also applies to decisions whereby further prosecution is barred, even if the judicial authorities have not examined the merits of the case.

The introduction to the programme of measures further provides interesting guidance about the scope of application of the principle of mutual recognition by stating that "... mutual recognition comes in various shapes and must be sought at all stages of criminal proceedings, before, during or after conviction, but it is applied differently depending on the nature of the decision or the penalty imposed". This makes it clear that mutual recognition is not limited to the mutual recognition of sentences in a strict sense and that it may also cover measures which intervene at the pre- and post-sentencing stage, such as restorative justice practices. This was confirmed and further elaborated upon in point 3.3.1. of the Hague Programme²²⁵, which states that "The comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which *encompasses judicial decisions in all phases of criminal procedure or otherwise relevant to such procedures*, such as the gathering of evidence, conflicts of jurisdiction and the *ne bis in idem* principle and the execution of final sentences of imprisonment or other (alternative) sanctions, should be completed and further attention should be given to additional proposals in that context" (emphasis added).

b) Council Framework Decision on the application of the principle of mutual recognition to financial penalties

In relation to requirements resulting from mediation in criminal matters for the offender to compensate the victim, the Commission wondered, in its Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union²²⁶, whether these requirements can be treated as equivalent to agreements covered by civil law (and hence falling under instruments for mutual recognition of agreements in civil matters), or whether there is a need for European rules (p. 59). The reality is that there is no simple answer to this question. There currently is no overview of the legal status of agreements reached in the course of restorative justice processes in the different European Union Member States. One can expect that there will be two main categories of agreements. In certain cases (depending on the country, but maybe also on the programme) mediated agreements will be considered to be agreements under civil law. In other cases, mediated agreements will be incorporated in the judicial sentence. If the agreement reached between victim and offender in the course of a restorative practice contains an agreement on financial compensation, and if this agreement on financial compensation is subsequently integrated in a sentence by a criminal court, the recognition of this aspect of the sentence – should one of the parties normally reside in another Member State and return to that State – could be considered to fall within the scope of the Council Framework Decision on the application of the principle of mutual recognition to financial penalties.²²⁷ If the mediation agreement is considered an agreement under civil law, mutual recognition instruments under cooperation in civil matters should be available. This could be a topic for further research.

²²⁵ Brussels European Council, 4 and 5 November 2004, Annex 1 to the Presidency conclusions, http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf (consulted on 15.10.2007).

²²⁶ Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final of 30.04.2004.

²²⁷ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16 of 22.3.2005.

c) *Initiative for a Council Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences*

Already in 2000, in the Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters²²⁸, the Commission raised serious questions about the issue of mutual recognition of alternative sanctions. As we described in Part III, section 3.3. e), point 9.4 of this Communication deals with alternative sanctions, for which the Commission sees two problems in relation to mutual recognition. The first one “is linked to the fact that alternative sanctions are often characterised by a restorative element” and that executing such a sanction in another Member State would not help the community against whose values the offence was directed.²²⁹ The second problem raised by the Commission is that “... some Member States have developed alternative measures to a lesser degree and may not have the appropriate social environment and monitoring bodies” and that, hence, transferring the implementation of the measure there may not achieve the intended educational effect. The Commission’s conclusion was that, whereas in principle mutual recognition of alternative sanctions should follow the same guidelines as that of custodial or pecuniary penalties, it seemed legitimate to leave more discretion to the Member States concerned because of the wide range of types and modalities of measures that could fall within the category of alternative sanctions. The suggestion was made that each Member State could ask for the transfer, but that the requested Member State would not be obliged to consent.

In the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union²³⁰ the topic of mutual recognition of alternative sanctions was picked up again. The Commission wrote the following: “Even if the Member States’ legislation seeks to avoid overt discrimination, the fact is that in practice the national courts do not pass suspended sentenced combined with rehabilitation measures where convicted offenders have their habitual residence in another Member State. Since the sentencing State cannot carry out supervision measures in the State where the offender has his habitual residence, the offender is liable to be sentenced to actual imprisonment even for a minor offence, with the result that the offender is punished more severely than if he had committed the same offence in his Member State of residence” (p. 43). In dealing with the question what decisions should be eligible for mutual recognition, the Commission wrote that it was its view “that the establishment of a genuine area of freedom, security and justice demands recognition of all criminal penalties, including alternative sanctions and measures and arrangements emerging from criminal mediation and settlement procedures. It would be quite unacceptable for alternative sanctions to be available in practice only for residents and not for people who live in another Member State” (p. 59).

In the meanwhile, a proposal to adopt a Council Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and custodial sentences²³¹ has been introduced by Germany and France. This proposal finds its legal basis in Art. 31(1)(a) (facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities in relation to proceedings and the enforcement of decisions). Its objective is, “with a view to facilitating the social

²²⁸ Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final of 26.7.2000.

²²⁹ We find this an unconvincing argument. It is the fact that the offender is undertaking positive action, rather than the visibility of the action taken, that is important.

²³⁰ Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final of 30.04.2004.

²³¹ Initiative of the Federal Republic of Germany and the French Republic with a view to adopting a Council Framework Decision (2007/.../JHA) of ... on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences, OJ C 147/1 of 30.6.2007.

re-integration of sentenced persons and improving the protection of victims, to lay down the rules according to which one Member State supervises suspensory measures imposed on the basis of a judgment which was issued in another Member State, or alternative sanction contained in such a judgement and takes all other decisions relating to the execution of that judgment, insofar as this falls within its competence (art. 1). It defines alternative sanctions as an obligation or instruction, imposed as an independent sanction, which is not a custodial sentence, a measure involving deprivation of liberty or a financial penalty (art. 2c). The proposal sets out a list of suspensory measures or alternative sanctions which may be transferred to another Member State, in which the sentenced person is lawfully and ordinarily resident for the purpose of recognition and supervision of those measures and sanctions, including (e) an obligation to compensate for the prejudice caused by the offence (Art. 5).

1.5. ALTERNATIVE DISPUTE RESOLUTION AS A GENERAL POLICY APPROACH

As was mentioned in Part III, section 3 b), the European Council called in its Tampere Conclusions for the creation of alternative, extra-judicial procedures. Unfortunately, actions under this call have been limited to initiatives in the field of civil justice. It is nevertheless interesting to look at the initiatives taken in this field as they may indicate what is possible to achieve in relation to restorative justice.

The section on the website related to alternative dispute resolution of the European Judicial Network in civil and commercial matters²³² opens with the sentence “The European Union is very interested in alternative dispute resolution”. We continue to quote from the website. “Following on from the Vienna Action Plan in 1998 and the Conclusions of the Tampere European Council in 1999, the Council of Justice and Home Affairs Ministers called on the Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration, taking stock of the current situation and launching broad consultations on the measures to be taken. Priority was given to the possibility of *laying down basic principles*, either in general or in specific fields, which would offer the *requisite guarantees that out-of-court dispute resolution will ensure the proper degree of security in the administration of justice*. In its Green Paper the Commission recalled that the development of these forms of dispute settlement was not to be regarded as a means of remedying deficiencies in the operation of the courts but as an alternative, *more consensus-based form of social peace-keeping and conflict and dispute resolution which in many cases would be more appropriate than the resolution of disputes by a third party as through the courts or by arbitration*. Alternative dispute resolution techniques such as *mediation allow the parties to resume dialogue and come to a real solution to their dispute through negotiation instead of getting locked into a logic of conflict and confrontation with a winner and a loser at the end*. ... The main purpose of the Green Paper was to come up with answers to the delicate question of *the balance to be achieved between the need for flexibility and the need to guarantee quality of results, and the harmonious relationship with court procedures*. ... Lastly, by publishing this Green Paper, the Commission contributed to the continuing debates in the Member States and internationally *on the best way of ensuring that the best possible environment was available for the development of alternative dispute resolution*. The 21 questions put in the Green Paper concerned the decisive elements of the different forms of alternative dispute resolution, such as clauses providing agreements to go to ADR, *the problem of periods of prescription and limitation, the need for confidentiality, the validity of consent, the effect of resulting agreements particularly for enforcement, training for mediators and other third parties, their accreditation and the rules governing their liability*” (emphasis added). Parallels with restorative justice and issues with which restorative justice is faced can be easily discerned.

²³² http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm (consulted on 22.01.2008).

A consideration of some of the initiatives taken in the field of alternative dispute resolution alongside the publication of the Green Paper generates a substantial inventory of activity at the EU level:

- 1998: The Commission published a Recommendation²³³ concerning procedures in which the third party actually settles the dispute between the parties in a manner which may or may not be binding on them. This Recommendation also covers arbitration in consumer disputes.
- 2000: Regarding consumer disputes in e-commerce, the role of alternative dispute resolution is stressed both in Directive 2000/31/EC on electronic commerce²³⁴ and in a Joint Declaration by the Council and the Commission²³⁵ made when the “Brussels I” Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted.
- 2001: The Commission published a Recommendation²³⁶ concerning procedures in which the third party does not express an opinion on the solution but simply helps the parties find the solution that suits them best. The Recommendation sets out four principles: impartiality, transparency, effectiveness and fairness.
- 2003: Following a Commission proposal the Council adopted a Directive on legal aid²³⁷, which provides for legal aid to be available for extra-judicial proceedings in certain circumstances, to help less well-off people enjoy access to alternative dispute resolution.
- 2003: In Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility²³⁸, the Commission has endeavoured to promote alternative dispute resolution.

The European Commission has also been instrumental in the setting up of three networks in relation to alternative dispute resolution:

- The European extra-judicial network “ECC-Net”²³⁹ is a structure to provide assistance and information for consumers, consisting of national contact points in each Member State and in Norway and Iceland. Each of the contact points acts as an information relay for the 400 bodies regarded by the Member States as meeting the demands of the two Commission Recommendations concerning the principles applicable to bodies responsible for the out-of-court settlement of consumer disputes.
- The out-of-court complaints network for financial services “FIN-NET”²⁴⁰ links thirty or so national bodies responsible for the out-of-court resolution of disputes falling under the first Commission Recommendation. FIN-NET offers consumers facing a problem relating to financial services (banking, insurance, investments) direct access to an out-of-court dispute resolution facility.

²³³ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 98/257/EC, OJ L 115/31 of 17.4.1998.

²³⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), L 178/1 of 17.7.2000.

²³⁵ See http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf.

²³⁶ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, 2001/310/EC, OJ L 109/56 of 19.4.2001.

²³⁷ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26/46 of 31.1.2003.

²³⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338/1 of 23.12.2003.

²³⁹ See http://ec.europa.eu/consumers/redress_cons/index_en.htm.

²⁴⁰ See http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm.

- SOLVIT²⁴¹ is an on-line problem solving network in which EU Member States work together to solve without legal proceedings cross-border problems caused by the misapplication of Internal Market law by public authorities.

In parallel with all this quasi-legislative activity, the European Union provides financial support for certain initiatives, in particular in the on-line settlement of consumer disputes. The Commission was financially involved in the launching of ECODIR²⁴² (Electronic CONsumer DISpute Resolution Platform).

In 2004, a European Code of Conduct for Mediators²⁴³ was developed by a group of stakeholders with the assistance of the services of the European Commission. The European Commission organised the launch of the Code of Conduct in July 2004. The Code of Conduct can be found in Annex 5. The Code of Conduct sets out a series of norms which can be applied to the practice of mediation and which can be adhered to by mediation organisations.

Finally, on 21 May 2008, the European Parliament and the Council adopted Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters²⁴⁴ (see Annex 6). The Directive seeks to further the use of mediation by making certain legal rules available within the legal systems of the Member States. These rules cover the areas of confidentiality of the mediation process and of mediators as witnesses, enforcement of agreements for settling disputes as a result of mediation, the suspension of the running of periods of prescription and limitation of actions while mediation is in progress thus removing one potential disincentive to the use of mediation. The Directive also encourages the training of mediators and the adoption of codes of conduct to ensure the quality of mediation throughout the European Union.

The preamble to the Directive provides some very interesting elements which could be equally applied to restorative justice practices in the penal field, namely:

- (2) The principle of access to justice is fundamental and with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.
- (5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods.
- (6) Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.
- (7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.
- (8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
- (13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits

²⁴¹ See http://ec.europa.eu/solvit/site/index_en.htm.

²⁴² See <http://www.ecodir.org/>.

²⁴³ See http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

²⁴⁴ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136 of 24.5.2008, p. 3-8.

- for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.
- (16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.
 - (17) The [quality control] mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way.
 - (19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.
 - (20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law.
 - (23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural law with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.
 - (24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails.
 - (25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

Finally, Art. 1, paragraph 1 of the Directive states that “The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”.

1.6. CONCLUSIONS

Based on the above, one can conclude that there are five possible entry-points to establish a legal base for the European Union to act in the field of restorative justice: victim rights, offender rights, crime prevention, mutual recognition and enforcement of decisions and adopting alternative dispute resolution as a general policy priority. This last point will be further elaborated in the next section. There is also the possibility of taking action based on the residual powers of the Council, which formed the legal base for adopting the Directive relating to compensation for crime victims.

Having said this, there are many other factors that – next to the legal base in Treaty articles – contribute to the question whether or not an initiative will be adopted. Most of the initiatives mentioned above were taken after the European Council had provided strong political support for them. The interest that the European Commission takes in the matter is also of crucial importance. Support from other bodies, like the European Parliament and the European Economic and Social Committee, and a strong lobby movement also contribute to the chances of success of the initiative. If, moreover, the issue features high on the national agenda of the Member States, the initiative should not encounter too much resistance. Finally, the way decisions are negotiated within the Council could also be decisive. As Asp states: “When the Council meets there are generally several difficult problems on the agenda and a

spirit of compromise is necessary to achieve results. In such an environment it is simply necessary for the Member States to choose which issues are worth fighting for. This means that a problematic article in a framework decision on judicial cooperation may pass simply because there were other and – from a political perspective – hotter issues on the table as well” (Asp, 2005: 35).

Having provided the above overview of legislative action at EU level, one should not forget the many possibilities that exist for the European Union to provide guidance through non-legislative action. Commission Communications, Council common positions, Council recommendations and resolutions, items on the agenda of the European Council and financial frameworks all provide opportunities for bringing a certain topic on the European Union agenda, and hence in the focus of attention of Member States.

2. WHY SHOULD THE EU ACT IN THE FIELD OF RESTORATIVE JUSTICE?

The introduction on the website of the Directorate-General Justice, Freedom and Security²⁴⁵ gives us an indication of the underlying values of the European Union in its commitment to achieve the area of freedom, security and justice. This introduction reads as follows: “... From its very beginning, European integration has been firmly rooted in a shared commitment to *freedom based on human rights, democratic institutions and the rule of law*. These common values have proved necessary for securing peace and developing prosperity in the European Union. ... The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge is now to *ensure that freedom*, which includes the right to move freely throughout the Union, *can be enjoyed in conditions of security and justice accessible to all*. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily life. ... The enjoyment of freedom requires a *genuine area of justice*, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no way of exploiting differences in the judicial systems of Member States. Judgments and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved. ... People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats, *a common effort is needed to prevent and fight crime* and criminal organisations throughout the Union. ... The area of freedom, security and justice should be *based on the principle of transparency and democratic control*. The EU must *develop an open dialogue with civil society on the aims and principles of this area in order to strengthen citizens acceptance and support*” (emphases added). Moreover, we can refer to the Action Plan from the Commission to implement the Hague Programme²⁴⁶ where a European area of justice is defined as an area where *effective* access to justice is guaranteed. To that end, the Union must not only adopt rules on jurisdiction, recognition and conflict of laws, but also measures which *build confidence and mutual trust* among Member States, creating minimum procedural standards and ensuring *high standards of quality of justice systems*, in particular as regards *fairness* and respect for the rights of defence. In the 2005 Communication from the Commission on mutual recognition of judicial decisions and the strengthening of mutual trust²⁴⁷, a call was being made to consider the value “of *promoting more diversified forms of punishment* in the Union and not focusing simply on prison sentences” (p. 8).

²⁴⁵ http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm (consulted on 25.02.2008).

²⁴⁶ Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005) 184 final of 10.5.2005.

²⁴⁷ Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, COM(2005) 195 final of 19.5.2005.

The challenges facing the European area of freedom, security and justice are considerable. Organised crime and terrorism have been high on the agenda since the setting up of the third pillar by the Treaty of Amsterdam. However, the biggest challenges to our criminal justice systems do not come from outside, but from within. It is clear that the European criminal justice systems face formidable challenges and that some of their elements are in a state of crisis; but this has more to do with the way in which they operate than with these ‘outside’ threats. Backlogs in the courts and prison-overcrowding are mundane examples of this state of affairs. A major consequence is a general distrust held by citizens in the EU about the capacity of the criminal justice system to deal with crime in an adequate and effective way. Even though EU crime rates have been steadily declining since 2000,²⁴⁸ the feelings of insecurity and the demands on and expectations of the criminal justice systems held by the public opinion are high.

Democratic societies are obliged to respond to these widespread concerns which focus predominantly on everyday violence and insecurity. Restorative justice, it is our contention, can contribute to the development of a criminal justice system that is more responsive to the needs of citizens, while *respecting fundamental legal principles*. Its focus on active participation by all the parties (victims, offenders and communities) makes that *restorative justice fits in a democratic oriented and emancipatory concept of justice*. In contributing actively to achieve justice, victims, offenders and communities are working with (and not against) the criminal justice system, which should concentrate on facilitating these processes, on protecting legal safeguards and on dealing with those cases that cannot be dealt with in a satisfactory way (only) through restorative justice processes. Moreover, the role of the criminal justice system in denouncing crime remains untouched.

In criminal law, the *principle of subsidiarity* means that the state should only exercise its *ius puniendi* as a last resort, namely when other less punitive measures appear to be incapable of responding adequately to the offence. This principle, which is widely accepted in jurisprudence and in criminal policy, has for example been well elaborated in the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules).²⁴⁹ In the republican theory of justice, as developed by Braithwaite and Pettit (1990), this principle is called parsimony. The central notion in the republican theory of justice is dominion, which offers, according to Walgrave (2008b: 140-144), “an excellent basis for developing legal and institutional theory on restorative justice”. It “synthesises the legal institutional dimension (the

²⁴⁸ See The Burden of Crime in the EU, Research Report: A Comparative Analysis of the European Crime and Safety Survey (EU ICS) 2005, <http://www.europeansafetyobservatory.eu/downloads/EUICS%20-%20The%20Burden%20of%20Crime%20in%20the%20EU.pdf>.

²⁴⁹ United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990. These state, amongst others that:

1.2. The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

1.4. When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

1.5. Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

2.3. In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. ...

2.5. Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.

objective rights and freedoms that are legally defined) and the informal relational dimension (the subjective assurance that others will respect these rights and freedoms)”. According to Braithwaite and Pettit, a good state must promote dominion (or ‘freedom as non-domination’) which can be defined as the set of assured rights and freedoms. The ideal “of a collectivity driven by solidarity and active responsibility can be achieved only in so far as the state and the citizens mutually assure respect for rights and freedoms, as accorded in dominion. Inversely, the assurance of rights and freedoms is achieved only to the degree to which citizens take up their responsibilities in view of respect and solidarity” (Walgrave, 2008b: 141). “The citizens and the state seek to extend and deepen dominion by promoting equality through more participation in democracy, more education, equitable socio-economic policy, welfare policy and the like. Criminal justice is the defensive institution. Its aim is not to extend or deepen dominion, but to repair it when it has been intruded upon by crime” (Walgrave, 2008b: 142). In case a crime is committed, it is not the legal rights of the victim that are lost because these rights remain legally defined. Rather, it is the assurance that fellow citizens respect these rights that is disturbed. However, the impact of the crime goes beyond the impact on the individual victim. It also undermines the trust of all citizens that their rights will be respected and hence, the authorities need to take action. “Hence public intervention after a crime is not primarily needed to redress the balance of benefits and burdens or to reconfirm the law, as traditional penal theories suggest. It is needed first of all to enhance assurance by communicating the message that the authorities take dominion seriously. The intervention must reassure the victim and the public at large of their rights and freedoms, and restore these rights and freedoms into a fully fledged dominion. This is done through clear public censure of the intrusion and through public actions involving, if possible, the offender in reparative actions” (Walgrave, 2008b: 142). Voluntary participation by the offender in such reparative actions is more effective in restoring this assurance than the involuntary imposition of conventional responses.

The current state’s approach to crime focuses narrowly on identifying and punishing individual offenders proven guilty of offending against its interests and laws, thereby subordinating the interests of victims and communities to the interests of the state. Justice is being defined in rather administrative and procedural terms. However, *justice is more than obtaining effects*. According to Walgrave (2008b), there are two notions of justice: moral justice and legal justice. Restorative justice strives to make both concepts coincide as much as possible. Moral justice refers to the outcome of an ethical evaluation. “It refers to a feeling of equity, according to a moral balance of rights and wrongs, benefits and burdens. Basically, the feeling is subjective and biased by self-interest, although embedded in a socio-cultural dimension” (Walgrave, 2008b: 30). In our current justice systems, this balance is achieved by imposing a certain amount of suffering on the offender which corresponds to the social harm he or she caused by committing a crime. Restorative justice, on the other hand, focuses on repairing the balance by compensating for the harm caused. It seeks to produce *procedural justice* (see further) and *satisfaction* for all parties with a stake in the offence. By actively involving victims in dealing with their case, victims feel that their victimisation has been taken seriously and that their harm is being put right. Offenders are being given an opportunity to make up for their mistake in a constructive way in an atmosphere of respect. All parties involved, including the community, feel reassured that rights and freedoms are taken seriously by fellow citizens and the authorities. Justice, seen in this way, is what those concerned experience as being just. “This bottom-up approach is crucial in restorative justice and contrasts with the top-down approach of the criminal justice system. That is, however, not a reason to exclude the state from the settlement of the aftermath of a crime. The state needs to be involved to assure citizens of its commitment to take dominion seriously” (Walgrave, 2008b: 30). Legal justice, then, refers to legal safeguards, which must also be respected by restorative justice. Legal safeguards protect citizens against illegitimate intrusion by fellow citizens, but also against abuses of power by the state. “One of the most fundamental criticisms of traditional criminal justice is that its procedures and outcomes may lead to legal justice, but very often (or even mostly) have lost track of the subjective experience of justice”

(Walgrave, 2008b: 31). Restorative justice may, where properly developed and implemented, contribute to re-establishing this feeling of justice in a broader sense, restoring citizens' trust in the criminal justice system to help them to obtain justice.

Whether or not the parties in a conflict experience *procedural justice* is to a large extent dependent on their perception of the procedure used to come to a decision (Aertsen, 2001: 325-333). A crucial element in this is the extent to which parties have been able to influence the process and the outcome. The possibility to provide information, to explain one's own point of view and to tell one's story are generally decisive factors. Tyler (1988), however, found that the assessment of the degree of justice or fairness in a police or judicial procedure is not only influenced by process control and decision control, but also by a number of additional aspects: the perception of the motivation, honesty and ethical attitudes of the government; the possibilities to represent oneself; the quality of the decision; the possibility for correcting mistakes and the possible prejudice or bias on behalf of the authorities. He further found that the experience of procedural justice leads to general satisfaction with the person who intervened, the judicial authorities, the justice system and criminal justice in general. The experience of procedural justice also leads to a higher compliance rate with decisions. Researcher further showed that if one has experienced procedural justice, one's opinion of the judicial authorities remains positive, even if the decision was not favourable to them.

Several research projects with regard to victim-offender mediation and family group conferencing have shown that both victims and offenders experience a high degree of procedural justice in restorative justice practices. Umbreit (1992; 1994) has found that the level of procedural justice experienced in victim-offender mediation was considerably higher than its level for a comparable group of people whose case was dealt with through a formal justice process. The differential effect seemed to be highest for victims. General satisfaction with the outcome of mediation was also very high (see also Part II, section 3). Even more important was the fact that participation in mediation influenced the perception of procedural 'fairness' of the criminal justice system for both victims and offenders. Some, like Braithwaite (1998), have even suggested that the high degree to which procedural justice is experienced in restorative justice may lead to more compliance with the law (and hence a reduction in *recidivism*) as compared to traditional criminal justice practices. The potential for restorative justice to have a positive effect on recidivism has been a topic of many studies these last years. A recent review of 36 independent tests, conducted by Sherman and Strang (2007) has concluded that there are positive perspectives in this respect.

Restorative justice also contributes, at the individual and community level, to demystification and to norm-clarification. Through the process of communication established in restorative justice practices, either directly or indirectly, it is possible for those involved to *humanise* the other party and to place what has happened in a realistic perspective. Moreover, restorative justice practices contribute to norm-clarification. In courts, norms and laws are imposed on citizens in a 'top-down' manner. In restorative justice processes, through communication and the interaction with the criminal justice system, norms and laws percolate down to the citizens' level and become part of the world of experience, while the (restorative) justice of the community influences formal law from the bottom up.²⁵⁰

In summary, and based on the above, restorative justice can contribute to the *fairness* of the criminal justice system, by *actively involving citizens* in the strive for *high quality and balanced justice*. Because restorative justice actively involves victims, offenders, their surroundings and society as a whole in the reaction to crime, it can be seen as fitting in the idea of the promotion of an area of freedom, security

²⁵⁰ See Braithwaite and Parker, 1999: 116 ("Citizen's concerns have an avenue for bubbling up the pyramid into legal discourses and procedures through legal supervision of conferences, just as the discourse of law has a way of percolating down").

and justice. Restorative practices help to decrease the distance between citizens and criminal justice, contributing to the democratisation of justice. It may help in securing better access to justice, in promoting active citizenship and in implementing the principle of subsidiarity (thereby minimising the use of expensive prison sentences and reducing backlogs in court). Restorative justice also offers an important perspective for crime prevention and for dealing with more serious and non-conventional crimes, such as forms of collective violence and mass victimization (see, for example, Aertsen et al., 2008). A project promoted by the European Forum for Restorative Justice on ‘Developing standards for assistance to victims of terrorism’²⁵¹ has looked into the possible role for restorative justice principles and practices in dealing with victims of terrorism. In an international context, methods like mediation also offer concrete ways to make cultural backgrounds and differences clear and reconcilable for the parties. This is not without value in a reality in which, with the constant increase in mobility between the Member States, increasing numbers of Europeans find themselves involved in one way or another in crime in a Member State other than their own.

Developing crime policy in the European Union cannot be done effectively by Member States alone. Within the European Union, Member States have committed to undertaking a *common* effort to prevent and fight crime. This requires, to a certain extent, an approximation of national crime policies. The call for a ‘European judicial culture’, as expressed in the Hague Programme, is one element in this. Although some have blamed the European Union for being a protagonist of a more punitive crime policy (see Part IV, section 4.3.), over the last few years we can see a more balanced approach in European crime policy, paying attention to victim and offender interests in a non-polarising manner. The clear interest in alternative dispute resolution in the civil and commercial field shows that the European Union appreciates its underlying values, which are very similar to those of restorative justice. By also undertaking action in the field of restorative justice, the European Union can help in extending these values to the penal field.

3. WHAT ARE THE NEEDS OF THE EUROPEAN RESTORATIVE JUSTICE SCENE IN TERMS OF SUPRANATIONAL ACTION AND HOW COULD THE EU RESPOND TO THESE?

A first overall conclusion that could be drawn from the results of the questionnaire (Part II, section 5) is that support for binding regulation by the European Union was relatively low amongst the actors of the restorative justice scene. Hence, we would like to start with a short consideration of the value of binding regulation versus non-binding regulation and supportive action. Next, we will look into more detail again at the results of the questionnaire and see where the areas for EU action might lie, and through which EU instruments and activities the needs of the European restorative justice scene could be met.

3.1. BINDING VERSUS NON-BINDING INITIATIVES

As a general consideration, it would be wrong to assume from the outset that binding regulation necessarily has a greater effect on policy developments in the Member States than non-binding initiatives. If we, for example, look at the first evaluation report²⁵² of the Framework Decision on the standing of victims in criminal proceedings, the state of transposal of the Decision was considered to be unsatisfactory by the Commission: “No Member State can claim to have transposed all the obligations arising from the Framework Decision”.²⁵³ This is not an isolated case. Moreover, it is not

²⁵¹ See <http://www.euforumrj.org/Projects/projects.terrorism.htm>.

²⁵² Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, COM(2004)54final/2 of 16.02.2004.

²⁵³ See also, for example, the article written (in Dutch) by Groenhuijsen and Pemberton (2007).

because legislative provisions in the Member States have been changed in order to accommodate binding EU regulation, that the situation in the field changes and that it will become similar to the one in other Member States. Indeed, "... even if we accept the necessity of mutual approximation of criminal law and procedure, we have to recognize that this task is very hard to fulfil. The harmonization of the respective provisions does not guarantee that their practical application will follow the same standards. To the contrary, the variety of legal cultures will cause significant differences" (Perron, 2005: 19).

Kollman describes how studies on Europeanisation indicate that the EU and its policies have a differential impact on Member State actors and policy areas. The reaction can take the form of inertia, absorption, accommodation, transformation and retrenchment. "That is state actors can try to ignore the adaptations demanded by Europe, they can absorb them with minimal change to core national norms or structures, they can accommodate more substantial changes within stable national structures or they can be forced or persuaded to transform key parts of that structure. Retrenchment is the one non-convergent reaction where European structures cause national actors to not only resist European mandates for change but to go in the opposite direction" (Kollman, 2007: 3-4). She also describes how the extent to which a Member State will adjust to a EU policy "depends on how domestic structures and actors mediate the pressure for change" (Kollman, 2007: 4). Some of the elements in this respect are: the number of domestic veto points as barriers to domestic change, the capacity of implementing institutions, the role that domestic interest groups play in 'pulling down'²⁵⁴ or blocking the implementation of EU policies, and the role that the European Commission plays in 'pushing' certain policies.

She argues in her paper, which is focused on national same-sex union policy, that "Europe has had a far greater impact on national policy outcomes when its influence has been felt through the informal processes of norm diffusion and elite socialization than when it tried to impose formal mandates through court decisions and EU Directives" (Kollman, 2007: 1). According to her, the European Union, the Council of Europe and a transnational network of NGOs have played a crucial role in the policy convergence of national same-sex union policy by creating a soft law norm for relationship recognition and disseminating this norm to key policy makers in European states. It was even so, according to her, that – somewhat ironically – the harder the norm was becoming, the more resistance it encountered in the Member States. "This implies that at least with some policies, soft law norms need to be accepted before hard law can be imposed" (Kollman, 2007: 6). This means that the influence of non-binding regulation, but also – and maybe even more important – of norms developed in less institutionalized settings, cannot be underestimated.

Based on her example of the same-sex union policy, Kollman describes three processes through which national debates about same-sex recognition were influenced: national agenda setting, elite learning and direct policy harmonisation. National agenda setting occurs when activists in a transnational network use developments in other countries or the European arena to help put the topic on the agenda of their own country. Elite learning refers to the process of elites learning from both the international/foreign examples provided by transnational NGOs and directly by policy elites in other countries or European institutions. They then draw on this to help frame and justify their own support for the issue. The final way in which European institutions affect domestic policy, namely by attempts to directly harmonise policy within supranational institutions, is also the least common of these (Kollman, 2007: 10-14). She

²⁵⁴ This corresponds with what Christa Pelikan wrote about the effect of the Council of Europe Recommendation concerning mediation in penal matters: "... a document becomes influential – and thus useful – when it is made use of" (Pelikan, 2004: 64). Or, in other words: "It needs people coming together voicing a need and an interest and making use of international documents to promote a policy that attends to those needs" (Pelikan, 2004: 67).

concludes that the same-sex union case “demonstrates that diffusely created soft law norms can have profound and transforming effects on European states’ policies. ... [T]he attempts by European institutions to impose binding mandates on European states only comes after soft law norms have laid the ground work. Imposing binding rules on states or governing parties that have not internalized the core principles of the new law is courting trouble. ... [H]ard law will not always make much difference where soft law has failed” (Kollman, 2007: 26).

If we transfer these conclusions to the field of restorative justice, one might say that we first need to ensure that the common values and principles of restorative justice become recognised by key policy makers in the EU Member States, before we can consider any further ‘hard law’ initiatives. This type of participatory process of policy development actually corresponds quite well with the core values of restorative justice and with its ‘bottom-up’ nature.

3.2. NEEDS RELATED TO LEGISLATION

a) Formulating restorative justice as a ‘right’ for victims and offenders in legislation

The returned questionnaires have shown that the need to formulate restorative justice as a right for victims and offenders in national legislation was considered as being very important by 83.5% of the respondents, and as not being met adequately by 78.2% of the respondents. Related to this is the fact that 71.1% of the respondents felt that it was very important to expand the reach of restorative justice beyond diversion, and that 74.2% of the respondents felt that this need was not met adequately yet. In addition, 61.5% of the respondents mentioned that the need to extend the categories of offences that can be referred to restorative justice practices is very important, whilst 69.3% of them said that this need was not adequately met yet. Finally, the need to change the legal force of the legislative provisions concerning restorative justice (i.e., for example, including an obligation for prosecutors and lawyers to consider referring the case to restorative justice instead of giving them a possibility to consider this) was considered very important by 33.3% of the respondents and relatively important by another 33.3%. This need was regarded as not being met adequately by 60.2% of the respondents.

At the project-related seminar in Lisbon, a workshop on the topic of ‘Restorative justice: a right or a favour?’ was organised. Leo Van Garsse (Belgium) presented key insights into this issue. In the following, we draw on the report of this workshop²⁵⁵ in order to explain such a ‘right to restorative justice’ in a more detailed manner.

There are several factors that currently make access to restorative justice difficult, or even impossible, for victims and offenders. The criteria laid down in national law, which vary from country to country, tend to limit the eligibility of cases to go to restorative justice to certain types of crime or phases of the criminal justice process. Sometimes restorative justice practices are seen as ‘nothing more than’ a diversionary measure, or it is only seen as an option in the case of juvenile crime. These criteria do not take into account the needs of the parties. Other restraining factors are linked to the way restorative justice practices have been implemented. In some countries, for example, restorative justice services are only available in certain regions, resulting in an inequality of access.

If access to restorative justice is conceived as a ‘favour’, it may only be applied in specific cases on the basis of eligibility criteria defined by an official body. However, if access to restorative justice is conceived as a ‘right’, every victim and every offender could claim the right to access a restorative justice programme. Experience with restorative justice in Europe and beyond has shown that the legal qualifications of a crime and the seriousness of the harm caused are poor indicators of the personal repercussions and of the type of process that is considered to be most suitable by the parties to deal with the conflict. Practice has shown that restorative justice can be used with crimes of all types of

²⁵⁵ Available from <http://www.euforumrj.org/Activities/seminars.Lisbon.htm>.

seriousness. Criteria like the structural imbalance of power between parties and the degree of emotional impact of the crime are considered to be more relevant indicators when deciding on the eligibility of a case. The more intense the emotional impact, the more process oriented the restorative justice process should become. Inversely, the less serious the emotional impact is, the more result driven the practice tends to be. Based on this, the working group that prepared the law on the generalised offer of mediation in Belgium concluded that there was no reason to preclude any type of crime from going to restorative justice. Rather, it will be the needs of the parties, and whether or not they are interested in participating, that will influence whether a restorative justice process takes place or not. Experience has also learned that there is no reason to limit access to restorative justice to any specific phase of the criminal procedure. The intervention has its own advantages and disadvantages at each stage. In the earlier stages of the criminal procedure, restorative justice may have a bigger 'external effect' in the sense that it may have an impact on the way the case is being dealt with by the criminal justice system. When restorative justice takes place at a later stage, for example during the serving of a prison sentence, parties may feel more secure and the impact may be greater in terms of the qualitative effect on the personal dimension of the aftermath of the crime. Practice has also shown that restorative justice practices may be needed by people affected by crime, indistinctively of whether they are victims or offenders. Restorative justice practices are 'neutral' and they serve to meet specific personal needs that emerge in the aftermath of a crime. Hence, the offer should be addressed to both victims and offenders at the same time. However, it is clear that for the sake of procedural reasons, it may not be appropriate at a given moment to refer cases to restorative justice practices. At the moment that these reasons cease to exist, judicial authorities should have the possibility to make a referral to a restorative justice practice.

Also from a theoretical point of view, different arguments can be brought forward to sustain a rights approach to restorative justice. In criminal law, the principle of subsidiarity means that the state should only exercise its *ius puniendi* as a last resort, namely when no other less punitive measure is available in order to respond to a crime. To limit eligibility of a case to certain types of offences or to a certain phase in the criminal procedure, would seriously limit the application of the principle of subsidiarity. Second, it is generally agreed that in contemporary society there is a need to achieve a better level of democracy, by increasing the active involvement of citizens. This also holds true for the criminal justice system. In the light of this, restorative justice practices appear to be an appropriate instrument to increase parties' participation, which in turn would help to promote more active citizenship. In the workshop it was suggested that restorative justice should essentially be conceived as a 'political action' to be exercised by every citizen involved in the criminal justice system, regardless of their position as a victim or as an offender. This may be seen as deriving from the effective application of the democratic rights of participation and freedom. At an international level, conceiving restorative justice as a right would be a way to ensure equal treatment of citizens, whether victim or offender, throughout the European Union. One limitation of the right to restorative justice, however, is the overarching principle of voluntary participation. The right to restorative justice should not be seen as a right to mediation with the other person who cannot be forced to take part. The right only extends to the access to restorative justice services. This can be broken down in two features: first, the right to receive complete, understandable and unbiased information, and, second, the right to having the possibility to propose mediation to the other party, to communicate to the other party one's interest in dealing with the aftermath of the crime in a restorative way.

Conceived as this, to consider the access to restorative justice as a right goes beyond the need to give a voice to victims and offenders in the criminal procedure. It serves to exercise the fundamental rights of freedom and participation in a democratic society, thus becoming a means to promote more responsive and active citizenship. The European Union could contribute to the establishment of such a right in several ways. One possible avenue is to include 1) a right to complete, understandable and unbiased

information about restorative justice practices, 2) a right to a voluntary decision whether or not to engage in restorative justice practices, and 3) a right to access a good quality restorative justice service in instruments dealing with both victim and offender rights. Another possible avenue for the European institutions would be to adopt policy papers or a recommendation (Council of Commission) or common position (Council) on restorative justice, including the reasoning behind this rights approach to restorative justice. A third possible avenue is to provide NGOs with the capacity to promote this rights approach with national governments and national criminal justice actors. A last avenue could be to develop an instrument along the lines of the Directive on certain aspects of mediation in civil and commercial matters²⁵⁶, which could also cover the elements that are discussed in the next points. However, it is doubtful whether – in the current state of play – such an instrument would be welcomed by the Member States. This is not to say that such a document, laying down general principles and safeguarding general values of restorative justice would not be useful. But, we feel that it would be wise to first conduct research on the possibilities to apply restorative justice processes to cases with a cross-border character and the challenges arising from this.

b) Legislation concerning the implementation of restorative justice

The need for more regulation at the level of the European Union concerning the Member States' implementation of restorative justice scored the highest in terms of being important among the questions asked in relation to legislation at the international/supranational level. 61.1% of the respondents felt that this was very important, and an additional 26.7% saw this as being relatively important. 65.4% of the respondents felt that this had to be done through binding legislation, and 61.7% said that this need was not adequately met yet. This is a strong indication that the European restorative justice scene is looking at the European Union for help in promoting restorative justice even beyond what is stated in Art. 10 of the Framework Decision on the standing of victims in criminal proceedings. This need can actually be seen as a corollary of the need to formulate restorative justice as a right for victims and offenders because doing this also implies that restorative justice practices are available in first instance and that they can deal with the requests from victims and offenders in a good way.

66.7% of the respondents felt that it was very important to have more (detailed) legislation ensuring the availability of restorative justice services. According to 60.2% of them, this need was not met adequately yet. In addition, 61.1% of the respondents mentioned that a more concrete legal basis that explicitly regulates the relation between restorative justice practices and the criminal justice system is very important. As much as 69.7% indicated that this need was not met adequately. In terms of more (detailed) legislation on the organisation of restorative justice services, 54.9% of the respondents answered that this was very important, and that this need was to a large extent not met adequately yet (68.5 %).

What could effectively be done at the level of the European Union to respond to these needs is again varied. Ensuring the availability of restorative justice services can be done, as was already stated under 3.2. a), by including the right to access to restorative justice in the context of a regulation concerning victim and offender rights. However, the ways in which this access is organised in each Member State should be a matter of national concern. It is our contention that the relationship between restorative justice services and the criminal justice system and the way restorative justice services are being organised are matters for national policy. Nevertheless, the European Union could be instrumental in this respect as well, by disseminating information on good practices to policy makers and actors of the criminal justice system, and by supporting the networking between organisations in the restorative justice field, but also between European policy makers and actors of both the criminal justice and

²⁵⁶ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136 of 24.5.2008, p. 3-8.

restorative justice fields. Moreover, the European Union could make useful recommendations to the Member States about which aspects should ideally be dealt with through national regulation, and propose some basic principles which should be respected in this (for example, ensuring that restorative justice services have enough autonomy vis-à-vis the criminal justice system).

c) Legislation concerning the procedural treatment of a dossier

The need for EU action in this area was considered very important by 32.2% of the respondents, whilst 37.9% felt that this was relatively important. The preferred course of action was to do this through non-binding regulation (51.3%). 51.8% of the respondents considered that the need for EU action was not met adequately yet. 69.2% of the respondents thought that it was very important to have more (detailed) national legislation concerning the cases that can go to restorative justice and the procedure to deal with them. This need was not met adequately yet according to 65.9% of those who responded to the questionnaire. In relation to the need to implement provisions in national law for the suspension of time limits during the time that a case is being dealt with through mediation, 56.0% of the respondents replied that this was very important (and 23.1% relatively important), whilst 57.0% answered that this was not met adequately yet.

Issuing binding regulation on this matter would probably go beyond the remit of the European Union. However, accommodating cross-border discussion on the topic, disseminating information and maybe even issuing recommendations on the matter would be very helpful.

d) Legislation safeguarding the values and principles of restorative justice

According to 32.9% of the respondents it is very important to have international/supranational legislation concerning the internal process of mediation (e.g. working principles). An additional 38.6% thought that this was relatively important. Most respondents (58.4%) communicated that this should be done through non-binding instruments, whilst 24.7% suggested to make use of binding instruments. 57.7% felt that this need was not adequately met yet (30.8% had no opinion). The need to provide for legal guarantees in national legislation for preserving the voluntary character of the participation in restorative justice processes was seen as very important by 68.1% of the respondents, and as being unmet in a satisfactory way by 52.9% of them. The need to provide for legal guarantees in legislation for confidentiality was considered very important by 65.9% of the respondents and as not being met adequately by 50.0% of the respondents, whilst 43.2% of them felt that it had been adequately met already in national legislation. The taking of legislative measures to ensure respect for the main principles of restorative justice practices was seen as very important by 62.2% of the respondents. Only 5.6% felt that this was not important, whilst 31.1% of the respondents said that this was relatively important. According to 67.8% of the respondents, this need was not met adequately yet in their country.

In the current state of play as regards restorative justice in the Member States of the European Union, it would be difficult to adopt a binding instrument detailing provisions to safeguard the values and principles of restorative justice. However, there are some worrying developments in Europe as well, where offenders are being forced to go to practices that are being called ‘restorative’ although they lack respect for the basic values and principles of restorative justice. Moreover, the term ‘restorative justice’ is increasingly being used by policy makers to cover issues like victim support and offender rehabilitation, but not being focussed on a balanced approach between these concerns. Here we see an important task for the European Union to help in disseminating a correct vision of restorative justice. This could be done in various ways. One possibility which could be considered is to adopt a Council or Commission recommendation or a Council common position along the same lines as the Council of Europe Recommendation concerning mediation in penal matters, which could be prepared – as it was

done within the Council of Europe – by a group of experts of restorative justice practitioners, legal practitioners, policy makers and researchers. Also by putting the topic of restorative justice on the agenda of meetings in the European Council, Council, European Parliament and other fora, the basic values of restorative justice could receive wide recognition. Supporting international NGOs in their task of providing accurate information about restorative justice to the European scene would also be welcomed. The European Forum for Restorative Justice is a prime actor in this field. It is the only organisation having the promotion of restorative justice at a European level as its core objective and can establish links with other European organisations such as the European Crime Prevention Network and European organisations of criminal justice practitioners, in order to work together on the dissemination of the values and principles of restorative justice. In the longer term, a binding instrument such as the Directive on certain aspects of mediation in civil and commercial matters should also be considered. We refer to 3.2 a) above for a discussion of this option.

e) Legislation harmonising the way in which mediation agreements can be recognised and executed in other countries

This need was considered as very important by 47.7% of those who responded to the questionnaire. Another 39.8% said that it was relatively important. In terms of how this should be done, opinions were equally divided. 41.3% replied that it should be done through binding regulation, whilst another 41.3% preferred non-binding initiatives. 61.7% of the respondents felt that this need was not met adequately yet.

The proposals to adopt a Council Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and custodial sentences²⁵⁷ might give a partial answer to this need. Also the Council Framework Decision on the application of the principle of mutual recognition to financial penalties²⁵⁸ could be considered to partially contribute. It is recommended that both these documents be studied in more detail in order to see what their implications are for the restorative justice field. In addition, more research and developmental work is needed in order to get a better view of the possibilities for applying restorative justice processes to cases with a cross-border nature.

f) Legislation harmonising the categories of offences that are amenable to restorative justice practices

Amongst the needs for legislation at international/supranational level included in the questionnaire, the need to harmonise the categories of offences that are amenable to restorative justice practices was considered least important. Only 28.2% of the respondents felt that this was very important, whilst 47.1% of them said that this was relatively important. Another 20.0% answered that this was not important at all. 60.0% of the respondents preferred non-binding regulation for this. However, 63.6% responded that this need was not met adequately yet. These, somewhat contradictory, results might require some further examination. However, it may be expected that most restorative justice actors would agree with the statement that restorative justice should not be limited to any specific category of offences, and that all types of offences should – in principle – be amenable to restorative justice. Hence, the suggestions made under 3.2. a) can be applied to this point as well.

3.3. NEEDS RELATED TO POLICY DEVELOPMENT AND IMPLEMENTATION

a) General guidance and coming to a common understanding of the basic principles of restorative justice

In general, more guidance from supranational/international institutions in national policy developments concerning restorative justice was considered to be very important by 55.7% of the respondents, with

²⁵⁷ Initiative of the Federal Republic of Germany and the French Republic with a view to adopting a Council Framework Decision (2007/.../JHA) of ... on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences, OJ C 147/1 of 30.6.2007.

²⁵⁸ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16 of 22.3.2005.

an additional 35.2% saying that it was relatively important. According to 71.1% of those who returned the questionnaire, this need was not met adequately yet. In terms of needs at the national level, for example, the need for a national strategic approach to the implementation of restorative justice programmes was not met adequately according to 88.2% of the respondents. All of the respondents felt that this was important (90.0% very important, 5.6% relatively important, 4.4% no opinion). Other challenges in implementation and aspects on which a clear national policy needs to be developed can be found back in Part III, section 5.2. c).

In order to support national policy developments, the European institutions could first of all facilitate a broad debate on criminal justice policy and the contribution that restorative justice could make to it. Further, the dissemination of good practices and coming to a common understanding of the basic principles of restorative justice would be facilitative elements. The latter was considered to be very important by 79.8% of the respondents, whilst 65.5% of them said that this need was not met adequately yet.

b) Funding for restorative justice programmes

From the questionnaire it becomes clear that funding for restorative justice programmes is a crucial problem. 76.4% of the respondents felt that it was very important for the European institutions to encourage Member States to institutionalise public funding of restorative justice practices. 77.1% considered this need to be unmet. This can of course not be done through binding regulation. A suggestion in this direction could be made in a policy paper, recommendation or common position about restorative justice. 81.9% of the respondents felt that more stability in funding of restorative justice programmes at national level was required, and also the need to ensure direct financial government support to restorative justice services was considered to be unmet adequately by 69.9% of the people who responded to the questionnaire. Both of these scored high in terms of being important (respectively 90.0% and 88.9% ‘very important’).

c) Providing technical assistance

63.6% of the respondents felt that it was very important to receive technical assistance from countries with more experience in the adoption of restorative justice practices. According to 67.9%, this need was not met adequately yet. The European Forum for Restorative Justice can be a key actor here as well, supported by the European Commission, by providing information to Member States about the state of affairs of restorative justice in the Member States, including a list of contact points to which countries in need of assistance could turn to.

d) Adopting formal ethical rules for restorative justice practice

This was considered as being very important by 61.4% of the respondents, whilst only 1.1% felt that this was not important at all. This need was felt to not have been met adequately by 65.4% of the respondents. As was the case with safeguarding the values and principles of restorative justice and formulating access to restorative justice as a right (see 3.2 a and d), we feel that it would be possible to do this via the adoption of a recommendation or common position on restorative justice. Alternatively, the European Union could facilitate the formulation of such recommendations at NGO level and provide support for disseminating the recommendations in the Member States.

3.4. NEEDS RELATED TO EDUCATION, TRAINING AND ACCREDITATION

In general, the respondents expressed that there was little support for undertaking actions in the field of education, training and accreditation at a supranational level. The comments provided by the respondents, however, indicated that the question was not clearly formulated (support from whom?), which resulted in – on average – one-quarter of ‘no opinion’ answers. It was also clear that many of the

needs (amongst others, a stable national training system for restorative justice practitioners, and national standards for the training and accreditation of restorative justice practitioners) where not being met adequately yet at national level (see Part II, section 5.2. e). This should, hence, be considered as an important area for the European Union to provide policy guidance on to its Member States. By doing so, the European Union could contribute to ensuring that restorative justice practice meets the high standards of quality that European citizens can expect. Reference should be made here to the fact that the European Forum for Restorative Justice has already formulated recommendations on the training of mediators in criminal matters.²⁵⁹ However, a revision of these recommendations could be considered and dissemination of the recommendations could be improved.

3.5. NEEDS RELATED TO THE DEVELOPMENT OF GOOD PRACTICE

What was said in the previous section also applies to this one. In general, there seemed to be little support for EU action in relation to the development of specific guarantees in order to protect vulnerable parties, the development of European guidelines specific to the participation of minors in restorative justice practices, the definition of common European criteria that could be used as benchmarks for quality assessment, the harmonisation of the mediation procedure, the development of a European Code of Conduct for restorative justice practitioners, and the harmonisation of the status of restorative justice practitioner. However, also here the question was not always understood clearly (support from whom?), and the needs at national level are largely unmet (see Part II, section 5.2. g). On many of these points (for example, the definition of criteria to be used as benchmarks for quality assessment) international cooperation and exchange of information would be beneficial to all Member States. Hence, the European Union is instrumental in providing a platform for this cooperation and exchange to take place. It can do this by creating such a platform, or by assisting the European Forum for Restorative Justice to provide this opportunity for exchange and cooperation.

3.6. NEEDS RELATED TO COOPERATION AND NETWORKING

The need for networking at an international level is considerable. 85.4% of the respondents felt that it was very important (and 13.5% relatively important) to have a network to exchange practical and theoretical questions, experiences and strategies for restorative justice between restorative justice stakeholders internationally (policy makers, researchers, restorative justice practitioners, legal practitioners). The need for a network to exchange information between representatives of the ministries of justice of the different Member States or other relevant departments dealing with restorative justice was considered less important, although still 61.4% of the respondents said that this was very important. Ideally, networking should take place in an integrated way, involving all stakeholders. This was also the conclusion of the Helsinki seminar, organised by the Finnish Presidency in cooperation with the European Forum for Restorative Justice (see Part I, section 2). A number of respondents pointed out that the European Forum for Restorative Justice is doing an excellent job in providing networking possibilities, but that the lack of adequate funding is making it difficult for the Forum to fully play its role.

Following more specific needs concerning cooperation and networking were included in the questionnaire:

- exchange of information on successful practices and their evaluation: 86.4% very important and 76.5% not met adequately yet;
- organise study visits to restorative justice services in other countries to exchange experiences: 66.3% very important and 53.6% not met adequately yet;

²⁵⁹ Available from <http://www.euforumrj.org/Training/pool.htm>.

- organise bilateral, regional and/or international conferences, seminars and projects to exchange information on good practice, legislation, research and training: 78.4% very important and 78.3% not met adequately yet;
- networking between researchers of different countries: 80.7% very important and 71.4% not met adequately yet;
- networking between legal practitioners of different countries: 71.6% very important and 73.5% not met adequately yet;
- networking between restorative justice service providers of different countries: 69.3% very important and 72.3% not met adequately yet;
- networking between policy makers of different countries: 69.0% very important and 76.2% not met adequately yet;
- have an international forum to coordinate above actions: 77.3% very important and 70.0% not met adequately yet;
- support international cooperation through structural funding of a European organisation bringing together all stakeholders in restorative justice: 81.6% very important and 76.5% not adequately met yet.

However, networking and cooperation cannot be done without adequate funding. Many of the restorative justice services, as was seen above under point 3.2. a), are struggling with funding, meaning that there is little room in budgets for costs related to international cooperation. Participation in international conferences and projects becomes difficult under such circumstances, certainly for participants coming from disadvantaged regions.

3.7. NEEDS RELATED TO COMMUNICATION AND AWARENESS RAISING

Also in terms of communication and awareness raising much remains to be done: developing effective communication strategies to educate and inform the community, the police, the judiciary, correctional authorities and others involved in the delivery of justice services about restorative justice; raising awareness about restorative justice among the supranational/international organisations; developing strategies for cooperation with the media; promoting the use of peaceful conflict resolution skills amongst the population; and so on. In all these areas, respondents indicated that action should be taken at both national and international level. The European Commission co-funded project, conducted by the European Forum for Restorative Justice, on building social support for restorative justice²⁶⁰, will already result in some first strategies for answering these needs. It would be useful if, in the conclusions of that project, specific recommendations would be made for action at the level of the European Union. A point which will not be covered by the project, but which is of considerable importance as well, is how to make use of the existing networks and institutions within the European Union to improve awareness of restorative justice.

3.8. NEEDS RELATED TO RESEARCH AND DATA COLLECTION

Also in relation to research and data collection, the restorative justice field still requires particular attention. The list of topics which require further research can be found in Part II, section 5.3. l). The respondents also think that all these topics should be studied at both the national and international level. One big obstacle in conducting research at both the national and international level is securing adequate funding for it. Making available more funding for international research was considered to be very important by 81.8% of the respondents.

²⁶⁰ For more information, see www.euforumrj.org.

Developing appropriate evaluation schemes and criteria that are coherent with the principles and goals of restorative justice was considered very important by 83.2% of the respondents. Action to develop those should be taken at both national and international level. Conducting more systematic evaluative research was felt to be very important by 78.9% of the respondents and 85.6% of them indicated that this should, again, be done at the national and international level. Developing common criteria, including both qualitative and quantitative evaluation aspects, to enable comparison between mediation services was thought to be very important by 71.9% of the respondents. Action for developing such criteria should be taken at both national and international level according to 86.5% of the respondents. The harmonisation of national data recording systems between countries, which is almost a condition sine qua non for doing comparative research, was considered to be very important by 65.6% of the respondents, whilst another 25.6% indicated this as being relatively important. The harmonisation of national data recording systems was one topic of discussion in COST Action A21 on restorative justice developments in Europe. It would be useful to explore how the EU could support the development of a common European data recording system.

PART VI:
**GENERAL CONCLUSIONS ON THE ROLE OF THE EUROPEAN UNION IN
THE FURTHER DEVELOPMENT OF RESTORATIVE JUSTICE IN EUROPE**

In this report we have set about to study whether there is a possible role for the European Union in the further development of restorative justice in Europe, and if so, what should be regulated or provided for and by which instruments. In Part I we have provided an introduction to the project which provided the framework within which this study took place. In Part II we started with a short introduction to the concept of restorative justice, after which we provided an overview of the development of restorative justice in Europe. After having presented some results from research conducted about restorative justice, an analysis was made of the legislation on and implementation of restorative justice practices in Europe. Section 5 then presented the results of a piece of research we did, on the basis of a questionnaire, about the needs of the European restorative justice scene. Some conclusions about restorative justice in Europe were included in section 6 of Part II.

Part III described the initiatives taken by the Council of Europe, the United Nations and the European Union in the field of restorative justice. From this overview it becomes clear that the Council of Europe has – by far – been the most active in the field of restorative justice. Compared to the Council of Europe, the European Union’s involvement in the field has been extremely limited. However, one should not forget to put this in the right context. Whereas the Council of Europe is a purely intergovernmental organisation, the European Union is a supranational organisation. Initiatives taken within its context have more far-reaching consequences than within purely international organisations, where compliance cannot be enforced. This is not to say that initiatives taken within the Council of Europe and the United Nations are without consequences. Their instruments often have a high moral force and provide practical guidance to States in their conduct. The value of such instruments rests on their recognition and acceptance by a large number of States and, even without binding legal effect, they may be seen as declaratory of broadly accepted goals and principles within the international community. Section 4 of Part III made a comparison between the three main international instruments in the field of restorative justice: the Council of Europe Recommendation concerning mediation in penal matters, the UN Basic principles on the use of restorative justice programmes in criminal matters and Article 10 of the Council Framework Decision on the standing of victims in criminal proceedings.

Part IV dealt with the role of the European Union in the field of criminal justice. It briefly describes the emergence and evolution of the European Union, the development of criminal justice as a new policy area for the European Union and the EU mandate in the field of criminal justice. Before drawing up conclusions, an assessment of the EU’s role in the field of criminal justice was made.

Part V first addressed the question whether there is a legal base for the European Union to act, whether through legislation or through policy development or other initiative, in the field of restorative justice. Five possible entry-points for the European Union to act on restorative justice were defined: victim rights, offender rights, crime prevention, mutual recognition and enforcement of decisions, and adopting alternative dispute resolution as a general policy priority not only in the civil and commercial fields, but also in the penal field. Moreover, it should not be forgotten that the Council has the possibility to act, even if the Treaties have not explicitly foreseen in this, should this be necessary to attain – in the course of the operation of the common market – one of the objectives of the Community. This power has been used to adopt the

Directive relating to compensation to crime victims. One of the objectives of the Community is to abolish obstacles to the free movement of persons in the European Union. The equal protection of people visiting a Member State from harms as compared to the protection provided to nationals and persons residing in a Member State is a corollary of that freedom of movement. In the Directive relating to compensation to crime victims, the argument was presented that measures to facilitate compensation to crime victims should form part of the realisation of the objective to abolish obstacles to the free movement of persons in the European Union. We have argued that, since restorative justice aims to restore the harm caused to victims, a similar reasoning could be used in order to adopt a Directive relating to restorative justice. Restorative justice practices should be available to all European citizens, whether they are in their home country or visiting another European Member State. Interesting perspectives are opened by the idea of conducting restorative justice practices in cross-border cases, involving two different restorative justice services. Although this avenue has not been developed yet in Europe, it could certainly contribute to providing equal access to justice to European citizens. The objective of securing better access to justice is currently still too often limited to ensuring access to courts. Extrajudicial dispute resolution is currently not a matter of high priority it seems. However, we have also argued that adopting such a Directive on restorative justice would currently be very difficult and not necessarily in the best interest of the restorative justice movement in Europe. One of the distinctive characteristics of the restorative justice movement is that it has developed from the bottom up. In many European countries, restorative justice is still in full development. Imposing top-down regulations would probably curtail creativity, but might also short-cut the necessary dialogue between restorative justice providers, the criminal justice system and policy makers on how best to implement and regulate restorative justice within a country's specific economic, historical and cultural context.

Moreover, decision making at EU level is not only a question of 'finding' a legal base. A lot of factors influence whether or not an initiative has any viability to pass the careful test of the protectors of national sovereignty. Political impetus from the European Council (meaning that the issue should be high on the national agenda's), support from the European Commission and other European institutions like the European Parliament, a strong lobby and 'circumstances of the moment' play an important role as well. In addition we have argued, drawing on the example of same-sex union policy, that in certain areas – including in the area of restorative justice – imposing binding mandates on European States should only come after soft law norms have laid the ground work. Or, we first need to ensure that the common values and principles of restorative justice become recognised by key policy makers in the EU Member States. In section 3 of Part V we have proposed, based on the needs identified by actors in the restorative justice field, some courses of action.

But why should the European Union act – in one way or another – in the field of restorative justice? What are its interests in doing this? We have argued that restorative justice can contribute to achieving an area of freedom, security and justice, which is one of the main objectives of the European Union. Restorative justice can help to improve the fairness of the criminal justice system, by actively involving citizens in the strive for high quality and balanced justice. It helps to decrease the distance between citizens and criminal justice, contributing to the democratisation of justice. It can help EU Member States to limit the use of imprisonment, pay balanced attention to the needs of the victims and the rights of the offenders, and may contribute to crime prevention. Within the European Union, Member States have committed to undertaking a common effort to prevent and fight crime. The development of a common crime policy, which integrates restorative justice as an important axe in the way to deal with crime, should be part of this.

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ANNEX 1: ANALYSIS OF NATIONAL LEGISLATION

Glossary:

- In Tables 1 and 4, under 'Legislation', the years between brackets () refer to the year in which the provision entered into force, whilst the years without brackets refer to the year in which the provision was adopted. If both dates are available, they are indicated as, for example, 1999(2000). If a blank space separates a year without brackets and a year with brackets (for example, 1999 (2000)) this indicates that reference is being made to two different provisions, one for which only the year of adoption is known (i.e. 1999), and one for which only the year of entry into force is known (i.e. 2000).
- A blank indicates unknown information.
- A – means that the author of the contribution explicitly stated that nothing was available.
- In jurisdictions where different provisions are analysed separately to show the differences between them, colour-codes have been awarded, the explanation of which can be found back in footnotes.

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Table 1: Juveniles: Legal base

	Legislation/Code/ Decree specific ¹	Legislation/Code/ Decree general ²	Departmental Circular/Code	Duty ³	Stage of the referral ⁴
Austria	1988(1989) 1999(2000) 1999			C	P T Z
Belgium	2006(2007)	1965		C	P T Z
Bulgaria	2004 2006		*	P	P T Z
Cyprus	-	-	-	-	-
Czech Republic	2001		*	P	P T S
Denmark	-	-	-	P	T PS
England and Wales (UK) ⁵	1998 1999		*	M C	P Z S
Estonia	1998 2001(2001) 2004(2005)			P	
Finland	2005(2006) 2006	1966 1997	*	P	P PS
France	-	-	-	-	-
Germany	1994 1999	1999	*	P	P T Z
Greece	2003	-	-	P	P T S
Hungary	2006 2006(2007+2008) 2007			C	P T Z
Ireland ⁶	2001				P Z
Italy	-	1988(1989)		P	T Z
Lithuania	-	-	-	-	-
Luxembourg	-	1992		P	T
Malta	-	-	-	-	-
Netherlands	-	1994 1995		P	P
Northern Ireland (UK)	2002			M	
Poland	2000 2001	1982		P	P T Z
Portugal	-	1999		P	P T Z
Romania					
Scotland (UK)	-	-	*	P	P
Slovenia	1998(1999)		*	P	P T Z
Spain	2000 2004	1992	-	P	P
Sweden	2002 2006(2008)			P	P T Z PS

¹ Specific: a law/code/decree or an article/articles in a law/code/decree that explicitly refers to restorative justice/victim-offender mediation.

² General: referral to restorative justice practices possible based on (articles of) a law/code/decree not referring explicitly to restorative justice/victim-offender mediation.

³ The gatekeeper may be permitted (P), or obliged (C) to consider to refer the offender to a restorative justice intervention, or it may be mandatory (M) to refer him/her.

⁴ P: pre-charge and pre-prosecution; T: pre-trial; Z: pre-sentence; S: sentencing alternative/addition; PS: post sentence.

⁵ Cautioning decisions; sentencing options.

⁶ Restorative cautioning/conferencing; family conferencing.

Table 2: Juveniles: Scope

	Referring body ¹	Effect of successful completion ²	Typical offences ³	Excluded offences ⁴	Orientation ⁵
Austria	PP J VO	D M	P	M X ⁵	VO
Belgium	PP J	D	P PR	V	VO
Bulgaria	PP J		M CO		O
Cyprus	-	-	-	-	-
Czech Republic	PP	D M			VO
Denmark	P V O	M		N	VO
England and Wales (UK)	P J	D M	PR ^M P ^M		OV
Estonia	C	D M	P	SE M O	VO
Finland	PP P VO	D M	CO P PR	N	OV
France	-	-	-	-	-
Germany	PP J V O	D M S	M P PR	N	OV
Greece	PP J	D M	M		O
Hungary	PP J VO	D	P PR T	X ⁵ M R OC PR	VO
Ireland	P J	D M	P T DR PR ^M		
Italy	PP SS J	D		N	OV
Lithuania	-	-	-	-	-
Luxembourg	PP				
Malta	-	-	-	-	-
Netherlands ⁶	P	D			O
Northern Ireland (UK)	PP J	D M	PR P C	X ^{life}	
Poland	J VO	M CD P		N	VO
Portugal	PP J VO	D M	PR P	X ⁵	O
Romania					
Scotland (UK)	C	D			VO
Slovenia	PP VO	D	P PR	V T O X ³	VO
Spain	PP	D M	M	S R	VO
Sweden	P SS PP V O	D M	PR P V		VO

¹ P: police; PP: public prosecutor; J: judge; V: victim; O: offender; SS: social services; PR: prison or probation services; C: Juvenile Commissions/Children's Reporter; VO: suggestion by victim or offender but decision about referral made by prosecutor or judge.

² CD: conditional discontinuation; D: dismissal of the case; M: mitigation of the sentence; S: suspension of a prison sentence; P: condition for probation.

³ PR: offences against property; P: offences against the person; M: minor offences (may also be used as a qualification – PR^M for example means minor offences against property); CO: complainant offences; T: traffic offences; D: domestic violence; V: vandalism; F: offences related to family-life (custody of children for example) or neighbourhood conflicts; DR: possession of drugs; C: disorderly conduct.

⁴ M: offences resulting in death; P: petty offences; X^s: offences exceeding a specified term of imprisonment (the number in superscript indicates the term); V: cases where there is no identifiable victim; SE: sexual offences; K: kidnapping; R: recidivist offences (can also be used as a qualification); S: serious offences; O: significant offences against public order or against the state; D: domestic violence, gender-based violence; T: traffic offences; OC: crimes in affiliation with organised crime; PR: crimes committed whilst on probation; C: crimes against children; PP: offences requiring private prosecution; N: none.

⁵ Primary orientation as aspiration rather than as effect: V: victim; O: offender; VO: both equally.

⁶ The entries are limited to the HALT project because of its numerical significance.

Table 3: Juveniles: Implementation

	Sponsoring body ¹	Delivery agency ²	Delivery practice ³	Process ⁴	Guidelines for agents of the CJS	Agency Code ⁵
Austria	M	PR	P	D I		*
Belgium	L	PR	P	D I C		
Bulgaria		I				
Cyprus	-	-	-	-	-	-
Czech Republic	M	SB	PC	D		*
Denmark		CP	V	D		
England and Wales (UK)	M L	PR SB	V P	I D CA	*	*
Estonia	M	PU	PC			
Finland	M	PR PU	V	D	*	*
France	-	-	-	-	-	-
Germany	L C	PR	P	D I	*	*
Greece	M	PS			-	
Hungary	M	PS I	PC	D I		
Ireland		P PS		C CA C		
Italy	L	PU		D I		*
Lithuania	-	-	-	-	-	-
Luxembourg		PR				
Malta	-	-	-	-	-	-
Netherlands	M	SS LA PR	P	I		*
Northern Ireland (UK)	M	PU	P	C		
Poland		I	V			*
Portugal	M	PU	PC	D		*
Romania						
Scotland (UK)	L	PR	P	D I C	*	*
Slovenia	P	I	X	D I	*	
Spain		PU		D I		
Sweden	M	SS CP PR	V PC	D I C	*	

¹ Sources of funds: M: central government; L: local government; J: the court system; C: charity or charitable foundation; P: financial contribution from the parties.

² I: Individual mediators/facilitators. If an agency is responsible for mediation work, it may be a private (PR) or public body. Where public: PS: probation service; SS: social services; CS: court services; P: police services; LA: local authority; SB: special body; CP: Crime Prevention Council/Board; PU: public body but not possible to bring under one of the previous categories or unknown.

³ Mediation or other services are delivered by: P: professionals for which mediation is their primary occupation; PC: professionals who combine mediation work with other responsibilities; V: volunteers (reimbursed for their costs but not receiving a fee or a salary); X: paid lay mediators (people for whom mediation is not their primary (professional) occupation, receiving a fee for their mediation work).

⁴ D: direct mediation; I: indirect mediation; C: conferencing; CA: (restorative) cautioning.

⁵ Includes any code of practice or code of ethics published by any public or private agency responsible for the organisation or the delivery of the provision.

Table 4: Adults: Legal base

	Legislation/Code/ Decree specific ¹	Legislation/Code/ Decree general ²	Departmental Circular/Code	Duty ³	Stage of the referral ⁴
Austria	1999 1999(2000) 2004(2008)		*	C P	P T Z
Belgium ⁵	1994 1994 1999 2002 2005 2005(2006) 2006 2006		* *	P P P	P P PS P T Z PS P T Z PS
Bulgaria	2004 2006		*	P	P T Z
Cyprus	-	-	-	-	-
Czech Republic	2001		*	P	P T S
Denmark	-	-		P	T PS
England and Wales (UK)	2003		*	P	P T Z
Estonia	2007 2007(2007) 2007			P	P Z
Finland	2005(2006) 2006	1966 1997	*	P	P PS
France	1993 1996 1999 2004		*	P	P T Z PS
Germany	1994 1999		*	P	P
Greece	2006(2007)		-	P	P
Hungary	2006 2006(2007+2008) 2007			C	P T Z
Ireland	-	-			
Italy	2000(2002)			P	Z
Lithuania	-	-	-	-	-
Luxembourg	1999 2003			P	P
Malta	-	-	-	-	-
Netherlands	-	yes		P	P T S PS
Northern Ireland (UK)	-	-	-	-	-
Poland	1997 1998 2003 2003			P	P T Z
Portugal	2007(2007) 2008 2008 2008			P	P T
Romania	2003 2006	2004		P	P T Z
Scotland (UK)	-	-	*	P	P
Slovenia	1998(1999)		*	P	P T Z
Spain		1995(1996)	-	P	T P
Sweden	2002			P	P T Z PS

¹ Specific: a law/code/decree or an article/articles in a law/code/decree that explicitly refers to restorative justice/victim-offender mediation.

² General: referral to restorative justice practices possible based on (articles of) a law/code/decree not referring explicitly to restorative justice/victim-offender mediation.

³ The gatekeeper may be permitted (P), or obliged (C) to consider to refer the offender to a restorative justice intervention, or it may be mandatory (M) to refer him/her.

⁴ P: pre-charge and pre-prosecution; T: pre-trial; Z: pre-sentence; S: sentencing alternative/addition; PS: post sentence.

⁵ Penal mediation; mediation at the police stage; law on the general offer of mediation; mediation in the prison context; mediation for redress.

Table 5: Adults: Scope

	Referring body ¹	Effect of successful completion ²	Typical offences ³	Excluded offences ⁴	Orientation ⁵
Austria	PP J VO	D M	P	M P PP	VO
Belgium	PP P V O V O PP J V O	D D D D M	M M P PR	X ² N	OV OV VO VO VO
Bulgaria	PP J		M CO		O
Cyprus	-	-	-	-	-
Czech Republic	PP	D M			VO
Denmark	P V O	M		N	VO
England and Wales (UK)	P PP J	D M	M		OV
Estonia	J	D M	P	SE M O C	VO
Finland	PP P VO	D M	CO P PR D	C D ^R	VO
France	PP	D	P PR F V	D ^{S,R} O	VO
Germany	PP J VO	D M P	M PR P	N	OV
Greece	PP	CD	D	All except D	
Hungary	PP J VO	D if punishable up to 3 years M if punishable up to 5 years	PR P T	X ⁵ M R OC PR	VO
Ireland					
Italy	J	D	M		VO
Lithuania	-	-	-	-	-
Luxembourg	PP	D	P F	D if victim and offender cohabit	VO
Malta	-	-	-	-	-
Netherlands	P PP V O PR				V VO
Northern Ireland (UK)	-	-	-	-	-
Poland	PP J VO	CD if punishable with less than 5 years	D P ^M PR	N	VO

¹ P: police; PP: public prosecutor; J: judge; V: victim; O: offender; SS: social services; PR: prison or probation services; VO: suggestion by victim or offender but decision about referral made by prosecutor or judge.

² CD: conditional discontinuation; D: dismissal; M: mitigation of the sentence; R: early access to conditional release; P: condition for parole.

³ PR: offences against property; P: offences against the person; M: minor offences (may also be used as a qualification – PR^M for example means minor offences against property); CO: complainant offences; T: traffic offences; D: domestic violence; V: vandalism; F: offences related to family-life (custody of children for example) or neighbourhood conflicts; DR: possession of drugs.

⁴ M: offences resulting in death; P: petty offences; Xⁿ: offences exceeding a specified term of imprisonment (the number in superscript indicates the term); V: cases where there is no identifiable victim; SE: sexual offences; K: kidnapping; R: recidivist offences (can also be used as a qualification); S: serious offences; O: significant offences against public order or against the state; D: domestic violence, gender-based violence; T: traffic offences; OC: crimes in affiliation with organised crime; PR: crimes committed whilst on probation; C: crimes against children; PP: offences requiring private prosecution; N: none.

⁵ Primary orientation as aspiration rather than as effect: V: victim; O: offender; VO: both equally.

		M			
Portugal	PP	D	PR P CO	SE C X ⁵	VO
Romania	V O SS	D	CO D		
Scotland (UK)	PP	D	M		
Slovenia	PP VO	D	P PR	X ³ V T O	VO
Spain	J PP V O	M D R		D	VO
Sweden	P SS PP V O	D M			VO

Table 6: Adults: Implementation

	Sponsoring body ¹	Delivery agency ²	Delivery practice ³	Process ⁴	Guidelines for agents of the CJS	Agency Code ⁵
Austria	M	PR	P	D I	*	*
Belgium	M M M M L	CS P P P PR PR PR	P P P P P	I D I D I D I D I D	*	
Bulgaria		I				
Cyprus	-	-	-	-	-	-
Czech Republic	M	SB	PC	D		*
Denmark		CP	V	D		
England and Wales (UK)	L	PR	P V	I D C A	*	*
Estonia	M	PU	PC			
Finland	M	PR PU	V	D	*	*
France	J	PR	P P C V	I D		*
Germany	L C	PR CS	P P C	D I	*	*
Greece		PP			-	
Hungary	M	PS I	PC	D I		
Ireland						
Italy		PR J		D I		
Lithuania	-	-	-	-	-	-
Luxembourg		I				
Malta	-	-	-	-	-	-
Netherlands	M	P S B PR	P P C	I D		*
Northern Ireland (UK)	-	-	-	-	-	-
Poland	J	I	X	D I		*
Portugal	M	I	X			
Romania	P	PR				*
Scotland (UK)	L	PR	V P	D I		*
Slovenia	P	I	X	D I	*	
Spain	L			D I		
Sweden	M	SS CP PR	V P C	D I C	*	

¹ Sources of funds: M: central government; L: local government; J: the court system; C: charity or charitable foundation; P: financial contribution from the parties.

² I: Individual mediators/facilitators. If an agency is responsible for mediation work, it may be a private (PR) or public body. Where public: PS: probation service; SS: social services; CS: court services; P: police services; LA: local authority; SB: special body; CP: Crime Prevention Council/Board; PU: public body but not possible to bring under one of the previous categories or unknown.

³ Mediation or other services are delivered by: P: professionals for which mediation is their primary occupation; PC: professionals who combine mediation work with other responsibilities; V: volunteers (reimbursed for their costs but not receiving a fee or a salary); X: paid lay mediators (people for whom mediation is not their primary (professional) occupation, receiving a fee for their mediation work).

⁴ D: direct mediation; I: indirect mediation; C: conferencing.

⁵ Includes any code of practice or code of ethics published by any public or private agency responsible for the organisation or the delivery of the provision.

ANNEX 2: QUESTIONNAIRE CONCERNING THE NEEDS OF THE EUROPEAN RESTORATIVE JUSTICE SCENE

Introduction

In the framework of the AGIS3 project, the European Forum for Restorative Justice is conducting research on the possible role of the European Union in the further development of restorative justice. Part of the research work consists in capturing the needs of the European restorative justice (RJ) scene, and checking with key actors (practitioners, but also academics and policy makers) in the field how acute this need is and at which level they feel that these needs should be met: at the national level, the international level or both. Also, if action at international level would be helpful, what should be the nature of this action: should it be of a supportive nature only (e.g. funding research projects), or should it take the form of legislative measures which can be binding (e.g. a framework decision) or non-binding (e.g. a recommendation) on the Member States?

In answering the questionnaire, we would like to ask you to - as much as possible - not only reflect your own point of view, but rather to reflect the general objective standpoint of your background group (e.g. if you are a practitioner: what would in general be the position of RJ practitioners in your country?).

After each set of questions, you have a possibility to provide us with comments. This is a way to provide additional information with one of your answers or to make us aware of a need that you feel that has not been incorporated in our list.

It is obvious that the more reactions we get on this questionnaire, the more reliable the results will be and hence the more convincing for the European Union. Therefore, we would like to ask you to complete the questionnaire, and to do this **before 17 March 2008**. It should not take longer than **20-25 minutes**.

Please do NOT use the ENTER-button while filling in the questionnaire. To navigate between questions either use the TAB key or your mouse. Please also make sure that you answer all questions. If you prefer to give no answer to a certain question, please check the 'no opinion' option.

Thank you for your cooperation!

0. General questions

Please indicate the country in which you work:

Please indicate the professional group to which you belong:

- RJ practitioner/RJ service
- legal practitioner (lawyer, judge, prosecutor)
- police
- civil servant or policy maker
- researcher
- other, namely:

1. Legislation

1.A. At the national level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met in your country or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
1.A.1. Need for more (detailed) national legislation concerning the cases that can go to RJ and the procedure to deal with them	<input type="checkbox"/>						
1.A.2. Need for more (detailed) legislation on the organisation of RJ services	<input type="checkbox"/>						
1.A.3. Need for more (detailed) legislation ensuring the availability of RJ services	<input type="checkbox"/>						
1.A.4. Need to change the legal force of the legislative provisions concerning RJ (e.g. changing a permissive formulation into a coercive one)	<input type="checkbox"/>						
1.A.5. Need for a more concrete legal basis that explicitly regulates RJ practices and their relation to the criminal justice system	<input type="checkbox"/>						
1.A.6. Need to take legislative measures to ensure respect for the main principles of RJ practices	<input type="checkbox"/>						
1.A.7. Need to expand the reach of RJ beyond diversion	<input type="checkbox"/>						
1.A.8. Need to extend the categories of offences that can be referred to RJ practices	<input type="checkbox"/>						
1.A.9. Need to provide for legal guarantees in legislation for preserving the voluntary character of the participation	<input type="checkbox"/>						
1.A.10. Need to provide for legal guarantees in legislation for confidentiality	<input type="checkbox"/>						
1.A.11. Need to implement provisions for the suspension of time limits applicable to criminal proceedings during the time that a case is being dealt with through mediation	<input type="checkbox"/>						
1.A.12. Need to formulate RJ as a right for victims and offenders in legislation	<input type="checkbox"/>						

Comments:

1.B. At the international/supranational level

Please provide three answers per line:

- one to indicate the level of importance of the need

- one to indicate the preferred level of legal force

- one to indicate whether this need is already adequately met at the international/ supranational level or not.

Needs	Level of importance				Legal force			Already adequately met		
	Not important	Relatively important	Very important	No opinion	Binding	Non-binding	No opinion	No	Yes	No opinion
1.B.1. Need for more regulation at the level of the European Union concerning the Member States' implementation of RJ	<input type="checkbox"/>									
1.B.2. Need for more regulation at the level of the European Union concerning the procedural treatment of a dossier (e.g. referral)	<input type="checkbox"/>									
1.B.3. Need for more regulation at the level of the European Union concerning the internal process of mediation (e.g. working principles)	<input type="checkbox"/>									
1.B.4. Need to harmonise the categories of offences that are amenable to RJ practices	<input type="checkbox"/>									
1.B.5. Need to harmonise the ways in which mediation agreements can be recognised and executed in other countries	<input type="checkbox"/>									

Comments:

2. Implementation and policy development

2.A. At the national level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met in your country or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
2.A.1. Need for a clear political statement on RJ from the government	<input type="checkbox"/>						
2.A.2. Need for a national strategic approach to the implementation of RJ programmes	<input type="checkbox"/>						
2.A.3. Need for strong leadership from senior criminal justice managers	<input type="checkbox"/>						
2.A.4. Need to create a specific RJ unit in the competent ministries	<input type="checkbox"/>						
2.A.5. Need to identify key officials in all the competent administrative authorities and establish a permanent consultation structure between them	<input type="checkbox"/>						
2.A.6. Need to expand the equal availability of RJ services across the country	<input type="checkbox"/>						
2.A.7. Need to take steps to ensure that certain social groups and immigrant groups have equal access to RJ services	<input type="checkbox"/>						
2.A.8. Need for the introduction of RJ processes in the prevention and management of conflicts to be increased through programmes, e.g., in criminal matters, schools, sports clubs, neighbourhoods and families	<input type="checkbox"/>						
2.A.9. Need to adopt clear and unambiguous guidelines for the referral of cases to RJ practices and for reporting back to the criminal justice system	<input type="checkbox"/>						
2.A.10. Need to reconcile differing interpretations that judges and prosecutors have of the legal provisions concerning RJ	<input type="checkbox"/>						
2.A.11. Need to ensure direct financial government support to RJ services	<input type="checkbox"/>						
2.A.12. Need for more stability in funding of RJ programmes	<input type="checkbox"/>						
2.A.13. Need for the codes of conduct for lawyers to include an obligation for lawyers to inform their clients about mediation and to consider the use of RJ when appropriate	<input type="checkbox"/>						
2.A.14. Need for the adoption of formal ethical rules for RJ practices	<input type="checkbox"/>						

2.A.15. Need for the creation of a deontological commission for RJ practices	<input type="checkbox"/>						
2.A.16. Need to take steps to ensure that volunteers can play an active role in RJ practices	<input type="checkbox"/>						

Comments:

2.B. At the international/supranational level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met at international/ supranational level or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
2.B.1. Need to work for a common understanding of the basic principles of RJ	<input type="checkbox"/>						
2.B.2. Need for more guidance from supranational/international institutions in national policy developments concerning RJ	<input type="checkbox"/>						
2.B.3. Need for a network to exchange information between representatives of the ministries of justice of the different member states or other relevant departments dealing with RJ	<input type="checkbox"/>						
2.B.4. Need for a network to exchange practical and theoretical questions, experiences and strategies for RJ between RJ stakeholders internationally (policy makers, researchers, RJ practitioners, legal practitioners)	<input type="checkbox"/>						
2.B.5. Need for European institutions to encourage countries to institutionalise public funding of RJ practices	<input type="checkbox"/>						
2.B.6. Need for technical assistance in the adoption of RJ practices from countries with more experience	<input type="checkbox"/>						
2.B.7. Need for the adoption of formal ethical rules for RJ practices	<input type="checkbox"/>						

Comments:

3. Education, training and accreditation

3.A. At the national level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met in your country or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
3.A.1. Need for a stable national training system for RJ practitioners	<input type="checkbox"/>						
3.A.2. Need for national standards for training of RJ practitioners	<input type="checkbox"/>						
3.A.3. Need for national standards for the accreditation of RJ practitioners	<input type="checkbox"/>						
3.A.4. Need to include RJ in the curricula for the initial and continuous training programmes for referral agents (police, lawyers, judges, prosecutors)	<input type="checkbox"/>						
3.A.5. Need to include RJ in the schools national curricula	<input type="checkbox"/>						
3.A.6. Need to include RJ in the curricula of university education in humanities/social sciences	<input type="checkbox"/>						

Comments:

3.B. At the international/supranational level

Please indicate the level of support there is in your country for undertaking following actions at international/ supranational level.

Action	Level of support			
	No support	Average support	Strong support	No opinion
3.B.1. Develop common European standards for RJ practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.2. Develop a shared framework for quality control and accountability	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.3. Establish links between national training institutes for RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.4. Establish a European training programme for RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

3.B.5. Develop common European standards for the training of RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.6. Develop common European criteria for the accreditation of RJ practitioners and/or institutions which offer RJ services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.7. Develop common European criteria for the accreditation of institutions which train RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.8. Develop a framework for external support (funding and expertise) for training at the national level	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.9. Develop European recommendations concerning the training of referring agents (police, lawyers, judges and prosecutors)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.B.10. Establish a European training programme for referring agents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:

4. Development of good practice

4.A. At the national level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met in your country or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
4.A.1. Need to develop appropriate complaints procedures when RJ practitioners breach a code of conduct	<input type="checkbox"/>						
4.A.2. Need to develop appropriate disciplinary procedures when RJ practitioners breach a code of conduct	<input type="checkbox"/>						
4.A.3. Need to define criteria that could be used as benchmarks for quality assessment	<input type="checkbox"/>						
4.A.4. Need to establish adequate procedural guarantees for the participation of minors in RJ practices	<input type="checkbox"/>						
4.A.5. Need for clear policies and guidelines concerning case referral by referral agencies	<input type="checkbox"/>						
4.A.6. Need for clear policies and guidelines concerning case acceptance decisions by RJ programme personnel	<input type="checkbox"/>						

4.A.7. Need to develop data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants	<input type="checkbox"/>						
4.A.8. Need to develop mechanisms to monitor the compliance with any agreement that is reached in the restorative process	<input type="checkbox"/>						
4.A.9. Need to set up programme performance standards and targets	<input type="checkbox"/>						
4.A.10. Need to put in place monitoring schemes	<input type="checkbox"/>						
4.A.11. Need to clarify mechanisms through which to protect the individual rights of the parties	<input type="checkbox"/>						
4.A.12. Need to encourage and support the involvement of mediators from the communities (lay or volunteer mediators)	<input type="checkbox"/>						
4.A.13. Need to increase the use of local resources and experience, including the not-for-profit/NGO sector	<input type="checkbox"/>						

Comments:

4.B. At the international/supranational level

Please indicate the level of support there is in your country for undertaking following actions at international/ supranational level.

Action	Level of support			
	No support	Average support	Strong support	No opinion
4.B.1. Develop a European Code of Conduct for RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.B.2. Harmonise the status of RJ practitioner	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.B.3. Define common European criteria that could be used as benchmarks for quality assessment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.B.4. Harmonise the mediation procedure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.B.5. Develop specific guarantees in order to protect vulnerable parties to RJ practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.B.6. Develop European guidelines specific to the participation of minors in RJ practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:

5. Cooperation and networking

5.A. At the national level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met in your country or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
5.A.1. Need for more communication between the different RJ projects in your country	<input type="checkbox"/>						
5.A.2. Need to create a common perspective for RJ amongst service providers, training providers, practitioners and the actors of the criminal justice system	<input type="checkbox"/>						
5.A.3. Need to establish a regular dialogue between RJ practitioners, referring agents, policy makers and other stakeholders concerning the meaning and terms of RJ	<input type="checkbox"/>						
5.A.4. Need to foster both institutional and individual links between RJ practitioners on the one hand, and judges and prosecutors on the other hand	<input type="checkbox"/>						
5.A.5. Need to establish working relationships between stakeholders (policy makers, legal practitioners, academics and other related statutory and not-for-profit organisations)	<input type="checkbox"/>						
5.A.6. Need to develop inter-agency protocols and formal agreements (e.g. on matters such as governance, programme policy setting, public communication, case referrals, joint training, cost-sharing, information flow, data sharing, protection of privacy, confidentiality of information, dispute resolution among partners, etc.)	<input type="checkbox"/>						
5.A.7. Need for collaborative partnerships between criminal justice personnel, the not-for-profit/NGO sector and community-based organisations	<input type="checkbox"/>						
5.A.8. Need for better cooperation between organisations working for similar aims (e.g. mediation and victim support projects)	<input type="checkbox"/>						
5.A.9. Need for bar associations and lawyers associations to have lists of RJ programme providers and to disseminate them to lawyers	<input type="checkbox"/>						
5.A.10. Need for more exchange of information on successful practices and their evaluation	<input type="checkbox"/>						
5.A.11. Need for more exchange between stakeholders on the role of volunteers in RJ	<input type="checkbox"/>						

practices in order to increase the level of confidence in the quality of the work of volunteers

Comments:

5.B. At the international/supranational level

Please provide two answers per line:

- one to indicate the level of importance of the need

- one to indicate whether this need is already adequately met at international/ supranational level or not.

Needs	Importance of the need				Already adequately met		
	Not important	Relatively important	Very important	No opinion	No	Yes	No opinion
5.B.1. Need to organise study visits to RJ services in other countries to exchange experiences	<input type="checkbox"/>						
5.B.2. Need to organise bilateral, regional and/or international conferences, seminars and projects to exchange information on good practice, legislation, research and training	<input type="checkbox"/>						
5.B.3. Need for networking between policy makers of different countries	<input type="checkbox"/>						
5.B.4. Need for networking between service providers of different countries	<input type="checkbox"/>						
5.B.5. Need for networking between researchers of different countries	<input type="checkbox"/>						
5.B.6. Need for networking between legal practitioners of different countries	<input type="checkbox"/>						
5.B.7. Need for more exchange of information on successful practices and their evaluation	<input type="checkbox"/>						
5.B.8. Need to have an international forum to coordinate above actions	<input type="checkbox"/>						
5.B.9. Need to support international cooperation through structural funding of a European organisation bringing together all stakeholders in RJ	<input type="checkbox"/>						

Comments:

6. Communication and awareness raising

Please provide two answers per line:

- one to indicate the level of importance of following actions

- one to indicate at which level (national and/ or international) the action should be taken/ cooperation is needed. If you feel that action should be undertaken nationally, but that it would be useful to cooperate internationally as well to develop a framework for the action (e.g. international project on how to raise awareness among lawyers), please choose for the option 'national and international level'.

Action	Importance				Level at which the action should be taken/cooperation is needed			
	Not important	Relatively important	Very important	No opinion	National level	International level	National and international level	No opinion
6.1. Develop effective communication strategies to educate and inform the community, the police, the judiciary, correctional authorities and others involved in the delivery of justice services about RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.2. Develop an integrated communication strategy to spread information about the possible negative effects of the criminal justice system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.3. Set up recurrent publicity campaigns about RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.4. Promote the use of peaceful conflict resolution skills amongst the population	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.5. Develop strategies for cooperation with the media	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.6. Raise awareness about RJ among social workers, the police, policy makers and legal professionals (lawyers, prosecutors and judges)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
6.7. Raise awareness about RJ among the international/supranational organisations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

Comments:

7. Research and data collection

7.A. Research to be done

Please provide two answers per line:

- one to indicate the importance of the following research topics

- one to indicate at which level (national and/ or international) the research should be conducted.

Research topic	Importance				Level at which the research should be conducted			
	Not important	Relatively important	Very important	No opinion	National level	International level	National and international level	No opinion
7.A.1. The concept of RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.2. The internal dynamics of RJ practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.3. Revising criminal justice principles and reformulating them in the light of the RJ philosophy	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.4. The practical aspects of implementing RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.5. Ways to assess whether RJ works and on the basis of which criteria	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.6. Explore and study the different ways in which RJ can be regulated by law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.7. The relation between RJ and criminal justice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.8. The differences between various RJ models	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.9. Acceptance by the public of RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.10. Use of RJ practices in non-conventional crimes (e.g. white collar crime)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.11. The possible role of the local community in RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.12. The role of volunteers in RJ and how they relate to professional RJ practitioners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.13. The special consideration that should be given to the needs of the victim before, during and after the RJ intervention	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.A.14. In-depth research into the meaning that victims and offenders and other parties give to their participation in RJ practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

7.A.15. Research on how to conduct research in the RJ field	<input type="checkbox"/>							
7.A.16. The effects of RJ on re-offending	<input type="checkbox"/>							
7.A.17. Cost-effectiveness of RJ	<input type="checkbox"/>							
7.A.18. The degree of satisfaction of the parties	<input type="checkbox"/>							
7.A.19. The benefits for the parties	<input type="checkbox"/>							
7.A.20. The improvement of RJ practice	<input type="checkbox"/>							
7.A.21. The limitations of RJ (when is it not successful or not applicable)	<input type="checkbox"/>							

Comments:

7.B. Actions to be undertaken in the research field

Please provide two answers per line:

- one to indicate the importance of undertaking following actions

- one to indicate at which level (national and/or international) the action should be taken.

Action	Importance				Level at which the action should be taken			
	Not important	Relatively important	Very important	No opinion	National level	International level	National and international level	No opinion
7.B.1. More systematic evaluative research	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.B.2. Develop appropriate evaluation schemes and criteria that are coherent with the principles and goals of RJ	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.B.3. Develop common criteria, including both qualitative and quantitative evaluation aspects, to enable comparison between mediation services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
7.B.4. Make available more funding for international research	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

Please indicate the level of importance of undertaking following actions.

Action	Level of importance			
	Not important	Relatively important	Very important	No opinion
7.B.5. Need for member states to continually monitor their RJ schemes and to arrange for their external and independent evaluation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.B.6. Set up a national data recording system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.B.7. Harmonise national data recording systems between countries	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.B.8. Need for mediation services to do research themselves (rather than an independent research institute)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:

PLEASE CLICK ON SUBMIT BELOW TO SEND YOUR ANSWERS.

WE THANK YOU FOR YOUR COOPERATION!

ANNEX 3: CROSSTABS – DIFFERENCE IN RESPONSE TO THE QUESTIONNAIRE ACCORDING TO PROFESSIONAL GROUP

Need to implement provisions for the suspension of time limits applicable to criminal proceedings during the time that a case is being dealt with through mediation – Need adequately met or not?

Profession * 1a11 adequately met

Crosstab

			1a11 adequately met		Total
			No	Yes	
Profession	RJ practitioners	Count	12	14	26
		% within Profession	46,2%	53,8%	100,0%
		% within 1a11 adequately met	24,5%	66,7%	37,1%
Others		Count	14	2	16
		% within Profession	87,5%	12,5%	100,0%
		% within 1a11 adequately met	28,6%	9,5%	22,9%
Researchers		Count	23	5	28
		% within Profession	82,1%	17,9%	100,0%
		% within 1a11 adequately met	46,9%	23,8%	40,0%
Total		Count	49	21	70
		% within Profession	70,0%	30,0%	100,0%
		% within 1a11 adequately met	100,0%	100,0%	100,0%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	11,340 ^a	2	,003
Likelihood Ratio	11,298	2	,004
Linear-by-Linear Association	5,490	1	,019
N of Valid Cases	70		

a. 1 cells (16,7%) have expected count less than 5. The minimum expected count is 4,80.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,402	,003
	Cramer's V	,402	,003
N of Valid Cases		70	

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

Need for a clear political statement on RJ from the government – Importance of the need

Profession * 2a1 importance

Crosstab

			2a1 importance		Total
			Relatively important	Very important	
Profession	RJ practitioners	Count	3	29	32
		% within Profession	9,4%	90,6%	100,0%
		% within 2a1 importance	17,6%	39,7%	35,6%
Others		Count	3	21	24
		% within Profession	12,5%	87,5%	100,0%
		% within 2a1 importance	17,6%	28,8%	26,7%
Researchers		Count	11	23	34
		% within Profession	32,4%	67,6%	100,0%
		% within 2a1 importance	64,7%	31,5%	37,8%
Total		Count	17	73	90
		% within Profession	18,9%	81,1%	100,0%
		% within 2a1 importance	100,0%	100,0%	100,0%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	6,553 ^a	2	,038
Likelihood Ratio	6,426	2	,040
Linear-by-Linear Association	6,408	1	,011
N of Valid Cases	90		

a. 1 cells (16,7%) have expected count less than 5. The minimum expected count is 4,53.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,270	,038
	Cramer's V	,270	,038
N of Valid Cases		90	

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

Need to include RJ in the curricula for the initial and continuous training programmes for referral agents (police, lawyers, judges, prosecutors) – Importance of the need

Profession * 3a4 importance

Crosstab

			3a4 importance		Total
			Relatively important	Very important	
Profession	RJ practitioners	Count	2	31	33
		% within Profession	6,1%	93,9%	100,0%
		% within 3a4 importance	9,5%	45,6%	37,1%
Others		Count	7	17	24
		% within Profession	29,2%	70,8%	100,0%
		% within 3a4 importance	33,3%	25,0%	27,0%
Researchers		Count	12	20	32
		% within Profession	37,5%	62,5%	100,0%
		% within 3a4 importance	57,1%	29,4%	36,0%
Total		Count	21	68	89
		% within Profession	23,6%	76,4%	100,0%
		% within 3a4 importance	100,0%	100,0%	100,0%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	9,473 ^a	2	,009
Likelihood Ratio	10,850	2	,004
Linear-by-Linear Association	7,265	1	,007
N of Valid Cases	89		

a. 0 cells (.0%) have expected count less than 5. The minimum expected count is 5,66.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,326	,009
	Cramer's V	,326	,009
N of Valid Cases		89	

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

Research on the difference between various RJ models – Importance of the need

Profession * 7a8 importance

Crosstab

			7a8 importance		Total
			Relatively important	Very important	
Profession	RJ practitioners	Count	19	14	33
		% within Profession	57,6%	42,4%	100,0%
		% within 7a8 importance	65,5%	24,1%	37,9%
Others		Count	5	18	23
		% within Profession	21,7%	78,3%	100,0%
		% within 7a8 importance	17,2%	31,0%	26,4%
Researchers		Count	5	26	31
		% within Profession	16,1%	83,9%	100,0%
		% within 7a8 importance	17,2%	44,8%	35,6%
Total		Count	29	58	87
		% within Profession	33,3%	66,7%	100,0%
		% within 7a8 importance	100,0%	100,0%	100,0%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	14,248 ^a	2	,001
Likelihood Ratio	14,289	2	,001
Linear-by-Linear Association	9,468	1	,002
N of Valid Cases	87		

a. 0 cells (,0%) have expected count less than 5. The minimum expected count is 7,67.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,405	,001
Nominal by Nominal	Cramer's V	,405	,001
N of Valid Cases		87	

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

Research on the limitations of RJ (when is it not successful or not applicable) – Importance of the need

Profession * 7a21 importance

Crosstab

			7a21 importance		Total
			Relatively important	Very important	
Profession	RJ practitioners	Count	0	33	33
		% within Profession	,0%	100,0%	100,0%
		% within 7a21 importance	,0%	45,8%	38,4%
	Others	Count	4	17	21
		% within Profession	19,0%	81,0%	100,0%
		% within 7a21 importance	28,6%	23,6%	24,4%
Researchers	Count	10	22	32	
	% within Profession	31,3%	68,8%	100,0%	
	% within 7a21 importance	71,4%	30,6%	37,2%	
Total	Count	14	72	86	
	% within Profession	16,3%	83,7%	100,0%	
	% within 7a21 importance	100,0%	100,0%	100,0%	

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	11,797 ^a	2	,003
Likelihood Ratio	16,214	2	,000
Linear-by-Linear Association	10,286	1	,001
N of Valid Cases	86		

a. 1 cells (16,7%) have expected count less than 5. The minimum expected count is 3,42.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,370	,003
Nominal by Nominal	Cramer's V	,370	,003
N of Valid Cases		86	

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

ANNEX 4: SUMMARIES OF NATIONAL RESTORATIVE JUSTICE PROVISIONS IN THE EUROPEAN UNION¹

AUSTRIA

The Austrian Criminal Code (CC) as well as the Code of Criminal Procedure (CCP) and the Criminal Procedure Reform Act contain a quite comprehensive range of provisions related to restorative justice principles. Victim-offender mediation was first introduced in 1985 as an experimental project and in 1988 was incorporated in the juvenile criminal law, which at the same time served as a basis of experiments for the general criminal law. Victim-offender mediation with adults was implemented twelve years later, in 2000, in the Code of Criminal Procedure. Since January 2000 victim-offender mediation constitutes one of the four diversionary measures that have been collectively implemented in the so-called ‘diversion package’ within the Code of Criminal Procedure. An important step in the promotion of restorative justice in criminal proceedings was made by the latest and major reform of the Code of Criminal Procedure (*Strafprozessreformgesetz 2004*, Criminal Procedure Reform Act [CPRA]), which was enacted in 2004 and will come into force on 1st January 2008. The reform seeks to modernise the preliminary proceedings, which in essence have not been restructured since 1873. Finally, restorative justice elements have been implemented within the new Corporate Liability Act (*Verbandsverantwortlichkeitsgesetz*, CLA) which came into force on 1st January 2006. The CC and CCP provisions on restorative justice mentioned above now have to be applied to corporations unless CLA provides otherwise.

The first legal regulations on victim-offender mediation were implemented by the Juvenile Courts Act in 1988. On 1st January 2000, an amending statute of the Code of Criminal Procedure (*Strafprozessnovelle 1999*) containing a comprehensive ‘package’ of new diversionary measures for adult offenders – including victim-offender mediation – came into force (art. 90a to 90m of the Code of Criminal Procedure). The existing provisions on diversion (including victim-offender mediation) in juvenile criminal law were amended at the same time (Art. 7 of the Juvenile Courts Law now refers to art. 90a to 90m of the CPP while providing some regulations that are less strict, taking into account the basic principles of juvenile criminal justice). On 1st January 2008 art. 90a to 90m of the Code of Criminal Procedure will be replaced by art. 198 to 209 of the *Criminal Procedure Reform Act*. The new provisions on diversion basically remain the same, especially with regard to the scope of their application and procedure, but significant changes have been made with regard to the position and interests of the victim: in future compensation for damage will be a necessary precondition for diversion.

The present victim-offender mediation is called *außergerichtlicher Tatausgleich*, which means ‘out of court case settlement’. In future victim-offender mediation will be called ‘case settlement’ as the attribute ‘out of court’ is capable of being misunderstood insofar as victim-offender mediation never has been a procedure entirely outside criminal proceedings.

There are four diversionary offers that the prosecutor may make, the performance of community service, the determination of a probationary period (one to two years), possibly combined with supervision of the probationer and/or the completion of so-called ‘obligations’ (*Pflichten*, or victim-offender mediation ([*außergerichtlicher*] *Tatausgleich*, in short: ATA. By law, victim-offender mediation (Art. 90g CCP) means that the suspect is prepared to accept responsibility for his

¹ The author of the report would like to thank Brunilda Pali for making these summaries.

commission of the offence and to confront him or herself with its causes. This acceptance may especially involve compensating the victim (to include any adequate settlement of the material and emotional consequences) and assuming obligations that show that s/he is willing to refrain from acting in a way that led to the offending behaviour. Art. 204 CPRA will explicitly restrict victim-offender mediation to cases in which *individual* interests have been *directly* affected by an offence.

Unlike the current general criminal law, the Juvenile Courts Act recognizes the possibility of non-intervening diversion (Art. 6 JCA (non-intervention: *Absehen von der Verfolgung*)). According to art. 6 JCA the prosecutor must terminate any juvenile proceedings concerning offences punishable only by a fine or by not more than five years' imprisonment (the equivalent of ten years in general criminal law), provided that no further measures, especially intervening diversion, are necessary for purposes of individual prevention. Further differences from the general criminal law relate to the juvenile suspect's capacity, for example, her/his ability to pay compensation, or to the fact that victim-offender mediation with juvenile suspects does not depend on the victim's consent.

There are no legal restrictions as to the *types* of offences that are amenable to mediation; basically all types of offences are eligible. There are, however, some that are excluded by law. These are, on the one hand petty offences (see art. 42 CC) and offences requiring private prosecution, and on the other hand offences to be tried before a *Schöffengericht* or a *Geschworenengericht* and offences resulting in death. Thus, diversion may not be applied even in the least serious cases of manslaughter, which in Austria are punishable by one year or less in prison.

Neustart is the single national private *association for probation services and social work* in Austria, which changed its name from '*Verein für Bewährungshilfe und Soziale Arbeit*' (in short: VBSA; meaning association for probation services and social work) to *Neustart* in 2002. Its activities in particular comprise the probation service, assistance for offenders discharged from custody, victim support, prevention as well as victim-offender mediation and community service in the context of diversion. *Neustart* cooperates as a kind of agent with the Ministry of Justice on the basis of a general contract (since 1994). *Neustart* reports to the Ministry quarterly on the development of the numbers of victim-offender mediation cases. Victim-offender mediation services are delivered by specially trained social workers (mediators, *Konfliktregler*) all of whom are professional staff employed by *Neustart*. There are no volunteers working in victim-offender mediation services.

BELGIUM

Since the 1980's Belgium has generated many restorative instruments in dealing with crime, of a lesser or more serious degree, committed either by adults or juveniles. Restorative inspired legislation was consecutively based on pilot projects in the field. Hence, restorative justice developments were clearly grassroots initiatives. Today, mediation practices for adults are implemented at the police stage (local mediation), at the level of the public prosecutor, before prosecution (penal mediation) and after prosecution (mediation for redress), and even during the execution of a penal sentence, usually in prison settings (mediation at the stage of execution of punishment).

Other restorative justice applications in the field of criminal justice for adults are the structural implementation of restorative justice principles in prison since 2001 and a redress fund. Juvenile delinquents can be referred to mediation or to a conferencing circle (*Hergo*). Some restorative practices function without being legally sanctioned, but legislative measures have been put in place to regulate penal mediation for adult offenders, mediation for redress for adult offenders, as well as mediation in a non-penal context (family mediation and mediation in non-penal minor conflicts, for instance between neighbours). Moreover, the implementation of the restorative

justice paradigm in prison is supported by ministerial guidelines. Other legislative projects have just left the planning stage. For instance, in the spring of 2006 the Belgian Parliament approved a new Youth Act, which will replace the 1965 Juvenile Protection Act. The law represents a combination of a sanctioning and a restorative model, whereas the current Youth Protection Act was primarily based on a pedagogical-rehabilitative approach. Restorative justice has also been promoted by two expert Commissions. Restorative justice principles are also being inscribed in the latest managerial guidelines of the Ministry of Justice and its departments. In this sense, the Belgian State progressively complies with the standards regarding the implementation of restorative justice set out by the Council of Europe (Recommendation N°R(99)19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters) and with art. 10 of the European Council Framework Decision of 15th March 2001 on the Standing of Victims in Criminal Proceedings.

In Belgium there exist several laws on mediation that relate to very different contexts: Law of February 10th 1994 containing the regulation of a procedure for mediation in penal matters (further referred to as the law on penal mediation); Royal Decree of October 24th 1994 containing executive measures relating to the procedure for mediation in penal matters; Royal Decree of June 13th 1999 containing the organisation of the Service of Justice Houses of the Ministry of Justice; Law of February 19th 2001 concerning procedurally related mediation in family affairs; Law of July 4th 2001 modifying some provisions of the Code of Criminal Procedure and modifying the law of February 19th 2001 concerning procedurally related mediation in family affairs; Law of February 21st 2005, modifying the Code of proceedings concerning mediation; Law of June 22nd 2005 introducing some provisions concerning mediation in the Preliminary Title of the Code of Criminal Procedure and in the Code of Criminal Procedure (further referred to as the law on a general offer of mediation); Law of June 22nd 2005 modifying art. 216ter of the Code of Criminal Procedure to reintroduce community service within the scope of mediation in penal matters; Royal Decree of January 26th 2006 concerning the criteria of recognition of the mediation services (further referred to as the Royal Decree on recognition criteria); Royal Decree of January 26th 2006 concerning the creation of a Deontological Commission on Mediation (further referred to as the Royal Decree Deontological Commission); Law of May 17th 2006 concerning the establishment of courts competent for the execution of punishments; Law of May 17th 2006 concerning prisoners' legal position when they are released on conditional licence or subject to electronic monitoring etc., and concerning the consequential rights of victims in the execution of sentences; Law of May 15th 2006 modifying the law of April 18th 1965 concerning the protection of juveniles, the Code of Criminal Procedure, the Criminal Code, the Civil Code, the new Communal law and the Law of April 24th 2003 concerning the reform of adoption; Law of June 13th 2006 concerning the protection of juveniles and taking into charge minors who have committed a fact described as criminal offence.

Moreover, as a subordinate legislation there is the Circular of the Minister of Justice of October 28th 1994 on the practice of penal mediation, replaced by the Common circular COL 8/99 of the Minister of Justice and the College of general-prosecutors of April 30th 1999.

Penal mediation is supported and financed by the Ministry of Justice. No private organizations are involved as it is only public officials who administer penal mediation. The justice assistants receive practical and moral support (a code of practice) and training from the Justice House in their judicial district. At the same time they maintain their office within the courthouse: they are organisationally dependent upon and are included within the prosecutorial services.

Under the law of 2005 on the general offer of mediation, mediation is to be organised and administered by private, non-profit organisations, supervised by a federal Deontological

Commission on Mediation. In this respect, two royal decrees have been adopted. The Royal Decree of the 26th of January 2006 specifies the composition and functioning of a Deontological Commission on Mediation. A second Royal Decree of the same date specifies criteria for the recognition of mediation services by the Minister of Justice. By the Ministerial Decree of 10 March 2006 the Minister had already granted recognition to two mediation services, namely the non-profit organizations *Suggnomè* and *Médiate*, which actively participated in the working group preparing the proposals that became the law.

The Belgian government has put a great deal of effort in introducing restorative justice principles in the criminal, civil and commercial justice systems. One can now find legal provisions on mediation in penal cases, family law, civil disputes and commercial conflicts. Moreover, the reform of the Youth Protection Act made in 2006 holds a formal recognition and encouragement of the use of mediation and sentencing circles regarding youth crime. Hence, it is right to state that restorative justice receives a distinctive amount of attention.

BULGARIA

The current Bulgarian legal system has traditionally used some alternative dispute resolution methods, different elements of which are integrated in the system's jurisprudence. They are primarily used in the resolution of civil, family and labour disputes, with the highest use in arbitration and out-of-court settlement. The new Penal Procedure Code, adopted in 2005, which came into force on 29 April 2006, reinforces these opportunities. In the new Penal Procedure Code, we can find restorative elements. The law gives the victim the opportunity to decide whether the offender should be prosecuted or not. Such cases are called complainant's crimes. Penal proceedings should not be officially instituted in cases of complainant's crimes. The instituted proceedings shall be discontinued if the victim and the offender have reached reconciliation. Such reconciliations can be taken at every stage of the proceedings. Although the legislation does not specifically refer to mediation or any other out-of-court method for settlements between the victim and the offender, it gives an opportunity for the application of these methods.

Since 2000 it has been possible to settle the case by agreement between the prosecutor and the defence counsel (Articles 381-384 of the new Penal Procedure Code 2005). This modified procedure was adopted mainly to reduce the burdens on the justice system, to facilitate its proceedings, and to speed up the final verdict. Current Bulgarian penal law envisages a number of alternative measures. It also establishes the cases when social measures may be imposed. These measures can be found in The Juvenile Delinquency Act of 1958. Some of the measures have a restorative character that imposes a number of duties on the juvenile for example: apology to the victim, doing community service etc. The implementation agency is the Commission for combating juvenile Delinquency.

The Strategy for the Reform of the Bulgarian Justice System, which has been developed by the Ministry of Justice and constitutes a condition precedent of Bulgaria's membership to the European Union, declares the introduction of a comprehensive system of alternative dispute resolution mechanisms to be one of the priorities. At the end of 2004 the Bulgarian Parliament finally adopted the long-awaited Mediation Act.

As the Mediation Act is itself relatively short, a number of soft law texts have been developed in order to create all the necessary prerequisites for the implementation of mediation in practice. In 2005 the Minister of Justice issued the Training Standards for Mediators, Procedural and Ethical Rules of Conduct for Mediators and Rules Pertaining to the Unified Register of Mediators.

However, new changes and amendments to the Mediation Act were introduced at the end of 2006. Those changes and amendments raise the requirements that mediators must meet concerning training and registration in the Unified Register of Mediators. It is envisaged that the Minister of Justice will approve the mediator training organizations with a ministerial order. The conditions for their approval, as well as the new training standards for mediators, together with the procedural and ethical rules of conduct for mediators, will be detailed in regulations to be issued by the Minister of Justice in the near future.

CYPRUS

There is no legislation regarding mediation on civil, family or criminal proceedings in Cyprus, however a bill concerning Mediation in Family Law Matters is pending before the Parliament of Representatives since 2004 and is been discussed before the relevant Parliamentary Committee. Furthermore, the Ministry of Justice and Public Order, in collaboration with the Law Office of the Republic, are currently examining the possibility to introduce in the domestic legislation, of a bill concerning Mediation in Penal Law Matters, according to the provisions of the Framework-Decision of the Council of the 21st March 2001, concerning the status of victims in penal procedures.

In 1999, Cyprus Mediation Association, a non-profit organization, established in Cyprus, by a group of Cypriot mediators and among others, it trains mediators and continuously upgrade knowledge and techniques through seminars, conferences and workshops. On 19-20 October 2007, the Technical Assistance Information and Exchange Office (TAIEX) with the financial support of the European Commission and in collaboration with the Ministry of Justice and Public Order, the Law Office of the Republic, the Supreme Court and the Cyprus Bar Association organized a Seminar on Mediation in Family and Penal Law Matters.

During the last years, the competent authorities of Cyprus understood the potential restorative justice has for helping victims, reforming offenders and strengthening society as a whole and believe that restorative justice can help build a criminal justice system which places the needs of victims and offenders at its heart. The Government of Cyprus is determined to improve the way the justice systems serve victims and offenders.

CZECH REPUBLIC

The legislation authorising victim-offender mediation comprises the Probation and Mediation Act (Law No 257/2000), which came into effect on the 1st of January 2001. This Act created the legal base for establishing the Probation and Mediation Service (PMS). It details how the PMS should operate, provides for its organisational structure and defines its duties and responsibilities for work with victims and offenders. Specific sections of the Code of Criminal Procedure authorise two types of diversion, which are used in close relationship with mediation: Conditional cessation of prosecution (*podminene zastaveni trestnibo stihani*) (Code of Criminal Procedure No 292/1993, ss. 307-8), and Settlement (*narovnání*) (Code of Criminal Procedure No 152/1995, ss. 309-14).

Victim-offender mediation is available at all stages of criminal proceedings for both juveniles and adults, from the time before the offender is charged until the court imposes a sentence. Mediation can be used as a means of diversion from criminal proceedings (in conditional or unconditional form applied by both the prosecutor and the court) or as a source of information relevant to the decision about the sentence (the court's responsibility). It is also possible to refer the offender to

mediation during the time that the sentence is served. In practice mediation is particularly used at the pre-trial stage as an aspect of the diversionary policy that applies to criminal proceedings.

The PMS is a governmental agency within the Ministry of Justice, and is funded by the government. The service operates at all stages of criminal proceedings and is responsible for both probation and mediation. The Council of Probation and Mediation is an advisory body to the Ministry of Justice. It works closely with the PMS, and is involved in planning and development. The members of the Council include representatives of the PMS, judges, state prosecutors and other experts from the field of justice and auxiliary professions.

DENMARK

Denmark has no legislation on restorative justice or victim-offender mediation in penal cases although restorative justice was introduced in 1998 with a pilot project of victim-offender mediation at the instigation of the Ministry of Justice. The pilot project was set up in three police districts during 1998-2003. Since 2003 the project has continued on a permanent basis in these districts

Victim-offender mediation applies to all crimes committed by offenders over 15 years of age (a few younger ones have been included). All kinds of offences, whether of a serious or minor degree, which involve an identifiable victim, can be referred to mediation. Offenders with a criminal record are not excluded from participating. The victim-offender mediation project is being carried out under the direction of the Danish Crime Prevention Council. The mediators are local lay people who have completed a training programme on mediation. They receive a fixed fee per case. Co-ordination meetings with the police and the Council are being held regularly.

In March 2007 the Danish government set up a committee which, on the basis of the evaluation reports, is to examine the organisation of the existing projects of victim-offender mediation in order to propose the organisation of a nationwide and permanent programme of victim-offender mediation. The committee is expected to finish its work in the summer of 2008.

ENGLAND AND WALES

During the 1980s a wide range of community-based non-statutory projects were introduced in England and Wales which, broadly speaking had as their primary objective the promotion of 'better' alternatives to the criminal justice system for both adult and young offenders. These alternatives were directed primarily towards diversion and reductions in re-offending and secondarily to such objectives as the reparation of the victim, mediation leading to reconciliation, and victim assistance. In the case of young offenders, a wholly new regime was introduced with the Crime and Disorder Act 1998 (CD 1988) and the Youth Justice and Criminal Evidence Act 1999 (YJCE 1999). The provisions in the 1999 Act were consolidated in Part 3 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC 2000). The Criminal Justice and Immigration Bill currently before Parliament proposes some further substantial changes to youth justice that touch upon the subject matter of this chapter. These acts contained provisions that sought to effect radical change in the way in which youth justice was conceived and delivered. They added reparation and referral orders. Reparation orders are governed by section 73 of PCC 2000. Action plans and supervision orders were already introduced. Each order is intended to include communication between the offender and the victim, and reparation for the victim. The Youth Justice Board issued guidelines on mediation and reparation. The Home Office, as an advice of the YJB, issued a set of National Standards for Youth Justice Services. The vision of the YJB on

restorative justice has been coordinated into Standard 5. The focus of the YJB is to facilitate a restorative justice process between consenting victims and offenders.

Since the 1970's non custodial- sentences have been available to the courts whereby adult offenders may be ordered to compensate or make reparation to their victims. These various options have until recently not been conceived in restorative justice terms. The possibilities for restorative justice have been a matter of local action. The Home Office published a consultation document, *Restorative Justice: the Government's strategy*. It led to the introduction of conditional cautions, which permitted reparative activity to be attached to a formal caution (*Conditional cautioning: Code of Practice*) and secondly, formal opportunities for reparative activity to be ordered as a sentencing condition. These various options were brought in by the Criminal Justice act 2003. There is also subordinate legislation. There is a Code for Crown Prosecutors which encourages the prosecutors to consider alternatives to prosecution. Furthermore there is Guidance on Conditional Cautioning and a Guidance of the Office for Criminal Justice Reform which identifies a range of restorative justice approaches in prison and as a probation possibility.

There is no state agency in England and Wales appointed or contracted for the purpose of carrying out restorative justice or mediation work, nor is there any one NGO having these functions. Instead there are a variety of organisations that offer such services on a commercial basis, to both public and private bodies. A number of them offer work with the business sector and with employers and employees, and there are a number of voluntary bodies that offer mediation services for family matters. Beyond this, mediation and such analogues as conciliation and arbitration are long established features of employment law, commercial and construction law. The Code of Practice for Conditional Cautioning advises that the statutory agencies (police, CPS and National Probation Service (NPS)) should take steps at the local level to identify agencies, groups or organizations, voluntary or statutory, which provide courses or other activities that might form part of a conditional caution, and which it may be appropriate to consult when deciding whether a case is suitable for a conditional caution.

ESTONIA

In accordance with the Council Framework Decision 2001/220/JHA of the European Union, mediation in criminal proceedings has been regulated by the Code of Criminal Procedure of the Republic of Estonia since 18 February 2007.

Art (203) deals with the termination of criminal proceedings on the basis of conciliation and the conciliation proceedings. If the facts are related to a criminal offence in second degree which is the object of the criminal proceeding and if they are obvious and when there is no public interest in the continuation of the criminal proceedings, when the suspect has reconciled with the victim pursuant to the procedure provided by this code, the Prosecutor's office may request termination of the criminal proceedings with the consent of the suspect and the victim. If the judge does not consent to the request, there will be a continuation of the criminal proceedings. Also when the suspect fails to perform the duties imposed on him, the court shall resume the criminal proceedings. The prosecutor's Office may send the victim and the suspect to conciliation proceedings.

The mediation (conciliation) procedures are carried out as a public service offered by the Social Insurance Board Victim Assistance Department within the Ministry of Social Affairs. The provision of the service is regulated by the Victim Assistance Act. The process of conciliation and other necessary procedures are delegated by statute to be regulated by government decrees. The procedure for conducting conciliation services is established by Decree No. 188 of the

Government of the Republic of Estonia, dated 13 July 2007, entitled “Procedure for Carrying Out Conciliation Proceedings”. The method for carrying out the conciliation procedure for minors is regulated by the Juvenile Sanctions Act which authorised the Social Ministry to promulgate its Decree No. 44 of 31 July 1998, which confirmed the Conciliation Procedures. Thus, minors and juveniles can also be referred to conciliation (mediation) by Juvenile Commissions.

Conciliation procedures are used as one of the re-socialisation methods employed in prisons and within the criminal care system. Alternative forms of punishment have been developing constantly since the creation of probation supervision in 1998. A formal legal basis and a competent institutional framework have been created to support the realisation of the conciliation procedure. The funding of the conciliation procedure has been guaranteed by the State budget.

FINLAND

It has since 1966 been possible to take mediation into account in the criminal justice system in Finland, for example in discontinuing action in the proceedings. During the 1990s, efforts began in earnest to promote systematic legislation and governmental organisation of mediation procedure throughout the country. These efforts resulted in the Act on Mediation in Criminal and Certain Civil Cases which came into force on the 1st of January. The purpose of the Act is to extend mediation in criminal cases to cover the whole of Finland. The legislation aims to safeguard sufficient government funding for mediation services. Under the 2005 Act mediation procedure in criminal cases can be either parallel or complementary to court proceedings in resolving issues concerning crimes and minor civil cases. Mediation may also be used in civil cases in which at least one of the parties is a person. What is provided on mediation in criminal cases in this Act applies, as appropriate, to mediation in civil cases.

Apart from the primary legislation, these matters are additionally addressed in guidance notes on mediation practice that the Ministry of Social Affairs and Health and Development and the Research Centre of Social Welfare and Health (*Stakes*) have prepared and distributed. Furthermore there is also a guidebook for mediators in criminal and certain civil cases.

In principle, any type of crime can be dealt with through mediation. Under the 2005 Act crimes are dealt with if they are considered eligible for mediation, taking into account the nature and method of the offence’s commission, the relationship between the suspect and the victim, and other issues related to the crime as a whole. The 2005 Mediation Act imposes no general age limits for offenders or victims, but a crime must not be referred to mediation if the victim is under fifteen years’ of age and has a special need for protection on account of the nature of the crime or his/her age. For instance, sexual offences against children are excluded from mediation, as are assaults on very young victims. Special measures apply where children are parties to mediation. The 2005 Mediation Act contains certain limits for cases involving domestic violence.

In Finland mediation has from the very beginning been closely related to social work, the prevention of social exclusion and, in particular, child welfare. The main responsibility for the national development of mediation services, and for the general supervision, management and monitoring of mediation services has fallen within the responsibilities of the Ministry of Social Affairs and Health.

FRANCE

The concept of restorative justice is relatively unknown in France. In the French context one speaks essentially of penal mediation. Community conferencing and sentencing circles are for the moment non-existent in France. The political system, inherited from the French Revolution, condemns all forms of communitarianism and forces individuals to renounce their cultural particularities.

15 years ago the Ministry of Justice's intention was to organize the diffuse range of penal mediation (about 70 programmes then existed within France) around a single model that was presented in the 'orientation note' of 3 June 1992 concerning mediation on penal matters'. In referring to foreign experience and the European recommendations, this note constitutes the main text about the practice of penal mediation, setting out its philosophy and ethical principles. On 4 January 1993, a law creating penal mediation was promulgated, but this has passed relatively unnoticed.

The very short text is introduced in Article 41-1 of the Code of Criminal Procedure (CCP). It is aimed only at adults (18 years and over). The prosecutor can suggest mediation for the complainant and the defendant, before taking a decision on whether to prosecute or to choose some diversionary measure. The parties are then free to refuse or accept. The diversionary effect of mediation applies at the pre-prosecution stage only. Whatever it may be, the outcome is reported to the prosecutor, whose decision whether to prosecute or to dismiss the case remains. The approval of this text has notably developed the implementation of the practice, encouraging even the most timorous magistrates to be less inhibited about its use. By contrast, mediation for minors has no official existence. The law of 1993 that created mediation for adults also introduced reparation for minors (Art. 12-1 of the ordinance of 1945 governing the juvenile justice system), but it did not extend mediation to them. By an extensive interpretation of the text it is possible to organize mediation interventions for minors, but there are currently very few (there is no statistical measurement of their occurrence). The majority of the practices that do take place are conceived as educative interventions for minors rather than any meetings with their victims.

A decree of 10 April 1996 inserting new articles into the CCP (D 15-1 to D.15-18) provides for the process of nomination of the mediators and specifies their obligations and conditions of practice. A circular of 18 October 1996 clarifies the details of this decree. Notably, the *Law of 23 June 1999*, amending article 41-1 of the CCP more clearly distinguishes the specific nature of mediation among other alternatives to prosecution, 'proceeding, with the agreement of the parties, to a session of mediation between the accused and the victim' (art. 41-1, 5°). It remains the case that the time spent on the mediation procedure is not taken into account in calculating the limitation of action in respect of a prosecution (ten years for crimes and three years for petty crimes). The law of 9 March 2004 that concerns more generally the alternatives to prosecution introduced for the first time the expression 'mediator' in respect of the public prosecutor. This text also indicates when mediation may and may not be used. It is excluded in the case of insulting behaviour, assault on a police officer, serious and repeated domestic violence, and significant offences against public order. By contrast it recommends mediation in the following fields: close personal and working relationships, conflicts between parents concerning maintenance or rights of access to their children, moderately serious offences within a neighbourhood, and malicious telephonic calls. The circular of 12 June 2006 details the activity of mediators and the procedures for their nomination (CCP Articles R.15-33-30 to R.15-33-37), circumstances under which persons cannot be appointed as mediators, and for those who are, the conditions of their recruitment, training and remuneration.

Since the end of 1980s, and before the legislation of 1993, the implementation of mediation has been directed by practice statements issued by two established national organizations. They are the National Institute of Victim Assistance and Mediation (*INAVEM*) and *Citoyens et Justice* (previously called *CLC*) on which virtually all of the programmes depended. In a system dominated by the cult of the law and vertically structured, penal mediation appears dichotomous to the dominant trends of French legal culture. Its quantitative success is based more on good management practices than restorative conceptions. Because of their financial vulnerability, mediation associations are in fact often obliged to reach compromises between institutional demands and ethical principles. It is certainly true that some 'restorative' experiments persevere with the mediation ethic in the face of judicial ideology. In this manner these experiments are sowing the germs of the restorative ideal, but their number is currently too small to transform the powerful logic of the penal system.

GERMANY

Restorative justice first appeared on the academic agenda in Germany in the early 1980s, where it became an immediate, runaway success. Shortly afterwards, in the mid-1980s, implementation began with the first pilot projects. Beside some indirect applications in the legal form of a compensation order, restorative justice is conducted primarily as victim-offender mediation. The generic term that prevailed here is *Täter-Opfer-Ausgleich*, usually called by its acronym, *TOA*. In recent years, the terms 'penal mediation' or 'mediation in penal matters' have also become frequently used synonyms.

Since the commencement of the first pilot projects, half a dozen legal reforms were made during the 1990s in order to enhance *TOA*'s application by amending existing provisions, implementing new ones, and widening the scope of their application in general. Broadly speaking, four different regulatory domains were amended: the juvenile criminal law; the general sanctioning rules in the Penal Code; the (procedural) regulations for diversion in juvenile and general criminal procedures, and the general provisions of the Code of Criminal Procedure which apply likewise in juvenile and adult procedures. As a result, a variety of different (primary) norms are available now in order to make the application of *TOA* possible in any procedural phase of a case. For the moment at least, the legal implementation process in Germany has come to an end.

In general there is a dual structure of restorative 'measures' available to public prosecution authorities in Germany. The first category of provisions deals with mediation and compensation in the context of diversion, i.e., without a formal conviction of the offender. They are procedural in character. The second category becomes relevant when the offender is formally sentenced. These are substantive provisions.

In response to a certain reluctance to refer cases that remains prevalent in the criminal justice system, a new provision was introduced in 1999 according to which the awareness of prosecutors and judges of the possibilities of restorative justice should be increased (Art. 155a of the Code of Criminal Procedure, as introduced by the 'Act to Anchor Victim-Offender Mediation within Criminal Procedure' of 1999). This new provision was designed to become the basic procedural norm for managing all cases that have a restorative potential.

In general, the offender's post-crime behaviour has to be taken into account in a positive sense at sentencing, 'especially attempts to compensate for the damage, as well as attempts to reach a settlement with the injured party'(Art 46 s.2 of the Penal Code, as amended by the 'Victim Protection Act' of 1986). In addition to this general aspect of sentence adjudication, the legislature introduced in 1994 participation in *TOA* or the compensation of the victim as an explicit so-called

‘standardised’ mitigating factor (*Vertypter Strafmilderungsgrund*) (Art. 46a of the Penal Code, as introduced by the ‘Combat of Serious Crime Act’ of 1994). Furthermore, the court can issue a warning combined with a mediation or compensation order (Art. 59a s. 2 no. 1 of the Penal Code)

In juvenile justice, the range of punitive options is even wider than those provided for adults, and restorative instruments are also available as sanctions of their own. The catalogue of such measures provided in the Juvenile Justice Code includes the order mentioned above to undertake efforts to reach a settlement (Art. 10 no. 7 of the Juvenile Justice Code).

The Federal Commission for the Reform of the German System of Penal Corrections proposed to insert some concrete provisions into the Federal Guidelines for Criminal Procedure (Commission, 2000, 75 *et seq.*). These uniform prosecution guidelines, adopted by the Conference of the State Ministers of Justice, deal with the general rules for the application of the main provisions of the Code of Criminal Procedure (Guidelines for the Criminal and Administrative-Criminal Procedures (*Richtlinien für das Straf- und Bußgeldverfahren; hereafter RiStBV*), published in Meyer-Goßner, 2006). As far as *TOA* is concerned, the guidelines provide only that in the context of diversion restorative measures shall be given priority above traditional monetary orders in all suitable cases. A similar general guideline exists for the Juvenile Justice Code (Guidelines for the Juvenile Justice Code (*Richtlinien zum Jugendgerichtsgesetz; hereafter RiJGG*) of August 1994, published, e.g., in Eisenberg, 2007).

For a while there have been efforts that aim to increase a wider knowledge of restorative justice. For example, the Federal Ministry of Justice’s Victim Handbook provides detailed information about the advantages of *TOA*. Such other institutions as the general prosecutors of Baden and Württemberg provide detailed information on their websites as well. Further efforts to stimulate self-referrals are being undertaken by the *Servicebüro TOA*. In addition to the idea already mentioned of establishing mobile mediation teams, the setting-up of a service telephone hotline in 2005 appears very useful indeed.

GREECE

Prior to the establishment of restorative measures through law, informal practices of dispute resolution have been taking place in Greece without, however, having a statutory basis. First of all, at a police level, in the case of offences prosecuted after the lodging of a complaint, police officers may attempt to bring together the offender and the victim and reach an extra-judicial settlement in order to avoid sending the case to the prosecutor. At a prosecutorial level, the prosecutor, on the pretext of his/her proactive role, can advise those in conflict to seek a peaceful solution for their differences. Finally, at a court-based level, right before the hearing of the case, the judge may attempt to reconcile the parties in order for the complaint to be withdrawn. In this case, if a settlement is achieved, the prosecution is definitively ceased.

The introduction of restorative schemes for juveniles was part of a wider shift attempted by Act 3189/2003 (‘Reform of the Penal Legislation for Juveniles and Other Regulations’) towards a more justice-based youth system. Up until 2003, the Greek juvenile justice system was largely influenced by a long-standing welfarist tradition. The new Act, which amends articles already included in the Greek Penal Code (PC) and the Code of Penal Procedure (CPP), promotes mainly: diversion and de-institutionalisation practices, and respect for due process rights. Within this context, it also introduces victim-offender mediation, compensation and community service both through diversion (art. 45A CPP) and as educative orders (art. 122 para. 1 PC).

Community service can be applied to adult offenders since 1991 (art. 82 paras 7 and 8 PC). Art. 393 para. 2 PC provides that the accused of some very specific actions (i.e. certain types of theft and fraud) may be released in case the accused fully compensates his victims prior to the court hearing. This means that there is some space for mediation here, although it has never been implemented. In October 2006, Act 3500/2006 introduced 'penal mediation' for cases of domestic violence (arts 11-14). The Act came into full force on 24 January 2007.

The Juvenile Probation Service carries out the restorative justice work. It is a department of the Greek Ministry of Justice (Act 378/1976, decree 49/1979). Its main mission is to prepare, during the stage of the juvenile's interrogation, a social inquiry report, and to exercise and monitor the execution and progress of educative measures.

The procedure itself of penal mediation is not described in the law and, thus, it will be the public prosecutor's job to structure it in the near future. The Greek magistracy needs to analyse it and understand the theoretical and practical impediments that may occur. It is not clear yet whether the prosecutor will act as a mediator or not. There are no developments in alternative dispute resolution in other fields and neither training nor educational programmes in place for legal practitioners. Furthermore, until today, there has not been any significant preparation within the public prosecutor's office or the Ministry of Justice itself. The future of restorative justice in Greece depends largely on the political and financial support directed towards the new measures. There is also need to raise the public's awareness of the possibility for mediation.

HUNGARY

Mediation as a method of conflict resolution has been used in Hungary since 1992 in civil cases (e.g. in labour, family, divorce disputes). Anyone who is registered on the roll of mediators may be a mediator for these purposes. During the mid-1990s a number of criminologists had argued for its extension to criminal cases and in 2003 this became a priority for the National Strategy for Community Crime Prevention (2003). However, concrete steps towards the legal and institutional implementation of victim-offender mediation were only taken in 2006. The Act LI of 2006 modified the Criminal Procedure Act and the Criminal Code in order to introduce mediation in criminal cases. A newly added article (art. 221/A) in the Criminal Procedure Act contains the most important conditions and regulations concerning its application.

The Criminal Procedure Act also regulates the organisational background to mediation. Art. 221/A (6) provides that "*the mediation proceedings shall be conducted by a probation officer engaged in mediation activities; the detailed regulations of mediation proceedings are laid down in specific other legislation*". A successful mediation (by which an agreement has been reached and completed by the offender) is considered to be a 'voluntary restitution', whose effect is to block a criminal prosecution as prescribed in the new art. 36 of the Criminal Code.

The 'specific other legislation' mentioned in art. 221/A(6) was adopted in December 2006. The Act CXXIII of 2006 on Mediation in Criminal Cases (the Mediation Act) contains the detailed regulation of the mediation procedure. It regulates the definition and the purpose of mediation proceedings, the role and obligations of the mediator, and the detailed rules of the procedure (deadlines, reports, confidentiality, costs etc.). These regulations created the procedural and substantive base for the application of victim-offender mediation in Hungary. They came into force on 1st January 2007.

The 1/2007 Decree of the Minister of Justice and Law Enforcement modified some previous decrees concerning the tasks of the Probation Service. This decree contains special regulations on

the mediation procedure (e.g. on the administration of cases, the methods for the allocation of cases, data collection for statistical purposes and case recording) and also prescribes the qualification requirements for mediators. In accordance with the special international recommendations concerning mediators' training requirements (e.g. Recommendation No. (99) 19 of the Council of Europe), this Decree provides that victim-offender mediation can only be conducted by probation officers, who have completed two periods of training. These comprise sixty hours of practical and ninety hours of theoretical training. They are also required to participate in the mentoring system established within the Probation Service as well as in regular case group meetings and supervision. At the time of writing, only probation officers may act as mediators, of which seventy have been trained to carry out victim-offender mediation in Hungary. This will change from 1st January 2008, when attorneys will also be allowed to sign up for the mediators' roll. This was an amendment to the original proposal initiated and accepted by Parliament. Special regulations concerning the training, role, procedure and financing of the attorneys as mediators will be elaborated during 2007.

As noted above, mediation in Hungary can be undertaken in the pre-charge and pre-sentence phase of criminal proceedings. Accordingly the decision to refer lies with the prosecutor or the judge. The Probation Service has been allocated the task of implementing mediation. This Service is a government organization that works within the Hungarian Office of Justice, from whose own annual budget the entire costs of the mediation process are funded.

Hungary has taken the first steps towards a modern criminal justice system that is compatible with European standards. Its use may be more routine and more frequent after practitioners and the public become familiar with this new ideology. However, Hungary is still very far from using the restorative approach in schools or in everyday life, preconditions for the application of the restorative philosophy within the whole society.

IRELAND

Restorative justice initiatives are of recent origin in Ireland. Legislation (Children Act, 2001) provides for restorative interventions for juvenile offenders at two stages: as part of a police diversion programme and on referral by the court. Restorative justice for adults is limited to two non-statutory pilot programmes that operate on the basis of court referrals. No restorative justice programmes operate as yet at the prison stage.

Restorative justice possibilities arise at the pre-court stage in respect of juvenile offenders (i.e. under age 18). The restorative interventions take place under a police-administered diversion programme. They are a complement to diversion and failure to participate in the restorative element does not result in the case going to court. Under the Children Act 2001, the relevant sections of which were brought into operation with effect from 1 May 2002, all juvenile offenders must at least be considered for police caution instead of prosecution. Two restorative options are provided for in this context. First, the victim may be invited to attend a formal caution, with the possibility of direct apology and reparation, including financial compensation. Second, a family group conference (simply referred to in the legislation as a 'conference') may be organised after a formal caution, with attendance by the offender, his/her family and other participants, including the victim. The facilitators of the restorative events are police officers who specialise in youth work and receive appropriate training in facilitation. Restorative justice at the pre-court stage is not currently an option for adult offenders. To date there has been no system of diversion from court by means of police caution for adults.

The Children Act 2001 (Part 2) provides for family conferences ('welfare conferences') for children under the age of criminal responsibility who engage in offending behaviour or children who are otherwise at risk. The relevant provisions in the Act were commenced on 23 September 2004. From the juvenile justice perspective, the welfare conference is a preventive measure that should result in fewer children ending up in the juvenile justice system.

The Children Act 2001 (Part 8) provides for court-referred 'family conferences' for juveniles. The relevant sections of the Act came into force on 29 July 2004. The conferences are organised by the Probation and Welfare Service and operate on lines broadly similar to the Garda conferences. Where a conference is approved, court proceedings are adjourned and the conference must be held within 28 days. Any action plan for the young person is submitted to the court, which has the power to approve or amend it and order compliance, or it can resume proceedings.

Two court-referred programmes of restorative justice exist on a non-statutory basis. They apply mainly to adult offenders. Restorative Justice Services in Dublin operates victim-offender mediation and community reparation programmes. A community reparation panel also operates in Nenagh, Co. Tipperary. Under these programmes, the court adjourns the case when a referral is made to the programme, and if an agreement is concluded and honoured, the case is dismissed.

ITALY

In Italy the main areas of Restorative Justice are concerned with two different jurisdictions: the juvenile Criminal Justice System and for adults the justice of the peace. The code of juvenile criminal procedure which was implemented in 1989 provides victim –offender conciliation. The law establishing the possibility for the justices of the peace to apply Restorative Justice or mediation came into force in 2002 (Legislative Decree n° 274/2000).

The juvenile Code of Criminal Procedure includes two norms currently used by magistrates to apply VOM and RJ: Articles 28 (probation) and 9 (personality assessment). According to Article 28 DPR 448/1988, the judge (frequently the judge at the preliminary hearing) may suspend the proceedings and refer the case to the VOM centres with the aim of 'conciliation', 'reparation' or 'mediation' if it has been stated in the 'supervision project' devised by the juvenile social workers. According to Article 9, during the pre-trial stage, either the judge or the prosecutor may refer the case to the VOM centre. In these cases the mediation process itself functions as an instrument that helps to assess the personality of the young person. Social service officers for minors can refer the case to VOM centres as well within the probation period (art 28).

The new law relating to criminal proceedings before the justice of the peace came into force in the beginning of 2002. The innovative element of this new legislation is the fact that it allows the justice of the peace to settle the dispute according to the outcome of a negotiated process between the parties. Justices of the peace deal with minor offences. They have no power to impose custodial sentences or any other form of detention. They can impose fines, community service orders (minimum 10 days to a maximum of six months) and a sentence called '*permanenza domiciliare*', which requires the offender to stay at home for a specified period (fixed in the order) not exceeding 45 days.

The role of VOM in altering the Italian juvenile justice landscape is quantitatively marginal. The public opinion in Italy is not favourable to this approach; it might be due to their lack of knowledge about what RJ is. However, very recently, a commission to prepare a bill concerning VOM in juvenile justice has been created. This opens an opportunity to introduce a better regulation of RJ and VOM.

LITHUANIA

Mediation is not known in the valid criminal law and the term ‘mediation’ has not been in use. Article 38 of the Criminal Code of the Republic of Lithuania foresees exemption from criminal responsibility where the offender reconciles with the victim, but this is not mediation in the true meaning of the word. In the Lithuanian scientific discourse, the importance of restorative justice and the possibilities for the implementation of mediation have been discussed for a long time already. Its potential is mainly seen in the context of juvenile criminal cases by way of experimenting by creating a pilot mediation programme in juvenile cases and by extending the experience to adult cases.

In civil cases there is a somewhat different situation. Since January 2006 a pilot project of judicial mediation in civil cases has been in operation. The Council of Courts adopted, on 20 May 2005, Resolution No. 13 P-348 “On a Pilot Project of Justice Mediation”, which also approved the judicial mediation rules. The Council of Courts, by its Resolution No. 13 P-15 “On the Extension of a Pilot Project of Justice Mediation”, adopted on 26 January 2007, decided to extend and expand the implementation of a pilot project of judicial mediation in the courts of Lithuania. From 1 January 2008, a pilot project of judicial mediation has been operating not only in Vilnius City 2nd District Court, but also in the Lithuanian Court of Appeal, Kaunas Regional Court, Šiauliai Regional Court, Vilnius City 3rd District Court and some other district courts. Judicial mediation in civil cases is performed by mediators, specially trained judges, assistants of judges or other persons possessing the appropriate qualifications which are included in a list of judicial mediators made by a working group formed by the Council of Judges.

In the part on “Criminal and Punishment Execution Policy” of the National Crime Prevention and Control Programme of 20 March 2003, approved by Parliament, the strife for the creation of a restorative justice system is mentioned, its aim being to restore the former situation between the subjects affected by a crime – victim, perpetrator and society.

The Code of Criminal Procedure (p. 5, Art. 212) foresees the termination of pre-trial investigation after the reconciliation of the suspect and victim in the cases specified in Art. 38 of the Criminal Code. In this case the pre-trial investigation is terminated by a decision of the judge of pre-trial investigation, which confirms the resolution of the prosecutor on the termination of pre-trial investigation (Pt 2, Art. 214 of the Code of Criminal Procedure). A person may be exempted from criminal liability after reconciliation with the victim during the preparation of the case for hearing in the court; the case is then discontinued by a court order (Art. 235 of the Code of Criminal Procedure).

LUXEMBOURG

In terms of the legal base for adults regarding mediation, the law of 6 May 1999 introduced victim-offender mediation by amending Article 24(5) of the Code of Criminal Procedure. Article 24(5) provides that “the prosecutor may, prior to his decision on further action, decide on mediation if it seems to him that such a measure would ensure reparation of the damage caused to the victim, or put to an end the trouble resulting from the offence, or contribute to the rehabilitation of the offender. A regulation coming into effect on 31 May 1999 regulates the mediation procedure and the accreditation of mediators. The law of 8 September 2003 on domestic violence amends the law of 6 May 1999 on victim-offender mediation in the sense that it

excludes the possibility of recourse to mediation by the prosecutor when the offender and the victim cohabit.

Victim-offender mediation applies at the pre-prosecution stage only. The decision to refer a case to mediation depends entirely on the prosecutor's discretion. There are in theory no restrictions concerning the type of offences that are amenable to mediation. Whatever the outcome of the mediation may be, it will be reported to the prosecutor, whose decision whether to prosecute or to dismiss the case remains. The mediator is bound by a duty of professional confidence. No information concerning the content of the mediation sessions may be reported to the prosecutor.

On the other hand there is no explicit legal reference to victim-offender mediation with juveniles. Referral takes place as an exercise in prosecutorial discretion, in the context of the law of 10 August 1992 relating to juvenile protection. While victim-offender mediation with adults is possible throughout the country, victim-offender mediation with juveniles is only carried out in the judicial district of the city of Luxembourg.

As a result of the debates on the Bill, the law of 6 May 1999 provides that only individuals may be appointed as mediators. The Ministry of Justice is responsible for the mediators' appointment procedures. The law requires that the candidate must satisfy the conditions of respectability, competence, training, independence and impartiality. The mediators receive a fixed fee per case which cannot exceed 500 Euro.

Those provisions only apply to victim-offender mediation with adults. Concerning juveniles, victim-offender mediation is carried out by the *Centre de Médiation a.s.b.l.* to which cases are referred by the prosecutor's office of the judicial district of Luxembourg city. There are no official regulations concerning victim-offender mediation with juveniles.

On 15 July 2003, the Luxembourg Parliament adopted a law concerning domestic violence. This law amended Article 24(5) of the Code of Criminal Procedure. It provides that mediation is excluded from cases where the offender cohabits with the victim. The reason for this exclusion was concern about the significant risk that the offender would exert pressure on the victim in order to push her to accept the mediation or the proposed reparation of the harm caused. This risk is real in domestic violence where the offender occupies a dominant position, preventing the victim from giving a free and voluntary consent to the mediation process.

MALTA

Victim-offender mediation as such is not present in the criminal justice system in Malta. In 1994, several members of Prison Fellowship International, employed by the Home Affairs Ministry, drafted a document on criminal justice reforms, which was subsequently modified and adopted by the Maltese Cabinet as a White Paper. The paper focused on restorative justice as a foundation for the reforms, and identified a number of recommendations for sustained government attention. Some of these had to do with the treatment of prisoners and victims. They included a provision for probation supervision, pre-release assistance for prisoners, and the launching of a victim-offender mediation programme. However, work in that direction was discontinued after 1996 and no victim-offender mediation services were ever started.

Nevertheless, it is important to highlight some significant developments in the direction of the humanisation of the Maltese criminal justice system. The new Juvenile Court Act (Chapter 287 of the Laws of Malta) establishes that the proceedings need to be held in an entirely informal setting; the goal being to enhance the communication and understanding between the stakeholders. The accused and his/her carers will take part in the hearing, sometimes with the participation of the

victim. Together with the judge, all of them will sit around a table and discuss the case and the best solution under the given circumstances. This approach, although it is not a formal victim-offender mediation process, allows participants to establish a space for dialogue and to foster a more constructive response to the young offender.

There is no legal authority for restorative justice or mediation in adult criminal legislation since no follow-up has been awarded to the White Paper that explicitly mentioned it. However there are two sets of articles that clearly favour this approach. These recent amendments to the Criminal Code, with the introduction of clear provisions for victims' rights to compensation and a more central role within the process, represent a good starting point towards a full recognition of the victim's needs in criminal proceedings.

In 2004, a new law called the Mediation Act was enacted. This law does not refer to the criminal justice system but is intended to encourage and facilitate the settlement of non-criminal disputes through mediation more focused on civil law and especially family disputes. It also establishes the creation of a Malta Mediation Centre as a centre for domestic and international mediation. It fosters the establishment of provisions that would regulate the mediation process itself.

NETHERLANDS

The three most important examples of restorative justice in the Netherlands are: claims settlement, HALT and community mediation. Claims settlement focuses on compensation of the victim by the offender, and is quite administrative in nature. It applies in principle to all offences. If, in the investigation stage, the victim has indicated a wish to receive compensation and the suspect has been found, the police attempt to arrange for payment between the parties at as early a stage as possible. The *HALT* programme is a voluntary diversionary measure for juveniles between twelve and eighteen years old. It started in 1981 and was one of the first Dutch programmes clearly containing restorative elements. HALT offers juvenile offenders an alternative to a civil or a penal law disposal. Community mediation is mainly of a non-criminal nature. A small part of the cases dealt with in community mediation can be qualified as criminal offences, mainly misdemeanours created by municipal law. Besides the already mentioned criminal law settlement there is also mediation and conferencing in the context of Neighbourhood Justice Centres, police mediation, restorative mediation, FGC with juveniles and the most recent introduction of 'victim-offender conversations', although the restorative character of the latter can be doubted.

In the Netherlands, there are as yet no statutory rules with regard to VOM or FGC. So far, claims settlement can take place in the context of the Directive for the Care of Victims. HALT has a legal basis in art. 77e Criminal Code. It is additionally regulated by the Directive on HALT and by a Decree. In 2002, the Board of Procurators-General has issued a viewpoint articulating a positive attitude towards restorative justice programmes. In 2007, a government bill with regard to changes in the Code of Criminal Procedure has been accepted by parliament, which includes a new par. 51h that states that rules can be issued with regard to mediation between suspects and victims. The intention is not to provide for statutory rules, but only for regulation through a ministerial Decree.

In most mediation practices, the mediator is not a professional mediator but a (lower) officer of the PPS, or a staff member of another (para-)justice agency. In community mediation, volunteers function as mediators. Only in restorative and community mediation the mediator is independent in the sense of not representing one of the parties or the public interest. In all other forms of

mediation the mediator is a staff member of the police or another justice agency (e.g. the prosecution service or HALT).

NORTHERN IRELAND

By contrast with the unofficial community-based initiatives there now exists in Northern Ireland an extensive statutory based scheme for young offenders. The Youth Conferencing Service was created by Part 4 of the 2002 Act and is part of the broader Youth Justice Agency (whose functions resemble those of the YJB in England and Wales) set up by the Northern Ireland Office (NIO). The conferencing service, which has much in common with the New Zealand model, was introduced in December 2003, and was made available to young offenders between ten and sixteen years of age living within the Greater Belfast area. In April 2004 it was extended to two other regions, Tyrone and Fermanagh, and by 2006 had become operational across all of Northern Ireland. There are two necessary conditions to a diversionary conference: the young offender must consent to the process and must admit the offence. If s/he denies either, the case is referred back to the prosecutor; if the decision is to continue, the offender will normally be charged and prosecuted. The Act also establishes court-ordered youth conferences. Like the referral order in England and Wales, this is mandatory (section 59, 33A(1)); unlike it, the Northern Ireland order is not confined to first-time offenders. Only offences attracting life imprisonment are entirely excluded. Offences that are triable on indictment only (if committed by an adult) and scheduled offences under the Terrorism Act 2000 may be referred, at the court's discretion.

POLAND

Although it is independent from the traditional retributive system of justice, victim offender mediation (VOM) in Poland was introduced into this system under the framework of the Code of Criminal Procedure, the Criminal Code and the Juvenile Justice Act of 26 October 1982. The Code of Criminal Procedure was amended on 10 January 2003. The new provisions introduced mediation to the principles and precepts of criminal procedure. The new provision of Article 23 of the Code of Criminal Procedure makes it possible for the police, the prosecutor and the judge to apply mediation at any stage of criminal process. Mediation is now to be treated as one of the operating principles of criminal proceedings.

The Juvenile Justice Act enacted in October 1982 did not include any provision for mediation or restorative justice. Despite the lack of a legal basis, its promoters supported the project on the basis of the special philosophy of the Juvenile Justice Act, which was that the main purpose and guiding principles of juveniles proceeding concerned the best interests of the young person. The Juvenile Justice Act has been amended many times, but its core, which is oriented to the best interests of young person, and to their education, correction and sense of responsibility, has remained unchanged. The substantial amendment adopted by Parliament on 15 September 2000 provides that the family court may refer the case to mediation to be undertaken by an authorised organization or person. The Minister of Justice made an Act of Implementation (subordinate legislation) on 18 May 2001, and from that time mediation could be applied in practice.

The first Executive act of the Minister of Justice dated 14 August 1998 on mediation in criminal matters and its basis from 13 June 2003. The Executive Act from 18 May 2001 on mediation in juvenile matters. The Senate Resolution of 3 June 2004, does not have a normative character but it does commend restorative justice as an alternative to retribution and it gives some important direction to professional groups within the justice system. There are, however, no further

normative or quasi-normative texts available to play a role in the implementation and development of mediation.

We may conclude that as matters now stand, mediation in Poland is being actively and seriously discussed, is subject to regular revision, and is in general on an expanding trajectory. There are many initiatives at both the non-governmental and governmental levels. In general the Polish authorities appear to consider mediation to be a good instrument for promoting both social and criminal policies.

PORTUGAL

The Portuguese legal system contemplates mediation within the Educational Guardianship Law (*Lei no. 166/99 Tutelar Educativa*), of 14 September 1999. The Educational Guardianship Law is applicable to young persons between 12 and 16 years old who commit acts defined by law as crimes.

In 2005, the Ministry of Justice initiated a law to introduce victim-offender mediation into the Portuguese criminal justice system. The bill was subjected to public discussion and eventually approved by the Portuguese Parliament on 12 April 2007, under the name of Law 21/2007 introducing mediation for criminal matters (*Lei no. 21/2007, que cria um regime de mediação penal*). It came into force on 12 July 2007 as Law no. 21/2007 introducing mediation for criminal matters.

According to this law, the cases amenable to mediation are crimes against persons and crimes against property, subject either to semi-public or private prosecution procedures, punishable by up to five years of imprisonment or less, or with a fine. Crimes where the victim is under the age of 16, where the defendant is a legal person or offences against sexual freedom or self-determination are excluded. Mediators must be at least 25 years old and should hold an academic degree (in any field) or have adequate professional experience. They must have undertaken victim-offender mediation training recognized by the Ministry of Justice. Furthermore, mediation services are free of charge for the parties.

This new law providing a legal basis for victim-offender mediation for adult offenders was approved in order to comply with art. 10 of the Council Framework Decision of 15 March 2001, on the Standing of Victims in Criminal Proceedings (2001/220/JHI). On 22 January 2008, one day before the official implementation of the victim-offender mediation programme, three *Portarias* (no. 68-A/2008, 68-B/2008 and 68-C/2008) and one *Despacho* (no. 2168-A/2008), regulating specific aspects of this programme, were approved by the Ministry of Justice (*Portaria* and *Despacho* are the names that two different types of secondary legislation in the Portuguese legal system).

Restorative justice ideals are gradually gaining relevance and supporters, mainly due to the presence in Portugal of foreign experts that participate in conferences and seminars, as well as the presence of Portuguese actors in international organisations and events. On the other hand, Portuguese authorities have experienced some pressure to increase the implementation of victim-offender mediation, due to the impact of such international instruments as the UN project in the field of restorative justice, the Council of Europe Recommendation R No. (99) 19 concerning mediation in penal matters and the Framework Decision of the Council of the European Union on the standing of victims in criminal proceedings.

ROMANIA

There are ADR provisions in civil and commercial matters (conciliation and mediation), domestic violence (restorative justice), work relationships (conciliation) and in criminal matters (victim-offender mediation). Chronologically, the first step in the regulation of ADR in Romanian law was made in 2000 through Government Ordinance nr.138 for the completion of the Civil Procedural Code. This regulates in a newly introduced Chapter XIV, Dispositions regarding the resolution of the commercial conflicts, a compulsory procedure for conciliation. According to art.720(1), 'in commercial matters before making a legal complaint, the parties in conflict will try to resolve their litigation through conciliation.' Based on this disposition, the Romanian Chamber of Commerce established an independent body, the *Centre for the Mediation of Commercial Disputes* (CMCD) which, in May 2003 published Rules of Mediation Procedure.

Law nr.217/2003 regarding Domestic Violence provides, in Chapter V (art.19-22), for mediation in cases of domestic violence. In Romania, two statutory provisions have restorative justice connections: law nr. 678/2001 (revised) regarding the *Prevention of the Trafficking of Human Beings*, and law nr. 211/2004 regarding the *Protection of the Victims of Crimes*. Both contemplate a duty to establish programs for free psychological counselling and recovery from the crime or the trafficking, and the provision of financial support and free legal assistance to engage the criminal justice process, and indirectly states that victim may benefit from mediation services.

In May 2006 the Romanian Parliament enacted the *Law regarding the Mediation and the Regulation of the Profession of Mediator*. It was adopted within the framework of the negotiations for accession to the EU as part of the obligation to implement the *acquis communautaire*. This new law is closely bound to the values and principles contained in the various recommendations on restorative justice declared by the EU, the Council of Europe, and the UNO. The Romanian legislator chose an all encompassing legal framework within which the following matters are regulated: the profession of mediator, the rights and responsibilities of the mediator, mediation procedure, and the types of conflicts (civil, commercial, family and criminal) that may be referred to mediation.

Unlike other European countries the Romanian law on mediation is focused mainly on the regulation of the status of the profession of mediator. It regulates in a special chapter mediators' rights and responsibilities. Among their most important rights are the right to inform the public about the mediator's activity, with due respect to the principle of confidentiality, and the right to seek an honorarium, negotiated and decided together with the parties, and also to have their expenses reimbursed (art.26). The mediation law established a national body with legal personality, *The Council of Mediation*, whose main purpose is to ensure the promotion of mediation and the representation of mediators' interests.

SCOTLAND

Scotland has long had its own legal system. Criminal prosecutions of adults are determined by a public prosecutor known as a procurator fiscal; depending on their severity they are tried before a sheriff or justice of the peace in summary procedure (minor offences). Serious offences involving trial on indictment are heard before a judge or a sheriff sitting with a jury (solemn procedure). Penalties on conviction resemble those elsewhere in the United Kingdom. The Children's Hearing, established in 1968, is a statutory agency that hears cases referred to it by the procurator fiscal. The current legislation, The Children (Scotland) Act 1995, provides that in reaching decisions about children between eight and 17 (a) the welfare of the child is the paramount consideration, (b) no compulsory intervention should be made unless it would be better for the

child than no compulsory intervention at all, and (c) children should be given an opportunity to express a view and, if they do so, consideration should be given to the child's views. The fundamental difference between the children's hearings system and other youth justice systems is that a child charged with an offence 'is diverted from prosecution in a criminal process and instead enters a non-retributive civil procedure which aims to meet the child's educational and developmental needs' (Scottish Executive, 2005, 3).

In 1996 the Children's Hearing system and SACRO set up a Young Offenders' Mediation Project (YOMP) located in Fife. Unlike the diversionary schemes introduced in England and Wales, this was not designed to deal with first time offenders. Following a referral from the Reporter, its purpose is to explore the possibility of mediation between the child and the victim, to mediate, and possibly to find a solution.

Other initiatives for young offenders were introduced at this time, including a restorative cautioning scheme for young offenders set up by the Dumfries and Galloway police service. In order to bring a greater degree of coherence to otherwise uncoordinated individual efforts, the Advisory Group of Youth Crime which the Scottish Executive established in 2001 recommended that greater efforts should be made to divert as many of those committing offences as possible out of the system altogether. Where they did become engaged with it, the system's response to young offenders should comprise a programme of intervention 'in which individual needs, responsibilities and rights are respected and in which restorative justice features'. A report on the feasibility of setting up a bridging pilot to refer young offenders aged sixteen and seventeen which incorporated such features was published in 2001 (Scottish Executive, 2001, 43, 47 and 55).

In 2005 the Executive noted that there were no national standards governing restorative justice, and published a set of criteria and protocols for referrals (Scottish Executive, 2005). These reflect the common European standards: sufficient evidence of the child's responsibility, an admission, a right to legal advice, presence of a parent or guardian, and so on. By 2006 there had been created what is in effect a restorative justice service for young offenders throughout Scotland (thirty-one of the thirty-two local authorities). All local authorities have a Youth Justice Service, with Sacro being the largest provider of a full range of restorative justice modalities, along with a training service funded by the Scottish Executive. The position with regard to adult offenders in Scotland is much less extensive, although it is one of the Scottish Executive's 'high-level' commitments.

SLOVENIA

Although it is a relatively recent concept applied by the criminal law, restorative justice is becoming well rooted in the legislation and the functioning of Slovenian criminal justice. In the case of adult offenders, authority for VOM is contained in Art. 161a of the Code of Criminal Procedure (hereafter CCP). This provision authorises the State Prosecutor (hereafter SP) to refer for mediation cases punishable by a fine or by a term of imprisonment not exceeding three years (Art. 161a, par. 1). In addition the SP may refer cases involving offences enumerated in CCP Art 161a, para. 2, if special circumstances for such referral exist. The referral may take place before the commencement of the formal criminal procedure or after the charge has been filed. In making the referral, the SP must take into account the nature and circumstances of the offence, as well as offender's personality, the degree of his or her criminal responsibility and his or her criminal record, if any (Art. 161a, para. 1 CCP). Conditions and circumstances guiding the SP's decision are further detailed by General Instructions (hereafter, GI), issued by the SP General (Art. 161a, para. 7 CCP).

Since the 2001 revision of the CCP came into force, it has been possible to refer a case for VOM after the charge has been filed but before the judgement has been passed. Referral after the commencement of the main hearing is governed by CCP Art. 443a. If the SP decides to refer a case for mediation, the court will suspend further proceedings for a maximum of six months. The decision to suspend is a matter for the discretion of the SP and is not subject to any judicial approval. If the referral is successful, that is, if the victim and the offender reach a settlement and the offender completes his or her obligations, the SP will withdraw the charge.

According to CCP Art. 466, para. 2, the option of mediation as provided for by CCP Art. 161a, applies also to juvenile offenders. The scope of VOM for juveniles is slightly broader: if special circumstances exist, the SP may also refer to VOM a juvenile case involving an offence punishable by an imprisonment not exceeding five years (CCP Art. 161a, para. 2).

There exist two legal texts of secondary value that are relevant for VOM. The first is the General Instructions (GI), mentioned earlier. The second are the Regulations on Mediation in Criminal Matters (hereafter, RMCM). The GI were issued by the SP General in 1999 and were amended in 2000. The RMCM were issued by the Minister of Justice in 2004.

There is no dedicated agency that has the specific task of delivering mediation. It is the State Prosecution Office (hereafter, SPO) that decides on referrals, trains mediators, sets up a list of mediators, pays mediators, and decides on the case after the mediation has been completed. The Association of Mediators is an organisation of mediators, but has no formal powers. Mediation is delivered by lay mediators. They are chosen through official public invitation published by the Ministry of Justice in the Official Gazette (RMCM Arts. 6 and 7).

SPAIN

The Organic Law 5/2000, an Act which regulates the criminal liability of minors (known in Spain by its Spanish acronym 'LORRPM'), came into force on 13 January 2001, repealing the previous Organic Law 4/92 and being partially amended, in turn, by the Organic Law 8/2006 of 4 December. As with the previous Act (4/92), LORRPM applies to actions classified in the Criminal Code as either serious or minor offences, but changes the sentences set down in the Code through measures that are essentially educationally inspired. The Criminal Liability of Minors Law applies to minors between fourteen and eighteen years of age.

According to art. 45 of the 5/2000 Act the Autonomous Communities and of the cities of Ceuta and Melilla are responsible for the implementation of the measures adopted by Juvenile Judges in unappealable sentences. In addition to adopting the opportunity principle, which enables the Public Prosecutor to refrain from bringing criminal proceedings (art. 18) this Act places particular emphasis on repairing the harm caused by the offender and reconciling the victim with the offender. Art. 19 provides for the dismissal of criminal proceedings through reconciliation or reparation between the minor and the victim for less serious and lesser offences. Art. 19.3 assigns the role of mediation between minor and victim to the corresponding Technical Team, as it does the mandate of notifying the Public Prosecutor of the undertakings agreed to and of their performance. Para. 19.4 governs the effects of reconciliation and the performance of the reparatory undertakings, whereby the Public Prosecutor shall conclude the investigative stage and 'apply to the Judge for the case's dismissal and the closure of proceedings, with remission of the foregoing proceedings'. According to art. 16 it is the responsibility of the Public Prosecutor to instruct and initiate proceedings. Art. 27 provides that during the investigation stage of the proceedings, the Public Prosecutor shall require the Technical Team to produce a report "*on the psychological, educational and family situation of the minor, and on the latter's social environment as well, and*

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generally on any other circumstances which may be relevant for the purposes of implementing any of the measures provided for in this Act". According to art. 27 the Technical Team may consider a social-educational intervention or the possibility of the minor carrying out a reparatory or conciliatory activity with the victim. According to art. 19.1, conciliation or the undertaking to repair the damage caused may give rise to the proceedings being halted only: where no serious violence or intimidation took place during the commission of the acts and in addition, and where the minor's alleged action constitutes a less serious or lesser offence.

On the other hand, Spain's adult criminal legislation does not directly regulate mediation or other restorative justice measures but it does provide in distinct ways for the attainment of specific legal and penal benefits for offenders who voluntarily make reparation to the victim. The 1995 Criminal Code was the first criminal legal text in Spain to introduce victim reparation as an institution producing different consequences that may reduce the sentence handed down to the adult offender. In sum, through the institution of voluntary reparation, which may be facilitated by mediation, we may consider restorative justice to be explicitly recognised in the texts on adult criminal law. A mediation concluded with a reparation agreement carried out in favour of the victim may lead to two mitigating factors being applied: a generic mitigating factor, defined in art. 21.5 of Book I of the Criminal Code and the specific mitigating factors defined in Book II. Art. 21 regulates the mitigating circumstances that may be applied to offences. Art. 21.5 allows for a reduction in the sentence where the offender repairs the damage caused to the victim or reduces its effects at any time during the proceedings, and fixes the time limit of the oral proceedings. Art. 66.1 provides certain guidelines for appraising the mitigating and aggravating factors that must be taken into account by judges or courts when applying sentences for intentional offences. Making reparations for the victim as agreed during the mediation process may in most cases prevent a convicted offender from facing a custodial sentence of up to two years.

The provision that most affects the application of mediation both directly and negatively is art. 44.5 of the Law on Comprehensive Protective Measures against Gender-based Violence, which expressly and very clearly excludes mediation in cases of gender-based violence. We may therefore conclude that as to the provisions affecting adult criminal law the only time that mediation is specifically mentioned is for its prohibition, rather than for its application in specific cases.

We might conclude that Spain's penal legislation contemplates mediation and its consequences for minors while for adults it recognises certain benefits in reparation. For adults there is a wide framework allowing a flexible interpretation regarding the application of mediation as an instrument that makes effective reparation possible for the victim and therefore encourages the legal benefits associated with reparation to be obtained. The important *caveat* is the limits imposed by Organic Law 1/2004 on Comprehensive Protective Measures against Gender-based Violence, which excludes the application of mediation in cases of domestic violence.

SWEDEN

On 1 July 2002 Sweden enacted a law on victim-offender mediation, the Mediation Act (*Lag 2002/445 om medling med anledning av brott*). The Mediation Act provides a framework for victim-offender mediation organised by the state or municipalities. The Act is primarily focused on young offenders but no age group is excluded. According to the Act, the goal of mediation is to increase the offender's level of insight into the consequences of the offence, and at the same time to provide the victim with the opportunity to work through his or her experience. For an offence to be referred to victim-offender mediation it has to have been reported to the police, and the offender must have acknowledged his or her guilt before mediation can be initiated. Participation

in mediation is always voluntary for the parties involved. The Mediation Act provides general criteria for victim-offender mediation, but does not regulate mediation in detail.

Victim-offender mediation is also mentioned in two paragraphs of the Young Offenders Act (*lagen om unga lagöverträdare, LuL*, paragraphs 6 and 17). One paragraph allows, but does not oblige, prosecutors to consider whether mediation has taken place when prosecuting a young offender. Since 1 January 2007 the duty of the prosecutor with regard to victim-offender mediation has been clarified further and the Prosecutor General has provided guidelines to all prosecutors stating the minimum extent of their obligations in this area. The other paragraph relates to the information provided by the police to the social services in relation to offenders below the age of 18. This should include information on whether the offender has been offered the opportunity to participate in mediation, and on how the offender responded to this offer. The Chief of Police is currently writing guidelines for the police on how they should refer a case to the mediation services within the municipalities.

Since 1 January 2008 it is obligatory for municipalities in Sweden to be able to offer victim-offender mediation to all young offenders under the age of 21 (Social Services Act, Chapter 5, Paragraph 1c, 2006: 901). As of the same date, victim-offender mediation constitutes part of the routine work of the Department of Social Services.

Mediation can be offered at any stage of the justice process. Most common is for mediation to be offered subsequent to the completion of the criminal investigation but prior to the initiation of court proceedings. According to the Act, however, mediation can take place at any time before, during or after court proceedings. By law, the prosecutor may take account of the fact that mediation has taken place and this may be used as one of the grounds for a decision to dismiss a case, though it is very rarely the only reason. Where a decision is made to dismiss a case, or to reduce the size of a fine as a result of mediation, the cases normally relate to shoplifting or similar minor offences. If the prosecutor is to take an agreement reached during mediation into account, mediation has to have taken place prior to the court proceedings. Only a few mediation services claim to work with both juvenile and adult offenders. Victim-offender mediation in the prison context has attracted much interest but so far has not developed into practical work.

ANNEX 5: EUROPEAN CODE OF CONDUCT FOR MEDIATORS (IN CIVIL AND COMMERCIAL MATTERS)

This code of conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.

Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code. Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.

For the purposes of the code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter “the mediator” – to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State.

Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas such as family mediation or consumer mediation.

1. COMPETENCE AND APPOINTMENT OF MEDIATORS

1.1. Competence

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2. Appointment

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

1.3. Advertising/promotion of the mediator’s services

Mediators may promote their practice, in a professional, truthful and dignified way.

2. INDEPENDENCE AND IMPARTIALITY

2.1. Independence and neutrality

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include:

- any personal or business relationship with one of the parties.
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

2.2. Impartiality

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. THE MEDIATION AGREEMENT, PROCESS, SETTLEMENT AND FEES

3.1. Procedure

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

3.2. Fairness of the process

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3. The end of the process

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

3.4. Fees

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

4. CONFIDENTIALITY

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

**ANNEX 6: DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL OF 21 MAY 2008 ON CERTAIN ASPECTS OF
MEDIATION IN CIVIL AND COMMERCIAL MATTERS**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

¹ OJ C 286, 17.11.2005, p. 1.

² Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129). Council Common Position of 28 February 2008 (not yet published in the Official Journal) and Position of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation³ establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴ or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility⁵ (2).

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to

³ Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

⁴ OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁵ OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1). (3) OJ C 321, 31.12.2003, p. 1.

protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the Interinstitutional agreement on better law-making (3), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

- (a) the parties agree to use mediation after the dispute has arisen;
- (b) mediation is ordered by a court;
- (c) an obligation to use mediation arises under national law; or
- (d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4

Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.
2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.
2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.
4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
 - (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
 - (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9

Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 May 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J. LENARČIČ