

SUCCESSOR TO AGON



Focus on the National Implementation of "Third Pillar" Legislation **Dossier particulier sur la mise en œuvre de la législation du « troisième pilier »** **Schwerpunktthema: Nationale Umsetzung der Gesetzgebung der „dritten Säule“**

Der Kommissionsbericht über die Umsetzung der Instrumente
zum Schutz der Finanzinteressen der Europäischen Gemeinschaften
Dr. Bernd-Roland Killmann

The Level of Implementation of the Convention on the Protection of the EC's
Financial Interests and of the Follow-up Protocols in the Czech Republic
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Why Delays the Ratification of the PFI Convention in Hungary?
Prof. Dr. Ákos Farkas

The Implementation of the European Arrest Warrant into National Law
Isabelle Pérignon

Euro-scepticism versus Building a Common System for the Surrender of Fugitives
Eugenio Selvaggi

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* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage www.mpicc.de/eucrim/search.php and then entering the ID-number of the link in the search form.

Editorial

Dear readers,

I am very happy to have been asked to introduce this new edition of eucrim. The focus of this issue is the implementation of EU legislation relating to the third pillar into national law. The Commission has recently adopted the 2nd Implementation Report on the European Arrest Warrant, a growing success story as you will read. These implementation reports are very important since they are currently the only possibility for the Commission to highlight difficulties and underline the importance of implementing third pillar instruments (conventions, framework decisions, decisions). Indeed, as you know, there are currently no infringement proceedings against Member States in this area. The only tool we have is political pressure, by way of these reports. Yet even these means have their limits.

This exception of the third pillar may, however, soon disappear. The June 2007 European Council set the mandate for the Intergovernmental Conference (IGC Mandate) that should give birth to a Reform Treaty to be ratified before the elections of the European Parliament in June 2009. The Reform Treaty will emerge from a combination of the amendments presented by the IGC Mandate, along with those provisions that will survive from the Treaty Establishing a Constitution for Europe as signed in Rome in October 2004 (“the Constitutional Treaty”). The abolition of the pillars will have the direct consequence that the “Community method” will apply to police and judicial cooperation in criminal matters, with certain exceptions.

The Reform Treaty will, in principle, improve the way decisions are made since the standard procedure will be co-decision with the exclusive right of initiative of the Commission, qualified majority voting in the Council, and an enhanced role for the European Parliament and national parliaments. Indeed, the IGC mandate states that the “national parliaments shall contribute actively to the good functioning of the Union (...) by taking part within the framework of the area of freedom, security and justice in the evaluation mechanisms (...) and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities”. In addition,

the national parliaments will be the guardians of the principles of subsidiarity and proportionality. There will be a “reinforced control mechanism of subsidiarity” so that “if a draft legislative act is contested by a simple majority of the votes allocated to national parliaments the Commission will re-examine the draft act, which it may decide to maintain, amend or withdraw.” The European Court of Justice will have general jurisdiction to interpret and review the validity of the acts adopted in the area of freedom, security and justice.

The Reform Treaty will also propose a common set of legal instruments. Instead of introducing new instruments (European laws, European framework laws, European regulations) as proposed in the Constitutional Treaty, the Reform Treaty will keep the traditional instruments of the EC First Pillar (regulations, directives, decisions, etc) for the entire legislative activity of the Union. The current third pillar instruments will disappear.

Like the Constitutional Treaty, the Reform Treaty will also provide the legal basis for the possible introduction of a European Public Prosecutor from Eurojust. A Communication from the Commission on the future of Eurojust and the European Judicial Network in criminal matters was adopted recently.

We are therefore entering a new and enriching era!

Franco Frattini
Vice-President of the Commission
Responsible for Justice, Freedom and Security



Franco Frattini



European Union

Reported by Thomas Wahl*

Reform of the European Union

By Thomas Wahl, Christine Löhr,
Sarah Kiesel

Fresh Elan in the Debate on the Future of the European Union

At the summit in Brussels in June 2007, the Heads of State or Government of the EU Member States agreed on a mandate for an Intergovernmental Conference (IGC). A new “Reform Treaty” is to be negotiated to replace the Constitutional Treaty that had failed as a result of the no-votes in France and the Netherlands in 2005. The IGC 2007 is significantly different from past inter-governmental conferences designed to alter the founding treaties since almost no margin for negotiations is left in the mandate and which is why it should be finalised by the end of 2007. The following news items will provide an introduction to the recent developments concerning the struggle of the European Union to achieve a new institutional structure. In the following, an overview will outline the main changes relating to European Criminal Law. It is followed by a historical review of the reform debate.

19 October 2007: EU Leaders Reach Accord on Reform Treaty

At an informal meeting in Lisbon, Portugal, the Heads of State or Government of the 27 EU Member States agreed on the precise text of the new “Reform Treaty”.

It ends a six-year long period of trying to institutionally reform the EU which began with the “Laeken Summit” in 2001 and ended with the IGC mandate at the summit led by the German Council Presidency in June 2007. The agreed text is expected to go down in history as the “Lisbon Treaty”.

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July/June 2007: Mandate for Intergovernmental Conference

On 23/24 July 2007, the Portuguese Presidency opened the Intergovernmental Conference (IGC) on the new EU Treaty, having previously achieved a respective mandate during the summit in Brussels on 22/23 June 2007 under the German Presidency. At the European Summit, the 27 Member States agreed – after a 36-hour marathon round of talks – on a detailed mandate for an Intergovernmental Conference. The term “IGC” is used to describe a special negotiation process between the Member States’ governments with the intent to amend the existing Treaties; its procedure is set out in Art. 48 TEU.

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This agreement was reached despite heavy resistance from some Member States. Poland especially vowed to fight against the proposed concept of a double majority, population-oriented system. The UK, which fought against a legally binding inclusion of the EU Charter of Fundamental Rights into the Treaty

on European Union, was also quite reluctant. The Portuguese Presidency affirmed its ambition to stipulate quick proceedings. Immediately after the IGC mandate, the European Commission, the European Parliament, and the European Central Bank were consulted as required by Art. 48 TEU. They gave green light to the IGC in July 2007. In its Communication to the Council entitled “Reforming Europe for the 21st Century”, the Commission outlines the benefits that a Reform Treaty will bring to the European Union and its citizens.

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The European Parliament, in its resolution on the convening of the IGC, welcomed the fact that the new Reform Treaty would incorporate the bulk of the Constitutional Treaty. However, MEPs also pointed out the shortcomings by criticising the IGC mandate as not adequately addressing the challenges that the Union faces today. They also regret the increased number of exemptions granted to Member States in important areas which could undermine the cohesion of the EU. In particular, they disapproved any derogation granted to Member States on the Charter of Fundamental Rights as damaging to the EU’s identity.

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Main Changes in General

In order to satisfy all the Member States’ concerns, not all of the Constitution’s innovations were taken up in the Reform Treaty, but the main institutional reforms will remain. Much of the substance of the Constitutional Treaty was able to be maintained, including, for example, the appointment of a President of the Council for a two and a half-year term, and a High Representative for Foreign Affairs and Security Policy. Furthermore,

* All news on the European Union have been reported by Thomas Wahl if not stated otherwise.

a general co-decision procedure in the legislative area, leading to an increase in powers of the European Parliament, was introduced, as well as a closer participation of the national parliaments in the decision-making process.

Smaller changes were, however, necessary due to the Polish and British objections: the double majority system for decisions taken by the Council of Ministers as of 2014 will nonetheless be retained, albeit with a transition phase until 2017. In addition, the obligatory nature of the Charter of Fundamental Rights in all Member States is kept, with an exception granted to Poland and the UK. In order to take into account many citizens' fears of a European Super-State, the term "Constitution" will no longer be used; instead, the Reform Treaty process will follow the traditional method of Treaty change, involving amendment of both the EC and EU Treaties. As a result, there will neither be state-oriented symbols in the form of a flag nor an anthem.

At the above-mentioned summit in Lisbon, EU leaders came to a compromise on some further last-minute objections which were brought forward by several Member States on the eve of the summit. Poland demanded introducing into the Treaty a mechanism which would allow a minority of States to delay key decisions taken by the Council by qualified majority – the so-called "Ioannina clause". The EU leaders agreed that the mechanism is not set out in the Treaty but in an additional declaration, meaning that the cumbersome procedure of Treaty change does not apply to altering the provision; Poland was successful, however, since the provision may only be altered by unanimity. Italy obtained an extra seat in the European Parliament and now has an equal number of seats as the UK (both 73); the agreed maximum of 750 MEPs was preserved because the President of the EP will no longer be counted as a lawmaker. The concerns of the Czech Republic on the division of competences between the EU and Member States were met by a "Declaration in relation to the delimitation of competences". The declaration includes the possibility for the Council, upon the initiative of one or several of its members and in accordance with Art. 208 of the EC Treaty, to request the Commission to sub-

mit proposals for repealing a legislative act. The UK defended its "red lines" and upheld wide-ranging opt-outs in matters of Justice and Home Affairs which were negotiated in the run-up to the Lisbon summit (see below).

The following link leads to the draft Reform Treaty which has been made available in all 23 official EU languages on the Council's website. The website also contains the latest declarations approved at the summit in Lisbon on 18 and 19 October 2007 as well as other background documents relating to the IGC 2007.

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Relevant Changes Relating to European Criminal Law

As to European criminal law, the Reform Treaty will retain the most relevant change of the Constitutional Treaty, i.e., the abolishment of the differentiation between the "first pillar" and "third pillar". The provisions of the "third pillar", which currently deal with police and judicial cooperation in criminal matters in Art. 29 ff. TEU, will be put under the regime of the EC Treaty (which will be renamed as the "Treaty on the Functioning of the European Union" (TFEU)). All JHA provisions will be moved to Title IV (Articles 61 ff.) which will change its name to "Area of freedom, security and justice". The Reform Treaty will take over most of the amendments of the Constitutional Treaty, the most important of which are:

- Although the text of the *Charter of Fundamental Rights* will not be incorporated into the EU Treaty, the Charter will be given a legally binding value for EU institutions and bodies as well as for the Member States (with special exceptions for Poland and the UK). Thus, the new status of the Charter makes it possible to check the conformity of legislation and practice in the area of freedom, security and justice with the fundamental rights and freedoms enshrined in the Charter.
- The Reform Treaty also maintains the single legal personality of the European Union, which paves the way for the EU's accession to the *European Convention on Human Rights*. The aim of accession is explicitly envisaged in the revised Article 6 TEU.
- The Reform Treaty introduces as standard procedure in the field of JHA

the *co-decision procedure* (i.e., joint decision-making powers between the Council and European Parliament, qualified majority voting in the Council, and the right of the Commission to submit initiatives), thus retaining Art. III-396 of the Constitutional Treaty.

- *National Parliaments* will participate in the decision-making process by being given the competence to scrutinize the conformity of proposals or legislative initiatives in the area of freedom, security and justice with the principles of subsidiarity and proportionality.

- The *European Court of Justice* is about to be granted general jurisdiction within all fields of JHA due to the new institutional structure. Thus, the Commission will have the power to instigate infringement proceedings. The special conditions on the preliminary ruling procedure in JHA as set out in Art. 35 TEU and 68 TEC will be repealed. Likewise maintained is the provision that the Court must, by means of an expedited procedure, judge if questions are referred to the Court by national courts in pending trials with regard to persons in custody (see below on the discussion to alter the current system already). The Reform Treaty also retains the exception of Art. 35 para. 5 TEU and Art. III-377 of the Constitutional Treaty that the ECJ may not judge the validity of measures carried out by the police or other law enforcement authorities of the Member States, or those measures related to the maintenance of law and order or the safeguarding of internal security.

- The possible establishment of a *European Public Prosecutor's Office* is maintained by the Reform Treaty (Art. 69i TFEU). As in the Constitutional Treaty, it provides that the Council, acting unanimously and having obtained the consent of the European Parliament, has the power to institute a European Public Prosecutor's Office "from Eurojust". Its task could first be limited to combating crimes affecting the financial interests of the European Union. The powers of the European Public Prosecutor's Office will include investigating, prosecuting, and bringing to judgment offences against the Union's financial interests. Moreover, the Reform Treaty retains the Constitutional Treaty's provision

concerning a possible extension of powers of the European Public Prosecutor's Office to include serious crime with a cross-border dimension.

- Concerning the Union's *fight against fraud*, the wording of Article III-415 of the Constitution is transferred to Article 280 of the EC Treaty. In essence, the last sentence of paragraph 4, which provides that "the measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community shall not concern the application of national criminal law or the national administration of justice", will be deleted. Thus, the European Union will be enabled to protect its financial interests by adopting legislative provisions on criminal law – if necessary, even by means of regulations.

- The Reform Treaty will contain in Art. 67a a clear legal basis for *financial sanctions* against persons suspected of being linked with terrorism. However, this provision, as already known from the Constitutional Treaty in Art. III-260, will be moved from the chapter on "capital and payment" to the general provisions of JHA, therefore being subject to opt-out measures.

The IGC mandate of 2007 also contains some divergences in comparison to the Constitutional Treaty, the most essential of which are:

- Newly introduced in the Reform Treaty is the possibility for the UK and Ireland to *opt out* of EU decisions on closer cooperation in judicial and police matters. The opt-out clause means that the countries are not required to participate in the measures relating to the area of freedom, security and justice. Whereas the UK and Ireland are currently granted an opt-out in the areas of visa, asylum and immigration, the extension of the opt-out to the entire area of JHA, including policing and criminal law, was agreed upon at the summit in June 2007 and differs from the Constitutional Treaty. The UK and Ireland even secured the right to opt out of amendments to Justice and Home Affairs legislation from which they have already opted in. Denmark has an opt-out to the Title on JHA too; however, this was already agreed upon as part of the Constitutional Treaty. The detailed rules on the positions of the

UK, Ireland, and Denmark as to JHA are laid down in separate protocols.

- The UK also pushed through a five-year *transitional period* within which existing measures of policing and criminal law that were adopted under the current treaties may not be subject to the powers of the Commission under Article 226 TFEU (infringement proceedings) and the full jurisdiction of the European Court of Justice. Under certain circumstances, in fact, the UK has reserved the right to opt out from these measures for a longer period (cf. Article 10 of Protocol No. 10).

- The Reform Treaty also modifies the way to apply the so-called *emergency brake* and opens the way for a group of Member States to go forward in the area of policing and criminal law by *enhanced cooperation*, while allowing other Member States not to participate. The "emergency brake" clause – as negotiated in the Constitutional Treaty – applies to legal acts on the mutual recognition of judicial decisions and on police and judicial cooperation in criminal matters, as well as on the approximation of the criminal law of the Member States; it is considered a compensation for the Member States for giving up their current right to veto in the third pillar. The "emergency brake" would lead to a suspension of the ordinary legislative procedure (in particular, qualified majority voting in the Council) if a Member State considers a legislative proposal affecting fundamental aspects of its legal system. As a consequence, it may request that the proposal is referred to the European Council. In contrast to the Constitutional Treaty, the Reform Treaty now modifies the procedure, i.e., by abandoning the possibility for the European Council to request from the Commission or the initiating group of Member States the submittal of a new draft of the proposal. The Reform Treaty also accelerates the possibility of a group of Member States (at least nine) to adopt the proposal by means of enhanced cooperation if a deadlock persists in the Council (cf. Art. 69e para. 3 and Art. 69f para. 3 TFEU versus Art. III-270 para. 3+4 and Art. III-271 para. 3+4 of the Constitutional Treaty).

- In a similar way, the Reform Treaty introduces the possibility for at least nine Member States to establish the *European*

Public Prosecutor's Office by means of enhanced cooperation if neither a unanimous vote in the Council nor a consensus can be reached in the European Council. Interestingly, the Reform Treaty is likely to only allow a group of Member States to use the mechanism of enhanced cooperation for the establishment of the EPP to protect the EC's financial interests, but not for the extension of its mandate to other serious cross-border crime (cf. Art. 69i TFEU vs. Art. III-274 of the Constitutional Treaty).

- The model of enhanced cooperation will also apply to measures on *operational police cooperation*, which, in principle, must be agreed upon unanimously (cf. Art. 69j TFEU vs. Art. III-275 of the Constitutional Treaty).

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Next Steps

After the Portuguese Presidency obtained an agreement on the Reform Treaty during the in-formal European Council in Lisbon on 18/19 October 2007, European heads of state and governments will formally sign the Reform Treaty at the European Council on 13/14 December 2007. The French Presidency is supposed to determine modalities in 2008. It is anticipated that the ratification process in all 27 Member States will be completed before the European Parliament elections in June 2009.

However, the ratification process at the national level is likely to experience further hurdles: a new round of ratification is necessary. Most Member States are expected to attempt a ratification of the Reform Treaty via their national parliaments only, so as to avoid new referendums. Most of the States will need only a simple or absolute majority to ratify the Reform Treaty, while others have to pass a threshold of a two-thirds or even a three-fifth majority in their respective parliaments. Ireland is legally bound to initiate a referendum. Other national governments, such as those of the UK, Denmark, and the Netherlands, face strong pressure to hold a referendum on the Reform Treaty. In case one of these countries relents, this could be the beginning of a "domino effect" as was the case in 2004/2005.

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Historical Review

For a short timetable with links to the most important documents, see: http://europa.eu/roadtoconstitution/chronology/index_en.htm

February 2002 – July 2003: European Convention

The Convention on the Future of Europe, known in short as the European Convention, is working on a draft constitution of the European Union. The European Convention was mandated by the Laeken Declaration of 2001. It is presided by the former President of France, Mr. Valéry Giscard d'Estaing, and convenes "the main parties involved in the debate on the future of the Union", i.e., representatives from national governments and national parliaments (of EU Member States and candidate countries) as well as from the main European Institutions and bodies. The Convention has to consider the key issues arising for the Union's future development, among them the following four objectives: (1) a better division and definition of competence in the European Union; (2) simplification of the Union's instruments; (3) more democracy, transparency, and efficiency in the European Union; and (4) reflection on the adoption of a European Constitution, integrating the Charter on Fundamental Rights adopted in Nice. On 20 July 2003, the draft Treaty establishing a Constitution for Europe is presented. Government representatives check and adapt the draft between October 2003 and July 2004 in the framework of an intergovernmental conference (IGC 2004).

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29 October 2004: Signature of Constitutional Treaty

In Rome, the Heads of State or Government and Ministers of Foreign Affairs of the 25 Member States of the European Union sign the Treaty establishing a Constitution for Europe. The ceremony takes place at *Campidoglio in the Sala Degli Orzi and Curiazi*, the same room in which the 6 original Member States signed the Treaty establishing the European Community in 1957. To enter into force, the Constitutional Treaty must be ratified by all Member States, which are originally given time until October 2006 to do so. Declaration 30 states that if, by 1 November 2006, only four fifths of the Member States (meaning at least 20) have ratified the constitutional text and the others encountered ratification difficulties, the matter would be referred to the European Council.

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29 May/1 June 2005: Negative Referenda in France and the Netherlands

The Constitutional Treaty is rejected by French and Dutch citizens. The result of the "no-votes" is a ratification crisis. Various other countries put the ratification process on hold.

16/17 June 2005: European Council Decision to Start a "Reflection Period"

In the aftermath of the negative referenda in France and the Netherlands, the European Council agrees that the ratification process should continue, but at a pace suited to the needs of the Member States. The delay occasioned by the "no-votes" is seen as an opportunity for reflection, afterwards often called the "reflection phase" or "reflection period". Member States are encouraged to use the time to engage in intensive debate on the issue of European integration, in which citizens, civil society, social partners, national parliaments, and political parties are called on to participate.

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13 October 2005: Commission's Plan D

The Commission contributes to the reflection period by the Communication on "Plan D for Democracy, Dialogue and Debate". Plan D aims to involve European citizens in a wide-ranging discussion on the European Union. It essentially sets out a common framework (models and structures) to stimulate public debate on the future of the European Union in all 25 EU Member States. The Commission also intends to structure the feedback process and proposes specific initiatives at the European level "to stimulate a wider public debate, to promote citizen's participation and to generate a real dialogue on European policies". Plan D is part of the Commission's new communication strategy which aims to act as a counterbalance to the European citizen's general disapproval of European Union's policies. Plan D is complemented by the following two initiatives: (1) The "Action Plan to Improve Communicating Europe", launched in July 2005, includes 50 actions which focus on improving the Commission's own capacities and skills to better communicate European policies. (2) The White Paper on European Communication Policy of February 2006 triggers a public consultation on the best way to bring into play the key "stakeholders" – EU institutions and bodies; the national, regional, and local authorities in the Member States; European political parties; civil society – regarding the new communication strategy.

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19 January 2006: European Parliament Calls for a Constitution by 2009

The EP, in a resolution, calls for a constitution to be in place by 2009. The resolution responds to the decision of the European Council to put in train a period of reflection. The EP favours a broad public dialogue on the future of European integration with clear political goals. MEPs resist proposals that a core group of Member States begin implementing reforms while the constitutional process is still under way. They also oppose the strategy based on selective implementation of the constitution. The resolution suggests, inter alia, that, among the reforms which could be introduced at this stage, full use of "passerelle" clauses (cf. Art. 42 TEU) in the field of justice and home affairs could be made. Furthermore, the EP stresses that, after the accession of Bulgaria and Romania, no further enlargement will be possible without a new constitutional settlement.

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10 May 2006: Commission Push for Citizens' Agenda

While taking stock of the debate on the future of Europe during the reflection period, European Commission chief Jose Manuel Barroso issues a reminder to put off a decision on the moribund constitution until at least 2008. Meanwhile, EU leaders are to draw up a "solemn" declaration committing to the EU's goals and values as a first step towards a later institutional settlement. The target date for this declaration is the 50th anniversary of the Treaty of Rome in March 2007.

The Commission considers the text of the Treaty as a basis for future decisions, but continues to endorse its principles and values; it emphasises improvements to the Constitution that would bring about the effectiveness, openness, and accountability of the EU. For the time being, the Commission proposes a new policy agenda as well as a continued dialogue intended to rebuild the citizens' confidence in the EU, including the implementation of Plan D (for democracy, dialogue, and debate). The Commission's thinking is

based on a Eurobarometer opinion poll which showed that most EU citizens have a strong wish for more EU action in many areas, such as security and unemployment.

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27/28 May 2006: Klosterneuburg Meeting

The Foreign Ministers of the EU Member States meet in Stift Klosterneuburg near Vienna to talk about the future of Europe. Austria's Foreign Minister Ursula Plassnik, President of the Council of the EU, declares that, by 2009 at the latest, the legal basis must be clear and that the incoming presidencies will work on this matter. In the meantime, the common goals are more efficiency in the EU, better information for the people of Europe about their advantages thanks to the EU, and a continued dialogue with the citizens. The Ministers reach an agreement that the plan for the EU constitution is to be pursued without any "cherry-picking" from the Constitutional Treaty.

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6 June 2006: Franco-German Impulse

The German Chancellor, Angela Merkel, and the President of France, Jacques Chirac, reaffirm their commitment to the Constitutional Treaty at an informal meeting in Rheinsberg, Germany. With a view to Germany's presidency of the EU in the first half of 2007, the German government will collect Member States' suggestions concerning a future constitution. Merkel and Chirac even consider a new opportunity for the Treaty during the French Council Presidency in the second half of 2008.

➤ eucrim ID=0701015

11 June 2006: Austrian Chancellor Proposes EU-Wide Referendum

Austrian Chancellor Wolfgang Schüssel, President of the European Council, proposes putting the EU Constitution to an EU-wide referendum. The referendum should be held simultaneously in all EU countries; to be successful, the referendum would require the affirmation of the majority of individual countries and of the total population. The idea of an EU-wide referendum is favoured by many people. It is often proposed to connect it with the elections to the European Parliament in June 2009.

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14 June 2006: European Parliament Calls for Clear Proposal on Constitutional Process

In the European Parliament resolution "on the next steps for the period of reflection and analyses on the Future of Europe", the Parliament emphasises that the EU needs a constitutional settlement as quickly as possible. Meanwhile, the Parliament supports democratic improvements to institutional procedures based on the existing EU Treaties (e.g., improving transparency in the Council of Ministers, introducing a form of citizens' initiative, etc.).

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15/16 June 2006: EU Leaders' Statement on Relaunching the Ratification Procedure

At the meeting in Brussels, Heads of State or Government seek an exit from the impasse of the constitutional process. Germany is commissioned to present, under its presidency in 2007 and after talks with the Member States, a report which "should contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments". The exploratory talks are to serve as a basis for a solution to be found under the French Presidency by the end of 2008.

Meanwhile, collateral projects are to be continued in order to show the citizens in all Member States the advantages and benefits of the EU. Apart from agreeing that more time is needed, there is no real clarification. According to Austrian Chancellor Wolfgang Schüssel, there is no consensus that the substance of the constitutional treaty should be kept alive. Indeed, the EU leaders prolong the reflection period until 2008, resulting in a negative echo in the press.

➤ eucrim ID=0701018

26 July 2006: UK's House of Commons Asks to Abandon Constitutional Treaty

The Foreign Affairs Committee of the UK's House of Commons sees only a very slim chance for the Constitutional Treaty ever to come into force. The British MPs want their government to officially "abandon the Treaty as a package". They also oppose the idea of implementing only parts of the Constitutional Treaty (known as "cherry-picking"). They reject "passerelle" or "bridging" clauses as proposed by the European Commission to remove national vetoes in justice and police cooperation.

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January 2007: End of the Reflection Period

In January 2007, the German Presidency declares that the reflection phase is over. The favoured approach is to set up an Intergovernmental Conference (IGC) to agree on a text for a new treaty under the Portuguese Presidency during the second half of 2007. German Chancellor Angela Merkel wants to present a roadmap for a new treaty at the end of her presidency at the EU Summit on 21/22 June 2007, thus fulfilling the mandate which was given by the European Council in June 2006. Finding a way out of the constitutional deadlock is at the top of Germany's Presidency agenda. In doing so, Germany rejects ideas in support of the entering into force of only parts of the Constitutional Treaty, but staunchly defends its stance to salvage all elements of the Constitutional Treaty.

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26 January 2007: Phalanx of Member States Advocates "Maxi-Treaty"

Representatives of the 18 EU Member States that have already ratified the EU constitution meet in Madrid on an initiative of Spain and Luxemburg. The "friends of the constitution", as the meeting is called, backed the German message, advocate the completion of the current constitutional text, instead of watering it down, and call for a 'daring proposal'. As a result, the States oppose demands for a slimmed-down "mini-treaty", as called for by more sceptical opponents; instead they favour the idea of a "maxi-treaty".

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25 March 2007: Berlin Declaration

The EU leaders celebrate the EU's 50th anniversary at an informal summit in Berlin. On this occasion, they sign the Berlin Declaration (officially "Declaration on the occasion of the 50th anniversary of the signature of the Treaty of Rome"). The intention of the Berlin Declaration is to recall the EU's achievements and the common heritage and values of all Member States. However, its key message deals with the challenges and tasks lying still ahead. Most importantly, the EU leaders express their hope of putting the EU on a "renewed common basis before the European Parliament elections in 2009". Prior to the summit, some EU leaders uttered scepticism about the main goal of the German Presidency to arrange a new treaty.

➤ eucrim ID=0701022

4 June 2007: Amato Group Presents Simplified Treaty

Immediately before the decisive summit of the European Council at the end of June 2007, a group of “wise” European politicians – officially called the Action Committee for European Democracy (ACED) – tables an optimised and streamlined text which would amend the current treaties. The rewritten treaty is aimed at being a model for the EU leaders at the June summit. It takes over almost all innovations contained in the Constitutional Treaty. The “New Treaty” would only contain the fundamental changes of Parts I and IV of the Constitutional Treaty (with some modifications), whereas Part III of the Constitutional Treaty – which essentially links the existing provisions of the EC Treaty – be put into additional protocols. As a result, the core text becomes more readable and understandable for the European citizens, cutting the size of articles to 70 instead of 448 in the Constitutional Treaty. The Charter of Fundamental Rights gets a binding character by means of a single clause and is thus not reproduced within the text of the new treaty. The group is led by former Prime Minister of Italy, Giuliano Amato (also Vice-President of the original European Convention), and assigned with the task of unofficially rewriting the EU Constitution. The group is backed by the Commission. The idea of a “simplified Treaty” is not new, especially after Nicolas Sarkozy coins the term “mini-treaty” in the run-up to the presidential elections in France in September 2006. However, he considers slimming down the Constitutional Treaty by only taking over the articles on the institutional reform from Part I. The ACED, by contrast, tackles the issue in a more thorough way. The “Amato group treaty” is the last in a line of proposals by politicians and academics which seeks the perfect solution for the European Union’s new footing.

► eucrim ID=0701023

7 June 2007: European Parliament Calls for Roadmap for the Union’s Constitutional Process

In preparation for the EU summit in June 2007, the MEPs vote for a resolution that urges the EU leaders to define a roadmap in order to reach a new agreement on institutional reforms. The EU leaders are called on to convene an Intergovernmental Conference at short notice in order to reach a settlement and to fully involve the Parliament in its work. The MEPs favour keeping the basic principles of Part I of the Constitutional Treaty in the future agreement on the institutional reforms. The parliamentarians also say that the outcome of the IGC must take into account all questions raised during the period of reflection on the future of Europe. They warn the EU leaders not to lessen the level of the protection of the rights of citizens as well as democracy, transparency, and efficiency in the functioning of the Union at the June 2007 summit.

► eucrim ID=0701024

27 August 2007: Idea of a “Council of the Wise”

French President Nicolas Sarkozy proposes setting up an independent body whose task it would be to debate the future of the EU, including the extension of its borders. In return, France would no longer block negotiations with Turkey. The idea of a “Council of the Wise” is supported by German chancellor Angela Merkel at a regular informal meeting with the French President in Meseberg, Germany on 10 September 2007. Since the “Council of the Wise” should sketch the EU’s development in the long term, it is expected to start work until after the election of the European Parliament in 2009. The concrete shape of the council remains vague, but no active European politicians should be involved.

► eucrim ID=0701025

Foundations

Community Powers in Criminal Matters – Environmental Protection

ECJ Gives Second Fundamental Ruling on EC Competence in the Ship-Source Pollution Case

On 23 October 2007, the European Court of Justice (ECJ) delivered a long-awaited judgment on the validity of Framework Decision (FD) 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (Case C-440/05, see also eucrim 1-2/2006, p. 3). After the ECJ’s judgment in Case C-176/03 on the Framework Decision on the protection of the environment through criminal law (see eucrim 1-2/2003, p. 3, as well as the articles in eucrim 3-4/2006), the present case is the second fundamental case on the scope of the competences of the Community as regards the harmonisation of criminal law. As in Case

C-176/03, the Court annuls the Framework Decision in its entirety.

Background: In the aftermath of the damage caused by the oil tanker Prestige, the EU, in 2005, adopted a legal framework in order to protect the maritime environment against ship-source pollution by means of administrative and criminal sanctions. Since the Council staunchly defended its stance that rules in criminal matters cannot be subject to Community legislation, a Directive sets out the principles and definitions of maritime pollution infringements caused by ships, while a Framework Decision, which supplements the Directive, provides that these infringements must be regarded as criminal offences in the most serious cases (so-called “double text” mechanism). In contrast to the Framework Decision 2003/80/JHA on the protection of the environment, Framework Decision 2005/667/JHA on ship-source pollution does not (only) contain the common clause that “each Member State shall

take the necessary measures to ensure that the offences are punishable by effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition”. In fact, it also prescribes in more detail the type and maximum level of penalties to be imposed on both natural and legal persons (cf. Art. 4 and 6 of the FD). Furthermore, the FD on ship-source pollution was, unanimously, not based upon the EC’s environmental law provisions (Art. 175, 176 TEC), but on provisions relating to transport policy (Art. 80 para. 2 TEC).

The Commission and the European Parliament maintained their position that the EC Treaty also provides the appropriate legal bases for criminal matters and therefore sought annulment of the FD before the European Court of Justice (ECJ). However, this case mainly raises two new questions of constitutional significance beyond the previous Case C-176/03:

- Does the Court's reasoning in Case C-176/03 also apply to other EC policy areas (here: transport) or must it be interpreted restrictively as relating exclusively to environmental policy?

- Is it in any event outside the Community competence to define the type and level of criminal penalties to be provided for by the Member States?

The point of departure of the Court's findings is Art. 47 TEU which provides that nothing in the Treaty on European Union is to affect the Treaties establishing the European Communities. The ECJ determined that the criminal law provisions of the FD in question affect the Community's competence because they had to be adopted on the basis of Art. 80 para. 2 TEC. In its argumentation, the ECJ focuses on the objectives of the FD which intends to promote environmental protection. This consideration leads the ECJ to draw a parallel with Case C-176/03, reiterating the formula given in that case: "Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective" (para. 66 of the judgment).

The ECJ seems to follow the opinion of Advocate General Mazák (28 June 2007) that the "*effet utile*" is the underlying ratio for the ECJ to confer powers to the Community to adopt criminal law measures in the first pillar. However, AG Mazák stated more clearly that the power is not limited to the protection of the environment under Art. 175, 176 TEC, but also exists in other Community policy areas, such as transport (Art. 80 TEC).

As regards the second question, the ECJ also follows the AG's view that the Community legislator is only entitled to prescribe that criminal penalties must be effective, proportionate and dissuasive, but, beyond that, is not empowered to specify the type and level of criminal penalties to be imposed. However, the ECJ gives

no reasons for this finding. The Advocate General brought forward the argument that the European Community would otherwise compromise the coherence of national penal systems. In paragraph 108 of his opinion he stated: "[...] the Member States are as a rule better placed than the Community to 'translate' the concept of 'effective, proportionate and dissuasive criminal penalties' into their respective legal systems and societal context". He underlined his view by saying that the determination of criminal penalties "goes well beyond the mere question of effectiveness" (para. 118).

For the solution of the case, this means that Art. 4 and 6 of the FD, in so far as they prescribe in some detail the type and level of penalties to be applied, fall within the scope of title VI TEU, as is the case for the provision on jurisdiction, the exchange of information, etc. Provisions concerning the establishment of constituent elements of the criminal offences to be provided for, and the (general) requirement that they be punished by effective, proportionate and dissuasive criminal penalties (Art. 2, 3, and 4 (1)), should have been adopted on the basis of Art. 80 (2) TEC. The same is true for the provisions on the liability of legal persons for these offences and the (general) requirement that such legal persons may be punished by effective, proportionate and dissuasive penalties (Art. 5 and 6(1) of the FD).

Although the ECJ established the annulment of the entire FD because of its indivisibility, it is only a partial victory for the Commission and the European Parliament. The judgment will greatly affect the content of the other Community initiatives which currently seek to harmonise national criminal law, e.g., in the areas of the protection of the EC's financial interests, the environment, or intellectual property. The following links lists not only the judgment and the AG's opinion, but also the Directive and the Framework Decision on ship-source pollution.

► [eucrim ID=0701026](#)

Ship Organisations Question Validity of Criminal Liability Concept of Directive on Ship-Source Pollution

In the meantime, another case has been pending before the European Court of Justice (ECJ) in which the Court has

to decide on the validity of the above-mentioned Directive 2005/35/EC of the European Parliament and the Council of 7 September 2005 on ship-source pollution and the introduction of penalties for infringements. The case had been brought forward before the London High Court by several organisations representing the interests of the shipping industry. The High Court followed the applicants' view that the Directive could be invalid and referred questions on its validity for a preliminary ruling to the ECJ (Case C-308/06, "INTERTANKO and others"). The applicants argue that the Directive is invalid because it conflicts with existing international law and that the Directive's test of "serious negligence" for criminal liability for ship-source pollution offends the principle of legal certainty.

► [eucrim ID=0701027](#)

Commission Answers on the Protection of the Environment through Criminal Law by a New Draft Directive

On 9 February 2007, the Commission put forward a draft for an EC Directive on the protection of the environment through criminal law (COM(2007) 51). It is the Commission's second attempt to harmonise the EU Member States' greatly differing laws on serious environmental offences through Community legislation (first pillar) after its first proposal for a directive in 2001 was rejected by the Council. Instead, the Council, on the basis of an initiative on Denmark's part, adopted a framework decision in January 2003, i.e., a third pillar instrument. The Framework Decisions was then annulled by the landmark ruling of the European Court of Justice in September 2005. The Court confirmed that the Community had the competence to adopt criminal law measures if they are necessary to ensure the effective implementation of its environmental policy (see [eucrim 1-2/2006](#), p. 3). The new Directive would fill the loophole left open by the judgment by putting the EU's criminal law approach against polluters on a new legal footing.

As regards substantive criminal law, the new draft largely takes up the definition of offences as set out in the above-mentioned Council Framework Decision of 2003, but also takes some amendments of the European Parliament made to the

original directive proposal into consideration. The list includes:

- the discharge, emission, or introduction of a quantity of materials or ionising radiation into air, soil, or water,
- the unlawful treatment, including disposal and storage, transport, export or import of waste, including hazardous waste,
- the unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used,
- the illegal shipment of waste,
- the unlawful trade in endangered species, and
- the unlawful trade in or use of ozone-depleting substances.

The Commission clarified that the list only deals with serious environmental offences which are already prohibited by EU or national legislation. The majority of offences are made conditional on the activities' result, i.e., that they cause or are likely to cause serious harm to persons or the environment. The activities are considered criminal offences if they were committed intentionally or by serious negligence. Regarding the latter, it is worth mentioning that the Council's Framework Decision left the matter of how to punish negligent commitment of the offences up to the respective Member State's domestic law.

Contrary to the original draft directive of 2001, the Commission now also proposes a concrete level of sanctions both for natural and legal persons. The approximation of the sanctions is based on a three-step scale. The scale depends on whether the offence was committed by serious negligence or intent and on aggravating circumstances, i.e., whether the offence caused death of or serious injury to a person, or substantial damage to air, soil, water, animals or plants. Particularly serious breaches should, for instance, be punishable by a maximum of at least 5 to 10 years imprisonment and fines for companies of at least €750.000 to €1.500.000. In addition, supplementary or alternative sanctions are foreseen for both natural and legal persons, such as the obligation to reinstate the environment.

The Commission proposal is the second main one which is currently on the negotiating table in the Council. The first

precedent – established in 2006 – suggests common rules on counterfeiting (see eucrim 1-2/2006, p. 13 and below). They are the most significant examples of first pillar legislation that would interfere with the Member States' sovereignty on criminal law. Of particular relevance for the protection of the EC's financial interests is that both proposals could serve as a model for making criminal law arrangements in the context of the first pillar before the reform treaty enters into force.

►eucrim ID=0701028

State of Play of Environmental Crime Proposal in the Council

During the German Presidency, the first debates on the above-mentioned Commission proposal on the protection of the environment through criminal law started in the Council working groups. Currently, the negotiations mainly focus on the drawing up of criminal offences. In this context, an initial controversy arose, i.e., whether the directive should only cover breaches against Community legislation or also apply to purely national environmental law. The majority of delegations opted for the first alternative. It is notable that the issue of whether EU legislation should cover national law was also raised in view of the scope of the framework decisions on certain rights in criminal proceedings or on data protection in the third pillar (see below). Member States agreed to postpone discussion on the rules of sanctions until the European Court of Justice has ruled on the Commission's action for annulment of the Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution (see above). Discussion on the matter will continue during the Portuguese Presidency. However, diplomats do not expect a quick adoption of the directive.

►eucrim ID=0701029

Community Powers in Criminal Matters: PNR Data

EU and USA Conclude Controversial Long-Term PNR Agreement

The EU and the United States of America (USA) reached a deal on a new legal framework on the processing and trans-

fer of Passenger Name Record (PNR) data by air carriers to the US Department of Homeland Security (DHS). The new agreement replaces the interim agreement of October 2006 which expired on 31 July 2007. The 2006 agreement itself replaced the initial PNR agreement of 2004 which had been annulled by the European Court of Justice because it did not fall under Community law (first pillar, Art. 95, 300 TEC). Instead, the following agreements are based on second and third pillar provisions of the EU treaty (Art. 24 and 38 TEU). For more details, please refer to eucrim 1-2/2006, p. 3, 4 and eucrim 3-4/2006, p. 48, 49.

The new agreement of 2007 aims at providing a more permanent basis for the PNR system and is therefore valid for a period of seven years. The DHS and the EU also agreed on periodically reviewing the implementation of the legal framework. The new legal framework consists of three parts: (1) an agreement which was signed by both parties, the EU and the USA, (2) a letter from the USA to the EU in which it sets out assurances on the way in which it will handle EU PNR data, and (3) a letter from the EU to the USA acknowledging receipt of the assurances and confirming that, on this basis, it considers the level of protection of PNR data in the U.S. as adequate. The legal status of the letters and their legal effects are not clear. The US side seemingly wanted to avoid having the exchange of letters amount to a (binding) "agreement" under the terms of international public law.

The US letter reclassifies the EU PNR data required from air carriers into 19 types instead of 34 elements of data, as listed in the previous agreements. However, all but two of the new data fields virtually correspond to the old ones, so that air carriers are obliged to share nearly the same data with the US authorities as to date. The data will be used for the purposes of preventing and combating terrorism and related crimes as well as other serious crimes that are transnational in nature, including organised crime. The US was successful in its demands to keep data for a longer period of time and be able to pass on the data to other US authorities without tight restrictions. The DHS now may store data in "an ac-

tive analytical database for seven years after which time the data will be moved to dormant non-operational status” for a further 8 years. In fact, data can be retained for 15 years. Under the 2004 agreement, access to PNR data was limited for a period of 3.5 years and the data were even destroyed after that period if they had not been manually accessed during that period of time. It should be mentioned that the new retention periods also apply to EU PNR data collected under the agreements of 2004 and 2006 and that the DHS has not given a guarantee that the data will actually be deleted after 15 years(!).

The agreement, pending its entry into force, is applied provisionally by the EU Member States in conformity with existing domestic law. Ten EU Member States stated that they must comply with the requirements of their constitutional procedure before the agreement can finally be binding for them (cf. Art. 24 para. 5 TEU). The EU agreement with the US was necessary because the US Aviation and Transportation Security Act of 19 November 2001 introduced the requirement that airlines operating passenger flights to, from, or through the USA provide US authorities with electronic access to PNR data contained in their reservation and departure control systems upon request. A single EU agreement avoids the conclusion of 27 bilateral agreements between the Member States and the USA. However, negotiations turned out to be difficult because of privacy concerns due to European data protection law. The EU itself is also planning the establishment of a PNR system for the EU Member States.

➤ [eucrim ID=0701030](#)

European Parliament Strongly Criticizes New EU-US PNR Deal

The European Parliament examined the new PNR agreement of 2007 which was concluded between the EU and US administration. In a resolution adopted on 12 July 2007, the EP regrets that the agreement is “substantively flawed in terms of legal certainty, data protection and legal redress for EU citizens, in particular as a result of open and vague definitions and multiple possibilities for exceptions”. The MEPs further state

that the new deal fails to offer an adequate level of data protection and lacks democratic oversight since it has been concluded without any involvement of parliaments. The main concerns of the MEPs are:

- The processing of personal data from air passengers is only founded on non-binding assurances that can be unilaterally changed by the DHS at any given moment.
- The purpose limitation is not clear, as given in the US letter, which notes that PNR data may be also used for other purposes than the fight against terrorism.
- The data retention period has been extended from 3.5 years to 15 years and is retroactively applicable to data collected under the previous PNR agreements.
- The storage of data for seven years in “active analytical databases” may lead to a significant risk of massive profiling and data mining.
- The PNR agreement fails to define precisely which US authorities may access the PNR data.
- The transfer of data to third countries is already possible if DHS-specified conditions are met.

The European Parliament brought action against the initial PNR agreement of 2004 before the European Court of Justice for annulment (eucrim 2006, p. 3). There, it already addressed concerns regarding fundamental rights which the ECJ did not deal with. Due to the new legal basis in the second and third pillar, the EP has no competence to tackle the agreement.

➤ [eucrim ID=0701031](#)

In the context of the differentiated views between Europe and the USA in relation to the handling of transferred personal data for security reasons, a public seminar held in Brussels on 26 March 2007 is worth mentioning. The seminar entitled “PNR/SWIFT/Safe Harbour: Are Transatlantic Data Protected?” was organised by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) and aimed at fostering dialogue between the European Parliament and the US Congress. Background information as well as presentations from the experts can be retrieved via the following website:

➤ [eucrim ID=0701032](#)

EDPS Expresses Concerns in Letter to German EU Presidency

Shortly before the final conclusions of the new PNR agreement, the European Data Protection Supervisor, Peter Hustinx, tried to influence the negotiations – in vain. He expressed several privacy concerns on the planned deal in a letter (dated 27 June 2007) to the German Interior Minister, Dr. Wolfgang Schäuble, at that time responsible for the dossier on behalf of the German EU Council Presidency. Like the European Parliament, Hustinx’ main concerns were the extension of the time that passenger data are kept – effectively increased from 3.5 to 15 years in all cases – introducing a concept of “dormant” data that is without precedence; the accessibility of the data to a broad range of US agencies; the absence of an effective redress mechanism of EU citizens to challenge the misuse of their personal data; and the lack of a binding instrument due to the exchange of letters.

➤ [eucrim ID=0701033](#)

Data Protection Advisory Group Issues Guidelines on PNR Data

Based on the interim agreement of October 2006, the Art. 29 Working Party published an opinion which gives practical advice on who needs to provide what PNR data to US authorities how and when. The opinion replaces a previous one from September 2004. Its main objective is to give guidance so that information is transferred consistently – throughout the EU – by travel agents, airlines, and any other organisations providing travel services to passengers flying to and from the United States of America. An annex contains model notices of information to passengers about the processing of their personal data in the framework of the PNR agreement.

The Article 29 Working Party was set up under Art. 29 of the EC’s Data Protection Directive 95/46. It is an independent European advisory body on data protection and privacy. It is composed of representatives of the national data protection authorities, the European Data Protection Supervisor, and the European Commission.

➤ [eucrim ID=0701034](#)

World's Data Protection Commissioners: Global Standards to Protect Passenger Data Needed

The increasing use of passenger data for law enforcement purposes induced the world's data protection and privacy commissioners to address the related problems in a special resolution. In the resolution of 28 September 2007, the data commissioners called for the urgent need to establish global standards for safeguarding passenger data used by governments for law enforcement and border security purposes. They called on governments not to ignore international data protection safeguards, such as purpose limitation or proportionality, when passenger data are processed. The commissioners particularly emphasized that all government proposals to use passenger data must be (1) demonstrably necessary to address a specific problem; (2) demonstrably likely to address the problem; (3) proportionate to the security benefit; and (4) demonstrably less invasive of privacy than alternative options.

►eucrim ID=0701035

The Hague Programme Review

Second Report on the Implementation of The Hague Programme

On 3 July 2007, the Commission presented its second annual report which assesses achievements in 2006 as regards the implementation of the multi-annual Hague Programme and its action plan ("the scoreboard", for the first report see eucrim 3-4/2006, p. 46). The report assesses both the measures taken at the EU level as well as the transposition of the instruments (directives and framework decisions) by Member States. The overall assessment is mixed. As regards the adoption of measures at the EU level, the Commission is generally satisfied with the progress made in "first pillar" areas, such as fundamental rights, citizenship, civil justice, or migration policy. However, a lot of goals could not be achieved in the third pillar, e.g., police and customs cooperation, prevention of and fight against organised crime, and judicial cooperation in criminal matters. The scoreboard highlights that implementation at the national level of previ-

ously agreed initiatives leaves a lot to be desired. A number of Member States failed to comply with the deadline for transposing legal instruments into national legislation, or have delays in transposition (one or more years). For example, only 4 of the 10 new Member States ratified the Convention on the protection of the European Communities' financial interests and its protocols. Often, Member States fail to communicate sufficient information on their transposition measures so that several evaluation reports by the Commission had to be postponed (e.g., the Framework Decision on execution of orders freezing property or evidence). On balance, the rate of achievements in 2006 is lower than in 2005 (53 % compared to 65 % in 2005).

Commission Vice-President Franco Frattini, responsible for Justice, Freedom and Security regretted that the current unanimity rule in the decision-making process used for police and judicial cooperation in criminal matters blocks or delays many important measures. He therefore welcomed that the Intergovernmental Conference reached agreement to overcome the pillar structure and apply qualified majority voting as well as the co-decision procedure for this area in the future Reform Treaty.

►eucrim ID=0701036

Council Reply to European Court of Justice Reflection on Preliminary Rulings

At its meeting in April 2007, the JHA Council endorsed a letter of reply to the discussion paper on the treatment of questions for a preliminary ruling concerning the area of freedom, security and justice, as presented by the European Court of Justice in September 2006 (see eucrim 3-4/2006, p. 47). The Council welcomes the proposal for the introduction of an emergency preliminary ruling procedure. The Council suggests that this procedure could be applied in accordance with urgency criteria which are to be defined more precisely. The Council is not in favour of excluding the participation of all Member States and institutions at the first stage of the procedure (option I of the discussion paper), but prefers an accelerated procedure with their participation from the outset (option II of the discussion paper). The

Council invited the Court to submit a formal proposal for the introduction of an emergency preliminary ruling procedure on the basis of which further discussion could continue.

►eucrim ID=0701037

Court Drafts Urgent Preliminary Ruling Procedure

After the Council agreed on the principal direction of the emergency preliminary ruling procedure (see aforementioned news), the European Court of Justice tabled a concrete proposal for a respective amendment of its Statute and its Rules of Procedure. In principle, the urgent procedure must be requested by the national court or tribunal which refers a case relating to visas, asylum, immigration, or judicial cooperation in civil and criminal matters to the Court. In exceptional cases, the Court can apply the urgent preliminary ruling procedure of its own motion. If the case is dealt with under the urgent procedure, the Court suggests that written observations can only be submitted – within a certain time limit – by the parties to the main proceedings, the Member State making the reference, and the EU institution(s) affected by the reference, whereas all other Member States can be heard during the oral stage of the proceedings. The Court argues that this combination of a limited written procedure with an oral procedure best takes into consideration both an acceleration of references made in the areas of Title IV TEC and Title VI TEU and an appropriate participation of all Member States.

►eucrim ID=0701038

Advisory Group for Post-Hague Programme Starts Work

The high-level advisory group on the future of the European Union's home affairs policy, proposed by the German Presidency in January 2007 at the informal meeting of Home Affairs Ministers in Dresden (see eucrim 3-4/2006, p. 48), met twice during the German Presidency. The group consists of Vice-President Frattini, the six Interior Ministers of the current and upcoming trio presidencies (Germany/Portugal/Slovenia and France/Czech Republic/Sweden), one representative from the succeeding trio

presidency (Spain, Belgium, or Hungary), and experts from individual Member States as needed. The first meeting took place in Eltville, Hesse, on 20/21 May 2007. The following link contains background documentation on the work of the group, the results of the first meeting, and a draft timetable.

► [eucrim ID=0701039](#)

Legislation / Databases

By Sarah Schultz

New Database for National Case-Law in the European Union

The Network of the Presidents of the Supreme Judicial Courts of the European Union has created a public database for national case law. At “www.network-presidents.eu/rpcsjuie” the user has access to a meta search engine which enables simultaneous research in case law databases of the Supreme Courts in the participating Member States by providing access through the Internet. The goal is for the user to compare the solutions given by different Member States of the European Union to a single legal question. The database aims at improving mutual knowledge among European judges and lawyers in general. Furthermore, it simplifies comparative research on case law in the European Union. Research terms can be entered in one of the official languages of the European Union; the research result appears in the language of the relevant database. The case law of the Supreme Courts of the European Union is presented simultaneously.

► [eucrim ID=0701040](#)

Database “Taxes in Europe”

Since May 2007, the new online database “Taxes in Europe” has been providing citizens and businesses with information on the main taxes in force in the Member States. An interface offers information on approximately 500 different taxes, including personal income tax, corporate income tax, value added tax, and excise duties. For each individual tax, information is given on its legal basis, the assessment base, main exemptions, applicable rate(s), economic and statistical classification, as well as generated revenue. The information

is dependent on the information passed on to the Commission by the respective national authorities.

► [eucrim ID=0701041](#)

Institutions

Council

Portuguese Presidency: Priorities in Justice and Home Affairs

For the second half of 2007, the Portuguese Council Presidency set its priorities for the *area of justice*. The Portuguese Presidency aims at further working on the creation of electronic justice (see the following news), facilitating the procedures of European jurisdiction so that the European citizen receives quicker answers related to the area of freedom, security and justice, and further developing the institutional reforms of Europol and Eurojust. Another focus is the prevention of crime and recidivism. In this context, progress on the Framework Decision on simplified cross-border supervision of conditions and sentences of probation among EU Member States will play a role (see [eucrim 3-4/2006](#), p. 75). Generally speaking, Portugal would like to reach a better accord between enhancement of judicial/police cooperation (in particular in the fields of organised crime and terrorism) and respect for fundamental rights. Here, it will be crucial that negotiations on the Framework Decision on data protection in the third pillar can be completed by the end of the year.

In the area of *home affairs*, the Portuguese Presidency will continue to focus on the development of the EU’s immigration policy. It will also work on the connection of the new Member States to the Schengen Information System (“SISone4all”) and guide the transposition of the Prüm Treaty and Europol into the legal framework of the EU.

► [eucrim ID=0701042](#)

German Presidency: Successful Stock of Results

The German Justice and Home Affairs Ministers, Brigitte Zypries and Wolfgang Schäuble, presented with satisfaction the results the German Presidency

achieved in Justice and Home Affairs in the first half of 2007.

In the *area of justice*, the report emphasizes the political agreement on the Framework Decision on combating racism and xenophobia at the JHA meeting in April 2007 and the agreement on the Framework Decision on the transfer of sentenced persons at the meeting in February 2007. The German Presidency also laid down the basis for an exchange of experience and information among Member States regarding the growing danger of *violent videos and games* for minors. To this end, Germany had carried out a survey of the Member States that presents general and criminal law measures by which to deal with media that glorify violence, particularly age-rating systems and prohibitions that aim to protect minors. It is a valuable comparative law document. Finally, outcomes are reported in the field of e-justice in which Germany promoted the increased cross-border use of information technology in the justice sector (see [eucrim 3-4/2006](#), p. 76 and below).

Beyond the focus on migration policy, the transposition of the *Prüm Treaty* into the legal framework of the European Union is among the principal results listed in the *area of home affairs* (for more information on the Prüm Treaty see below, under the heading “Police Cooperation”). Furthermore, political agreement could be reached on the incorporation of *Europol* into the EU’s legal framework which will include the extension of Europol’s mandate to all forms of serious cross-border crime.

Progress could be made in view of one of the EU’s crowning achievements, i.e., ensuring the free movement of persons between the new Member States without border controls. One of the indispensable conditions is the States’ connection to the *Schengen Information System* (SIS); it is the Schengen State’s common data network which allows the storage and retrieval of data on criminals and illegal immigrants as well as on stolen objects. The Presidency was able to stay on schedule regarding the connection of the new Member States to the existing Schengen Information System, thus enabling the removal of checks at internal borders at the end of the year. Howev-

er, this implementation, also known as “SISone4all”, is only an interim solution. The forthcoming Presidencies need to work hard on the implementation of the second generation of the Schengen Information System (SIS II) which will replace the existent SIS I. Despite technical setbacks that led to several delays in the past, SIS II is envisaged to be operational by the end of December 2008. It will offer new capacities and functionalities, such as the possibility to store and transmit fingerprints and photos.

The home affairs report ultimately mentions the progress achieved concerning *data protection in the third pillar*. However, it is up to the Portuguese Presidency to finalise negotiations on the respective framework decision by the end of the year.

The following link leads to brochures which were published on the Presidency’s results in English, French, and German by the Ministries of Justice and Home Affairs.

► [eucrim ID=0701043](#)

OLAF

European Courts Further Clarify Information Policy in Fraud Cases

The European Courts delivered two judgments which concern press releases on internal investigations carried out by OLAF. The Courts specified their case law on the way the public can be informed about ongoing investigations. Both judgments are presented in the following:

Civil Service Tribunal: Public Has Interest in Becoming Informed

In its judgment of 2 May 2007, the Civil Service Tribunal of the European Union elaborated on which measures can be taken against an EU official during OLAF investigations and how the public can be informed about a concrete case (Case F-23/05 “Giraudy v Commission”). The applicant was Head of the Commission’s Office in France. As a result of allegations made against him concerning supposed irregularities adversely affecting the European Union’s budget, OLAF carried out an operation at the headquarters of the Commission’s

Office in Paris on 18 November 2002. The next day, the applicant was transferred to Brussels and denied all contact. The applicant also claims that a press release issued by the Commission on 21 November 2002 and widely circulated gave rise to considerable publicity unfavourable to him in the media. According to the applicant, OLAF’s final report of 6 May 2003 concluded that the allegations against him were groundless.

By his action, the applicant seeks to obtain compensation for the damage caused to him by these acts. In support of his action, he claims that he was transferred unlawfully, without justification, and in breach of the presumption of innocence. He also claims that the Commission’s spokesman did not observe the confidential nature of the inquiry and made public statements liable to damage his reputation.

The Court holds that the Commission has a wide margin of appreciation to decide on measures which secure the smooth conduct of OLAF investigations, taking into account the interest of the service. Therefore, the transfer of the applicant to Brussels for the duration of OLAF investigations on the premises in Paris was an appropriate measure and did not violate the principle of proportionality. The principle of the presumption of innocence was not applicable since the transfer was only a precautionary measure and not intended as a sanction on the applicant. However, the Court did find that the Commission did not fulfil its duty to pay regard to the official’s interests because the competent Commission service did not directly inform him about the lifting of the precautionary measure and, instead, the applicant found out about the measure indirectly through the press.

As regards a possible breach of confidentiality (cf. Art. 8 Reg. 1073/99) due to press communications, the Court holds that these statements must strictly respect the interests of the accused, on the one hand, but, on the other, attention must also be paid to the need to inform the public about the fight against irregularities and fraud. The Court states that a culture of responsibility has grown inside the Community institution, which responds particularly to the wish of the

public to be informed and reassured that dysfunctions and cases of fraud are being identified and, if discovered, duly eradicated and sanctioned. The Court further says that this requirement carries with it the consequence that officials and other agents holding management positions in an administration such as the Commission must take into account the existence of a well-justified need to communicate certain information to the public. While the Court has no objection as to the information given on the opening of the case, it does criticize the Commission for not having adequately informed the press when the allegations against Mr. Giraudy proved groundless following OLAF’s final report. This would have been a necessary counterbalancing act for the rehabilitation of the person under suspicion.

The case was referred from the Court of First Instance (CFI) to the EU’s Civil Service Tribunal after it had taken up its functions at the end of 2005. The new specialised court, composed of seven judges, is called upon to adjudicate in disputes between the European Union and its civil service, a jurisdiction formerly exercised by the Court of First Instance. Its decisions will be subject to appeal on questions of law to the CFI. The Tribunal is based on Art. 220 and 225a, as amended by the Treaty of Nice, which provides for the creation of judicial panels to be attached to the CFI in order to exercise the judicial competence of this court in specific areas.

► [eucrim ID=0701044](#)

Court of First Instance: Indirect Information Can also Cause Damage

In the Case T-259/03, the European Court of First Instance (CFI) had to judge whether the applicant could seek compensation for non-material damage because leaked OLAF information brought about a negative press echo. In this case, OLAF had carried out internal investigations against a former member of the European Court of Auditors. After the investigation had been completed, certain items appeared in the European press referring to the applicant and the investigation against her, such that the applicant considered them disparaging and offensive. In addition, OLAF issued

a press release concerning the investigation and also included a reference to it in its annual activity report. Although she was not referred to by name in the documents made public by OLAF, the applicant feels that the information given made it particularly easy to identify her, so that it was clear who the person in question was. In addition, after the investigation had been completed, the applicant requested OLAF to disclose to her the file, its final report, and any other information concerning its findings in the accusations against her. However, OLAF refused to disclose anything to her at all. By her action, the applicant sought compensation for the non-material damage and harm to her health which she claims to have suffered.

The Court of First Instance awarded only a small part of the claimed non-material damage to the applicant. It found that the EC data protection law (Regulation 45/2001) had been violated because of two illegalities: First, specific information concerning the applicant was leaked by OLAF; and, second, the publication of the OLAF press release on the case enabled the identification of the applicant and publically confirmed certain information about the accusations. As a result, the CFI confirmed that even indirect information which does not refer explicitly to a specific person can cause liable behaviour on the part of EC institutions and bodies. The Court also held that the applicant had no opportunity to obtain information on the allegations against her in a timely manner, thus infringing her defence rights; however, the CFI takes the view that this measure did not constitute an additional damage. The remainder of the recourse claim was rejected by the CFI.

► eucrim ID=0701045

OLAF Activity Report 2006

The seventh Activity Report provides insight into OLAF's mission and working methods as well as its operational activities (including case studies) for the period from 1 January 2006 to 31 December 2006. In its foreword, Director General Franz-Hermann Brüner points out the internal reorganisation of the office which provides for four Directorates from 1 September 2006 onwards.

The reorganisation takes up recommendations made by the European Court of Auditors which are contained in the special report No. 1/2005 concerning the management of OLAF (see eucrim 1-2/2006, p. 7). The new structure is designed to enable the office to increase its focus on core activities and to improve the management and supervision of its operational work.

The report shows that the volume of information on fraud which is passed on to OLAF is constantly on the rise. However, decisions on the opening of cases have declined in comparison to previous years. The underlying figures mirror OLAF's focus on more serious, complex cases. Furthermore, the different types of cases show that OLAF tends to concentrate more on its own investigations (internal and external cases), rather than simply assisting national authorities (coordination and criminal assistance cases). For the first time, the number of OLAF's own investigations equals the number of cases in which OLAF assisted national authorities. Direct expenditure cases, including external aid, are the most significant area in which OLAF opens cases.

Cooperation with OLAF's partners in the fight against fraud makes up a large part of the report. The report highlights the well-working agreement between the European Commission and Philip Morris International. By the end of 2006, all but one of the 25 Member States were participating in this agreement. The multi-year agreement with the American tobacco giant has established an efficient system of combating the smuggling and counterfeiting of cigarettes; it includes the payment of 1 billion dollars to the European Community and the Member States over a period of 12 years (see eucrim 3-4/2006, p. 57). The report also gives examples of successful cooperation with international organisations such as the UN and the World Bank. Lastly, increasing and more effective cooperation with the other EU bodies involved in fraud cases, Europol and Eurojust, is notable. Director General Brüner stated that "greater and more effective cooperation both between European bodies and internationally will be an essential part [in the coming years]".

The OLAF Activity Report must be distinguished from the European Commission's annual "Report on the protection of the financial interests of the Communities – fight against fraud" which is being published at the same time. The latter is analysed below under "Specific Areas of Crime – Protection of Financial Interests".

► eucrim ID=0701046

First Joint Seminar of OLAF and Eurojust on "Fraud and Corruption"

An example of the strengthened cooperation of OLAF with EU bodies is the following event: Four years after the signing of a Memorandum of Understanding on 14 April 2003, OLAF and Eurojust, the EU's Judicial Cooperation Unit, held their first joint seminar on "Fraud and Corruption Affecting European Communities' Financial Interests" in Brussels on 26/27 March 2007. Together, they examined corruption, preventive measures (such as the development of an interactive e-mailing system and electronic whistle-blowing), and case studies of international corruption. Furthermore, practical arrangements in the cooperation and exchange of information between Eurojust and OLAF were made. The background and intention of this seminar was to improve relations with national authorities and other EU bodies, namely the European Judicial Network (EJN) and Europol, as well as the future cooperation between them all. Mr Siim Kallas, Vice-President of the European Commission responsible for Administrative Affairs, Audit and Anti-Fraud, stressed that the conference was a signal that there has been a significant improvement in the daily operational cooperation between OLAF and Eurojust.

► eucrim ID=0701047

Eurojust Joins OAFCN

During the aforementioned seminar, the full body of the OLAF Anti-Fraud Communicators' Network (OAFCN) approved the request from Eurojust to join the network. The OAFCN is an information and communication tool designed to spread information on the fight against fraud and corruption to the general public and professionals. It

links the major players involved in the fight against fraud and irregularities affecting Community financial interests at the EU and national levels. The OAFCN includes the OLAF Spokesman, spokespersons responsible for public relations, and information officers in the national investigation services with whom OLAF cooperates in the Member States and Candidate Countries.

The objectives of the network are:

- Preventing fraud through the “free flow” of information: “prevention is better than cure”.
- Creating a permanent dialogue between the OLAF’s External Communication Unit and its counterparts in the national investigation services.
- Informing European citizens of what OLAF and its partners in the Member States are doing both jointly and individually in order to protect their financial interests. This includes making all parties concerned aware of the need for an anti-fraud program that is global, balanced, and effective throughout the territory of the European Union.
- Providing joint media coverage to the public relating to the fight against fraud and irregularities to the detriment of the European Union’s financial interests with the aim of illustrating OLAF’s operational activities with national investigation services of the Member States and the success achieved by means of administrative cooperation within its operational scope.

► eucrim ID=0701048

EDPS Opinion on OLAF Reform Proposal

The European Data Protection Supervisor (EDPS) published an opinion on the Commission’s proposal to reform OLAF’s basic legal framework – Regulation No. 1073/99 (more details on the reform proposal available in eucrim 1-2/2006, p. 6-8, and 3-4/2006, p. 50). The EDPS assessed the proposal in the light of data protection and privacy rights since the proposal sets forth new rules on the conduct of OLAF investigations and their significant impact on the processing of personal data. He examined whether the proposed rules correspond with Regulation No. 45/2001, in particular, as regards the basic rights of the data subject – the right of informa-

tion, the right of access and the right of rectification. Regulation 45/2001 is the basic EC law which protects personal data *within* Community institutions and bodies; it establishes the same safeguards as the data protection Directive 95/46 which is addressed only to the Member States.

The EDPS detected a number of shortcomings which reveal that the rules in question do not reach the minimum standard of the data protection Regulation. Since the new OLAF Regulation would be the *lex specialis vis-à-vis* the general framework contained in Regulation 45/2001, the EDPS fears a watering down of data protection standards in the context of OLAF investigations. The EDPS makes a number of recommendations in order to address these shortcomings. He suggests that the proposal should include further provisions: One provision, for instance, should govern the exchange of information with third countries, which should be allowed only if the third country ensures an adequate level of protection of personal data. Furthermore, an additional paragraph should guarantee the confidentiality of whistleblowers.

► eucrim ID=0701049

EDPS Verified “Follow-up” Data Processing Operations of OLAF

Beyond the above-mentioned opinion, the European Data Protection Supervisor (EDPS) issued a second significant opinion concerning OLAF. This time, the opinion did not refer to a legislative proposal (consultative function), but was a preliminary check on a specific data processing measure within the anti-fraud office (supervision function). Upon receipt of a notification from the Data Protection Officers, who are to be appointed in each institution or body, the EDPS checks whether the operations are in line with the above-mentioned Regulation 45/2001. Requests for prior checking are made when data processing operations of Community institutions or bodies are likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope, or their purposes (cf. Art. 27 of Reg. 45/2001). The OLAF case was submitted to the EDPS

by the OLAF data protection officer. The data processing operations in question referred to the so-called “follow-up phase” of OLAF investigations. This stage normally begins after investigations have been completed; a report on the findings of an investigation normally contains recommendations for follow-up actions. In this stage, OLAF officials process personal data in order to monitor whether the competent Community and national authorities have carried out the recommended measures. These follow-up measures can be of judicial nature (e.g., criminal proceedings before national courts), disciplinary nature, administrative nature (e.g., exclusion of future funding, withdrawal of importer privileges), or financial nature (principally recovery of debts). Depending on the type of follow-up measure, different units within OLAF process the data. The EDPS makes a number of recommendations which OLAF should comply with in order to correctly apply the data protection rules of Reg. 45/2001. In particular, OLAF should evaluate the long storage of the data (20 years after the follow-up has been completed), ensure that data transfers take place only “if necessary”, and implement measures which safeguard the data subject’s rights of information and access.

► eucrim ID=0701050

Europol

Europol Work Programme 2008

The Council endorsed the Europol Work Programme for 2008. The Work Programme is Europol’s annual business plan. Its purpose is to communicate the organisation’s activity and objective-based business planning to the EU Member States in a transparent and structured manner. The Work Programme defines Europol’s objectives in four key business areas, i.e., (1) operations, (2) strategy and monitoring of overall business performance, (3) logistics, and (4) management activities. The programme is based on Art. 28 of the Europol Convention. It must first be unanimously adopted by the Management Board and then endorsed by the Council.

► eucrim ID=0701051

Bulgaria and Romania Become Full Members of Europol

On 1 August 2007, the Europol Convention and its Protocols entered into force for Bulgaria and Romania. Both countries are now full members of the European police office. Accession to the European Union does not automatically lead to membership in Europol. The respective new Member State must ratify the Europol Convention and the accession be agreed upon by a Council decision. The Council decision involving these two countries was taken on 23 July 2007. Since 2002 and 2003, Bulgaria and Romania have been cooperating with Europol on the basis of operational agreements and both countries already have liaison officers posted at Europol's headquarters in The Hague.

►eucrim ID=0701052

Management Board Decisions on Implementation of Protocols

The entry into force of the three protocols amending the Europol Convention in spring (see eucrim 3-4/2006, p. 50, 51) required further implementation decisions by the Management Board of Europol.

The first decision of the Management Board in the context of the implementation of the protocols refers to the establishment of control mechanisms for retrievals – including attempted retrievals – from the Europol computer system of collected information as amended by the “Danish protocol” of 2003.

►eucrim ID=0701053

The second decision contains the modalities for the association of third party experts with the activities of Europol's analysis groups. The association was also made possible by the “Danish protocol”. To this end, the annex of the decision contains a model arrangement.

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After the protocol of 2002 enabled Europol officials to participate in joint investigation teams in a support capacity, the third decision of the Management Board lay down the rules governing the arrangements which regulate the administrative implementation of participation in joint investigation teams.

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Finally, the Management Board adopted rules on public access to Europol documents. The access to Europol documents for any EU citizen is based on the new Article 32a of the Europol Convention, which was introduced by the mentioned “Danish Protocol”. The new article applies the right to access documents relating to police and judicial cooperation in criminal matters as required by Article 41 of the EU Treaty. The implementing rules define the principles, conditions, and limitations on the grounds of public and private interests, governing the public right to access to Europol documents which will be in line with the respective regulation for the access to European Parliament, Commission and Council documents (cf. Art. 255 of the EC Treaty). The rules aim at promoting good administrative practice on the access to documents. They shall contribute to more openness and greater legitimacy in the area of justice and home affairs.

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The Management Board is one of Europol's organs which – generally speaking – exercises a more political control. The Europol Convention enumerates a number of tasks, including help in determining Europol's priorities, unanimous determination of the rights and obligations of liaison officers, adoption of data-processing rules, preparation of rules for work files, and the examination of problems brought to its attention by the joint supervisory body. The Board is comprised of one representative of each Member State; each Member State has one vote. It meets at least twice a year. Each year, it unanimously adopts a report on Europol's activities and a report on its future activities, taking into account the Member States' operational requirements and the budgetary implications for Europol.

Council Conclusions on Europol Participation in Joint Investigation Teams

After the entry into force in spring of this year of the above-mentioned Protocol of November 2002 made it possible for Europol officials to participate in Joint Investigation Teams (JITs), experts from Member States, Europol, and Eurojust met several times in order to enhance the use of this investigative tool in practice.

The JHA Council seized this opportunity and encouraged the Member States to invite Europol to participate in JITs, whenever possible and useful.

►eucrim ID=0701057

Europol also strengthened cooperation at the international level which show the following three news items:

Cooperation Agreement with Australia Enters Into Force

The strategic and operational cooperation agreement between Europol and Australia entered into force after Australia ratified the agreement on 27 September 2007 (further details on the agreement in eucrim 3-4/2006, p. 50).

►eucrim ID=0701058

Europol Tightens Cooperation with Interpol

The Director of Europol, Max-Peter Ratzel, and the Secretary-General of Interpol, Ronald K. Noble, agreed on measures to further improve cooperation between the two police organisations. They signed a joint initiative on the protection of the euro and discussed a better exchange of information. The relationship between Europol and Interpol is regulated by an operational cooperation agreement of 2001 which makes it possible to exchange vital information on organised crime and criminals, assist in training initiatives, and provide relevant operational assistance to member countries. An Interpol liaison officer has been working at the premises of Europol since the beginning of 2007.

►eucrim ID=0701059

Europol Cooperation with US Postal Inspection Service

Europol further improved its cooperation with the USA by signing a liaison agreement with the US Postal Inspection Service (USPIS) in September 2007. The agreement makes it possible for a liaison officer of the USPIS to be permanently seconded to Europol. The USPIS is a federal law enforcement agency assigned with the task of investigating “crimes that may adversely affect or fraudulently use the U.S. mail, the postal system or postal employees”. In order to fulfil this mission, the agency has approximately 2000 criminal inves-

tigators, an armed uniformed division, forensic laboratories, and a robust communications system.

➤ [eucrim ID=0701060](#)

Europol Annual Report 2006

Europol published its annual report relating to its activities in 2006 (for the annual report 2005, see [eucrim 1-2/2006](#), p. 8). The second part reports on the main achievements in specific priority crime areas in 2006, the definitions of which are based on the new tool of the Organised Crime Threat Assessment, OCTA, (see [eucrim 1-2/2006](#), p. 14 and below under “Specific Areas of Crime – Organised Crime”). These crime areas are: organised crime groups, drug trafficking, crimes against persons and facilitated illegal immigration, financial and property crime (focusing on money laundering), counter-terrorism, and euro counterfeiting.

According to the report, organised crime groups in 2006 continued to increase their level of sophistication as well as the use they make of legitimate business structures. As regards their means of communication and cooperation, they benefited heavily from globalisation. They employ the latest communication technologies to maintain and expand their national and international links.

Closely connected to organised crime groups are financial crimes, which are the most favoured crime of these groups after drug trafficking. Financial crimes range from VAT and excise fraud to money laundering. Hence, Europol discovered that organised criminal networks are increasingly involved in counterfeiting and the smuggling of cigarettes – an activity which considerably damages the EU’s budget. However, Europol, other EU institutions, and Member States law enforcement authorities were successful in taking counter-measures. Joint operations with customs authorities succeeded in depriving criminals of their illicit proceeds. Europol’s focus on tackling financial crimes is intended to support cross-border money laundering investigations, recover the proceeds of crime, combat missing trader intra-community fraud, and link suspicious transactions reported in other Member States with offences committed in individual countries.

In general, the Member States and Europol partners were satisfied with Europol’s products and services in combating serious crime. Particular success was able to be achieved in the Western Balkans. Beyond specific crime areas, the report provides information on Europol’s internal working structures, development of budget and staff, Europol’s cooperation agreements, etc. The fifth part contains an overview of the liaison bureau activities of the 25 EU Member States as well as those of third-country authorities (Bulgaria, Romania, Norway, Switzerland, Colombia, and various US authorities).

➤ [eucrim ID=0701061](#)

Europol’s New Footing: Council Conclusions

The Council dealt with the Commission proposal on a Council Decision establishing Europol (for more detail, see [eucrim 3-4/2006](#), p. 51). At its meeting in June 2007, the Council endorsed the replacement of the Europol Convention by the Decision which will incorporate Europol into the legal framework of the EU. The main changes would be the extension of Europol’s mandate to all forms of serious cross-border crimes (thus no longer being restricted to organised crime), the financing of Europol from the general budget of the EU, and the application of EC Staff Regulations and the Protocol on the Privileges and Immunities of the European Communities to Europol staff.

In their conclusions, the Home Affairs Ministers defined some key points for future implementation: the Council Decision shall be finalised by 30 June 2008 at the latest, and Europol shall be funded from the Community budget as from 1 January 2010. However, some legal issues remain to be solved, such as the lifting of immunity for Europol officials when participating in operational activities (especially in Joint Investigation Teams (JITs)), the principle of staff rotation, the possibility for Europol staff participating in JITs to receive instructions from the team leader, as well as general budgetary consequences. Therefore, the Commission and Europol still need to present a road map to solve these issues.

➤ [eucrim ID=0701062](#)

Europol’s New Footing: Opinion of the Joint Supervisory Body

After the European Data Protection Supervisor (see [eucrim 3-4/2006](#), p. 51, 52), the Joint Supervisory Body of Europol (JSB) also presented an opinion with respect to the Commission proposal for a Council Decision establishing Europol. The assessment of the JSB especially takes into account the implications of the draft for the information structure of Europol. In its examination of the Commission proposal, the JSB makes specific suggestions on individual articles. The opinion concludes that “[t]he proposed Council Decision establishing Europol contains some fundamental changes in comparison with the Europol Convention [and that] the JSB understands that there might be a need for flexibility, but such flexibility should comply with the necessary high data protection standards and the principle of proportionality.”

The Joint Supervisory Body of Europol is established by Art. 24 of the Europol Convention. Since Europol handles a large amount of sensitive personal data, the main task of the JSB is to ensure that the rights of the individual are not violated by the storage, processing, and utilization of data at Europol. By means of regular inspections, the JSB also monitors whether Europol complies with the data protection provisions enshrined in the Europol Convention. The JSB is made up of up to two representatives of the national data protection authority of each Member State. Members are appointed to the JSB by their respective Member States and serve for a period of five years. The JSB is an independent body, i.e., its members may not receive instructions from any other body.

➤ [eucrim ID=0701063](#)

Eurojust

Eurojust Signs First Agreement with International Organisation

Mr. Michael Kennedy, President of Eurojust, and Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC), signed a letter of understanding on cooperation. The agreement with the ICC, which is located in the same building in The Hague as Eurojust, is the first agreement with an inter-

national organisation beyond the existing agreements with other EU bodies, such as OLAF or Europol. Both parties agreed on enhancing contacts, exploring areas of cooperation, and exchanging experiences of a non-operational nature. The sharing of general and specific information about serious and organised crime which may be of mutual interest and benefit is a particular aim. The letter of understanding could be the basis for a more formal cooperation agreement in the future.

► [eucrim ID=0701064](#)

Annual Report 2006

Eurojust presented the fifth Annual Report which describes its activities during the calendar year 2006. The report provides valuable insight into the practicalities of judicial cooperation within Europe and shows that the work of Eurojust has been of true benefit. In his foreword, the President of Eurojust, Michael Kennedy, noted an increased caseload: the number of cases referred to the College increased by 31 % over 2005. He also emphasises that the continued growth in referrals reflects that there is an increased willingness on the part of national prosecution and investigation authorities to collaborate with Eurojust in fighting cross-border crime and that there is a continuing increase of referrals by the new Member States which joined the EU in 2004. Likewise, Eurojust's work with non-EU states is steadily increasing and the list of contact points is growing. However, Michael Kennedy reiterates the observations made in previous years that the Member States do still not make full use of Eurojust.

The report covers the structure and legal environment of Eurojust, its relations with national authorities, other EU bodies and third states, Eurojust's development relating to administration, an assessment of performance against the objectives set for 2006, and Eurojust's objectives for 2007 and 2008. A major part of the report is dedicated to casework. It also summarises the discussions on the future of Eurojust (see also [eucrim 3-4/2006](#), p. 53).

In its discussion of the legal environment, the report stated that all Member States but Greece have implemented the

Council Decision of 22 July 2003 establishing Eurojust. However, the report also confirms that the level of implementation is uneven: First, in some Member States the Decision has been codified by law, in others it has been enacted via an administrative directive. Second, the scope of powers of National Members at Eurojust is also uneven, a factor which can affect the ability to issue letters rogatory or their specific powers in cases of emergency.

In addition, the report regrets that a number of key legal instruments in the field of criminal justice have not been put into effect in the Member States, e.g., the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union and its Protocol of 16 October 2001 on mutual cooperation in banking information, as well as the Council Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence.

The report discusses the cooperation of Eurojust with the European Judicial Network and with OLAF, respectively. As regards the relationship with OLAF, President Kennedy points out that there are still many opportunities to be developed. Eurojust and OLAF aim at replacing the existing Memorandum of Understanding, which now governs their relationship, by a formal cooperation agreement which would provide a clearer legal basis for the exchange of personal data in the context of casework cooperation. The new agreement is planned to be concluded in 2007.

The section on casework illustrates the results achievable by practical cooperation. Interestingly, most cases which were referred to Eurojust concerned drug trafficking and fraud. Some examples show how Eurojust is involved in cases which directly affect the EC's financial interests. In a large-scale VAT fraud case, Eurojust supported investigations against Hungarian suspects who, on behalf of Slovak and Dutch companies, imported tons of sugar from Croatia without paying VAT. In a fraud case about illegal activities in an EU programme in the Ukraine, OLAF requested the assistance of Eurojust in order to find the best place of jurisdic-

tion for prosecution, since the criminal activities were linked to Belgium, the Czech Republic, Luxembourg, Portugal, the UK, and the Ukraine.

► [eucrim ID=0701065](#)

Council Conclusions on Eurojust Annual Report 2006

At its meeting in June 2007, the Justice and Home Affairs Ministers examined the above-mentioned Eurojust annual report and adopted 18 conclusions. The Council, inter alia, calls on Member States to refer complex and serious cases to Eurojust by involving the unit at an early stage of investigations, where possible. It also recommends that Member States provide Eurojust with high-quality, up-to-date information about ongoing investigations concerning serious and organised cross-border crime. In respect of Eurojust's capacity, the Council thinks that further development of the Case Management System at Eurojust should be prioritised, in particular in view of better analysis. As regards the relationship between Eurojust and OLAF, the Council agrees with the annual report that the conclusion of a (formal) cooperation agreement is important. The Council invites the Commission to present the planned Communication on the future of Eurojust and the European Judicial Network (EJN), which should take into account the practical application of the Eurojust Decision in the light of five years of experience.

► [eucrim ID=0701066](#)

European Union Agency for Fundamental Rights

By Julia Macke

Agency Started Work

As reported in [eucrim 3-4/2006](#), the new European Union Agency for Fundamental Rights (FRA) was ceremonially inaugurated and took up its work on 1 March 2007. The agency first becomes operational in the field of racism and xenophobia as covered by the previous mandate of the European Monitoring Centre on Racism and Xenophobia, EUMC. With regard to other areas of fundamental rights, it will gradually build up knowledge and expertise as required under its

mandate and future work programmes. The agency is expected to be fully operational in 2008 (more details on the establishment of the FRA and its mandate in: eucrim 3-4/2006, p. 53-55).

➤ eucrim ID=0701067

Agency's Work Programme for 2007

On 13 July 2007, the Work Programme of the FRA for 2007 was adopted by the FRA Management Board. As already reported, the Agency initially takes up its work in the fight against racism, xenophobia, and related intolerance until the adoption of the Agency's first Multi-Annual Framework by the Council. Until then, the Agency will carry on with its data collection on (1) racism and xenophobia through the European Racism and Xenophobia Information Network (RAXEN), (2) the content, structure, and expected outcome of Holocaust Education, (3) the situation regarding homophobia, and (4) on the situation regarding children's rights in the EU. Corresponding research is planned as well as a series of communication and cooperation activities. Furthermore, the FRA will publish several reports, surveys, and papers, e.g. an annual report, different progress reports, and so-called bulletins.

➤ eucrim ID=0701068

Commission's Proposal for a Five-Year Multiannual Framework Now Out

On 12 September 2007, the European Commission finally presented a proposal for a Council decision regarding the adoption of a Multiannual Framework for the period 2007–2012 establishing the thematic areas of the agency. As to the planned thematic areas, the proposal explicitly mentions racism, xenophobia and related intolerance, discrimination, compensation of victims, prevention of crime and related aspects relevant to the security of citizens, protection of children, immigration and integration of migrants, asylum, visa and border control, participation in the Union's democratic functioning, human rights issues relating to the information society, and access to efficient and independent justice. The Commission's proposal has been transmitted to the Council for adoption after consultation of the Eu-

ropean Parliament. The framework is expected to be in place by 2008.

➤ eucrim ID=0701069

Bulletins Inform General Public

One major tool by which the FRA will regularly inform the public is the release of bulletins. They contain information about its work, the human rights developments in the European Union, the human rights situation in EU Member States and accession countries, and forthcoming events. These bulletins will be published six times a year in English, French, and German. The latest issue can be found under the following link:

➤ eucrim ID=0701070

First Major Report Published

On 28 August 2007, the FRA published its first major report. In accordance with its current task (see above), the report covers developments on racism and xenophobia in the EU Member States in 2006. According to the data collected in this report, unequal treatment continues in employment, housing, and education. Furthermore, the figures for racist crime are up in a number of EU countries. Nevertheless, the FRA notes that both the EU's anti-discrimination legislation and the EU's legislation on racial equality are gradually stimulating positive change. In this context, see also the EU's new Framework Decision on Racism and Xenophobia below.

➤ eucrim ID=0701071

Bilateral Cooperation with Council of Europe Planned

The new EU Agency for Fundamental Rights (FRA) is also named in the recently signed Memorandum of Understanding between the Council of Europe (CoE) and the European Union (more details below under the section "Council of Europe – Foundations"). The Memorandum underlines that the FRA strengthens the European Union's efforts to ensure respect for fundamental rights within the framework of the EU and Community law and that it respects the unity, validity, and effectiveness of the instruments used by the CoE to monitor the protection of human rights in its Member States. As to the Memorandum, the concrete cooperation between the

CoE and the Agency will be the subject of a bilateral cooperation agreement between the CoE and the Community.

Negotiations on a cooperation agreement between the two organisations have already begun. With regard to the planned cooperation agreement, CoE Secretary General Terry Davis – on the occasion of the inauguration of the Agency – especially welcomed that the mandate of the agency, which is clearly limited to the EU's distinct legal order, respected the pre-eminent role of the CoE and its European Court of Human Rights in defending human rights in Europe. Thus, the concerns which representatives of the CoE expressed before the establishment of the Agency seemed to have been put to rest (cf. eucrim 3-4/2006, p. 53-55).

➤ eucrim ID=0701072

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Commission Recommends Accession of Bulgaria and Romania to PFI Law

The Commission brought in a recommendation for a Council Decision in order to determine the date on which the Convention on the protection of the EC's financial interests (PFI) and its three additional protocols should enter into force for Bulgaria and Romania. The decision of the Council is foreseen in the 2005 Act of Accession of Bulgaria and Romania, by virtue of which the two new EU Member States acceded to these instruments. The Council shall act on a recommendation of the Commission, after consulting the European Parliament. This is a simplified procedure compared to the former one under which specific accession protocols to the PFI agreements had to be concluded first; this would have implied ratification by all 27 Member States.

➤ eucrim ID=0701073

Commission Report 2006 on the Protection of the Financial Interests

In 2006, the number of irregularities increased in the areas of agriculture, co-

hesion and pre-accession funds, and decreased for own resources (i.e., customs duties, agriculture duties, and sugar levies) and structural funds. This is the result of the Commission 2006 annual report on the “protection of the financial interests of the Communities – fight against fraud”. The Report compiles the most significant measures undertaken by the Member States and the Commission to prevent and fight fraud against the EU budget more efficiently. This year’s Commission report focuses especially on risk analysis and risk management, debarment (blacklisting) databases, warning systems involving whistleblowers, and mechanisms for recovery by offsetting under national law.

An annex gives a more detailed sector-by-sector explanation on the irregularities. It shows, for instance, that, in the politically most controversial field of agricultural expenditure, the number of irregularities reported was up 3 % on the previous year whereas the total amount involved in 2006 was 15 % less (it was about €87 million compared to approximately €102 million in 2005). In the field of own resources, the number of cases of fraud and irregularities detected and reported (cases concerning more than €10,000) was down 12 % on 2005, but the amount affected by irregularities rose by over 7 % (from €328 million to €353 million). The statistics are based on notifications by the Member States which are obliged to make them by Community law. Since the Commission depends on the reporting discipline of the Member States, the picture may be inexact. In this context, Siim Kallas, Commissioner responsible for Administrative Affairs, Audit and Anti-Fraud, called on Member States to deliver information more precisely, completely, and in a timely manner.

A second annex to the annual Commission report lists national measures of the Member States which give effect to Art. 280 TEC, i.e., measures to combat fraud and all other activities affecting the EC’s financial interests. The list is based on answers to an annual questionnaire issued by the Commission. Unlike questionnaires in previous years, this year the Commission did not ask for all measures taken by the Member States in 2006, but

focused instead on the aforementioned topics, thus allowing for a more detailed analysis of special themes. The topics will now change from year to year. The Commission report was presented on 9 July 2007, alongside the OLAF Activity Report (for the OLAF Activity Report see above; for the 2005 Commission Report, see eucrim 1-2/2006, p. 10).

►eucrim ID=0701074

Commission Progress Report on EU Anti-Fraud Strategy

After having presented a communication on a strategy to fight fiscal fraud at the EU level in May 2006 (COM(2006) 254) and after the Council had given guidelines on how to proceed with this strategy in November 2006 (see eucrim 3-4/2006, p. 57), the Commission presented a progress report in May 2007 on the work done so far. The Commission and the Member States discussed the topics which had been given priority by the Council within the framework of a new expert group (Anti Tax Fraud Strategy expert group). Discussions so far have dealt particularly with measures related to intra-Community supplies, but the experts will also consider other topics raised in the Commission’s Communication, such as the role of OLAF in the support of operational and intelligence activities. There seems to be common agreement in the group that the potential impact on business of the possible measures must be examined carefully. Furthermore, some guiding principles of future anti-fraud strategy have been considered. The Commission’s progress report served as preparation for the Council conclusions on combating tax fraud which are reported on below under “Tax Fraud/VAT”.

►eucrim ID=0701075

EESC Opinion on Strategy to Fight Fiscal Fraud

In March 2007, the European Economic and Social Committee (EESC) published its opinion on the aforementioned Communication from the Commission “concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud” (COM(2006) 254). The EESC supports the Commission’s initiatives to combat fiscal fraud, but

regrets that they have not yet been adequately backed up by cooperation from the Member States. It therefore views the Commission’s proposal to ensure increasingly efficient cooperation between national anti-fraud bodies as being an absolute priority. This could be achieved by setting up a network of police forces and investigative bodies, allowing them to share available databases. The EESC also recommends that the technical and legal issues involved are carefully examined.

In addition, the EESC encourages the Commission to make full use of OLAF’s current powers, under which the European anti-fraud body holds important functions. It urges the Commission to assess whether OLAF has adequate means to perform its official tasks. Finally, the Committee backs up the proposal to reconsider VAT – something it has itself advocated on previous occasions – believing that a think-tank should be formed to envisage replacing VAT, provided that any new tax will not lead to increased payments by businesses or citizens.

►eucrim ID=0701076

Kick-Off for Worldwide Treaty on Illicit Trade in Tobacco

In July 2007, governments agreed to start negotiations on a new international treaty to combat global trade in illicit tobacco products. The treaty will be negotiated within the framework of the World Health Organisation (WHO) and complement the WHO Framework Convention on Tobacco Control (FCTC). The FCTC, which is the first global health treaty negotiated under the auspices of the WHO, aims at curbing the tobacco epidemic with a package of measures. It not only addresses health aspects but also obliges the State Parties to adopt and implement effective measures to eliminate illicit trade, illicit manufacturing, and counterfeiting of tobacco products (Art. 15 of the FCTC).

In the preparatory phase of the new instrument, an expert group recommended the adoption of a protocol on combating illegal trade in cigarettes and other tobacco products which contains a comprehensive set of measures in addition to Art. 15 of the FCTC. The protocol should include:

- an international tracking and tracing system for tobacco products;
- markings and codes on packs, cartons, and master cases;
- a system of record keeping for all imports and exports of tobacco products;
- obligations for tobacco manufacturers to control their supply chain, including penalties for those who fail to comply;
- the criminalization of participation in illicit trade in various forms;
- increased international cooperation in the sharing of information and prosecution of offences.

The first results of the negotiations are expected in 2010. OLAF will contribute by participating in the intergovernmental negotiating body. It is expected that the protocol can further facilitate the investigative and operational activities of OLAF and its operational partners in the EU Member States. The hope remains that the protocol will be equally as successful as the FCTC which has been ratified by 149 countries so far and entered into force on 27 February 2005, less than two years after it was opened for signature in June 2003.

► [eucrim ID=0701077](#)

Practice: OLAF Detects Fraud Involving Citrus Fruit Aid

OLAF and Italian authorities discovered a fraud scheme directed against Community aid for the processing of citrus fruits. This scheme allows economic operators to obtain Community aid if citrus fruits grown in the EU are processed into juice. After carrying out on-the-spot checks and examining the company's books and registers, the investigators found out that the supposed production of juice in Italy and the claimed transactions were completely fictitious. The fraud may have damaged the EU budget by up to €50 million.

► [eucrim ID=0701078](#)

Practice: Illegal Funding in the Agricultural Sector Discovered

In close cooperation with OLAF, investigators in Germany, Bulgaria, and Switzerland busted a network of subsidy fraudsters. Over 50 companies in Bulgaria, Germany, and Switzerland were involved. They had illegally claimed subsidies from the Community

European Criminal Law Associations' Conference in Catania: Re-launching the European Project

The following gives a summary of the annual conference of Lawyers of the Associations for the Protection of the ECs' Financial Interests and of European Criminal law which took place in Catania on the 24-26th of May 2007. The conference – also celebrating the 10th anniversary of the Centro di Diritto Penale Europeo – had the motto „Re-launching the European Project: needs for protecting EC interests and new strategies for penal integration pending the European Constitution.“ In an ambitious programme, scholars and practitioners from across Europe discussed the various challenges faced but also the opportunities seen. Some relativised the controversy sparked by the European Court of Justice judgement in Case C-176/03 seeing it as a development of argument already to be found in the famous Greek Maize judgement of 1989. Others pointed to the third pillar having been used to avoid conflict over criminal competence; a use the Commission now objects to. The difficulties of overseeing the relevant areas, let alone protecting the financial interests of the EC – whether by means of administrative or criminal law – were highlighted.

The variety of institutions and views represented meant that calls for a centralised enforcement institution and/or direct administrative sanctioning powers for EC agencies were to be heard alongside calls that the Commission should first utilise the means already available to the full. Whilst there was broad agreement that the principle of subsidiarity must be observed at all times and that EC administrative law enjoys primacy, it also became clear that this conference could only be the beginning – or re-launching – of a broad and complex debate as to the extent of legal harmonisation

which is required to facilitate effective European criminal law. In relation to the protection of EC interests in particular, there was a clear call for a debate as to what should spark criminal rather than the, more efficient administrative, law reactions.

There were many positive voices among the participants, viewing the provisions of the Constitutional Treaty as way forward; a tool overcoming the democratic deficit seen in EC structures and doing away with a hindering pillar structure. Whilst displaying awareness of the problems entailed, some emphasised the need to use criminal law in order to enforce and adequately protect EC interests because this task sometimes requires the level of social stigma attached only to criminal law. On this basis, thoughts were turned to the potential benefits and difficulties of enforcing Community related offences via national or supra-national institutions, in particular in relation to securing efficiency and procedural rights.

The conference also considered the practical effects of some European measures: the success of the European Arrest Warrant was emphasised. Some suggestions for improvement were made, e.g. the installation of better reporting structure for failures to ensure the mechanism can be improved. There was, however, no lack of more philosophical analysis of very specific suggestions to improve such mechanisms.

The conference succeeded in emphasising that the possibilities of co-operation by EU Member States is limited and providing a variety of possible fundamentals upon which suggestions as to what the next steps should/can be. With a view of the challenging developments in the near future, such as the bringing into force of the new Reform Treaty, next year's conference of the Associations in Prague will again see a multitude of topics requiring discussion.

By Dr. Marianne Wade

► [eucrim ID= 0701081](#)

Programme “SAPARD” (Special Accession Programme for Agriculture and Rural Development) by applying for funding of machinery for the processing and packaging of meat products at inflated prices. The Zollkriminalamt (German Customs Criminological Office) confirmed that €3.5 million had been fraudulently obtained; another €7.5 million may, allegedly, have been unduly paid.

► [eucrim ID= 0701079](#)

Commission Reclaims €285.3 Million in Farm Subsidies

Thanks to its 24th decision, the Commission has recovered a total of €285.3 million from Member States which were unduly spent within the framework of the Common Agriculture Policy (CAP). At the top of the list this time is Spain which is charged with €60.6 million, followed by the United Kingdom (€53.7 million), and Italy (€48.5 million). For more details on previous decisions and

on how the recovery system works, see eucrim 1-2/2006, p. 10 and 3-4/2006, p. 56/57.

➤ eucrim ID=0701080

Tax Fraud / VAT

Discussions on Amendments to Present VAT Scheme Continue in Council

At its meeting on 5 June 2007, the Council responsible for Economic and Financial Affairs reached a political agreement on some elements of the VAT package. Prior to the formal adoption of the full package, however, the Portuguese Presidency has to solve further difficult issues in the second half of 2007, e.g., how to improve control and cooperation measures involving both the Member State of the supplier and the Member State of consumption. The Council aims to formally adopt the package before the end of the year with the intention of having it enter into force on 1 January 2010 at the latest. The VAT package is composed of interlocking elements intended to establish new rules for determining the place of taxation for services and minimise regulatory burdens on businesses engaged in cross-border trade. It also includes aspects relating to combating VAT fraud (see eucrim 3-4/2006, p. 58).

➤ eucrim ID=0701082

Council Conclusions on Combating Tax Fraud

Taking into account the above-mentioned progress report on the EU strategy to fight fiscal fraud, the Council of Economic and Financial Affairs, at its meeting on 5 June 2007, adopted conclusions on the next steps to tackle tax fraud, especially VAT fraud. First, as regards conventional measures, the Council agreed that the following issues should be pursued with priority:

- (1) to introduce amendments in declaring intra-Community supplies, with the aim of reducing timeframes;
- (2) to ensure more rapid sharing of such information among tax administrations;
- (3) to examine joint and several liability where information on intra-Community supplies has not been provided or has not been correctly provided to the extent that leads to loss of VAT at a subsequent stage;

(4) to improve confirmation messages and information on business identified for VAT purposes to operators active in intra-Community trade without hampering the risk analyses applied by Member States.

Second, the Council examined two more far-reaching proposals of the Commission relating to combating VAT fraud. The first one relates to the taxation of intra-Community transactions. Among the two models for the taxation of intra-Community transactions, the vast majority of Member States reject taxation in the Member State of arrival (country of destination). Instead, Member States agree to further explore the system of taxation in the Member State of departure. The second issue concerns the introduction of a general *reverse-charge system* which would principally shift tax liability from the supplier to the recipient/customer of goods or services (see eucrim 3-4/2006, p. 57). The mechanism would apply to domestic commercial transactions, the value of which exceeds a certain threshold (€5.000 are proposed). Germany and Austria consider this mechanism an effective tool to combat VAT fraud and are in favour of European law providing (at least) an option for Member States to allow for application of such a system. Although most Member States oppose the plan to date, the Council has invited the Commission to present a more detailed impact assessment on this issue by the end of 2007 at the latest.

➤ eucrim ID=0701083

Commission Launches Public Debate on Reverse-Charge Mechanism

Against the background of the above-mentioned task of presenting an impact assessment on the optional reverse-charge mechanism, the Commission addressed the business sector and invited its representatives to submit their views and opinions on the question of which impact the possible introduction of an optional reverse-charge system would have, especially in terms of additional costs. The Commission had also launched a study for this purpose. The consultation paper as well as the final report of the study can be downloaded from the following website:

➤ eucrim ID=0701084

Practice: Co-ordination Meeting at Eurojust Steps up Investigation in Big VAT Fraud

In March 2007, Eurojust hosted a large-scale co-ordination meeting between prosecutors and tax investigators from 18 of the 27 Member States plus Switzerland, the Netherlands Antilles, and the United Arab Emirates. The purpose of the meeting was to share information in order to unravel the mystery of money flow which originated from various VAT carousel frauds in different Member States. The money was laundered in the Netherlands Antilles and subsequently in Dubai. The fraud is estimated at €2.1 billion. The meeting identified all relevant investigations and prosecutions in the EU, provided an opportunity for an exchange of information, encouraged new investigations and prosecutions to be taken up in other countries, and explored how to co-operate successfully in each other's actions.

➤ eucrim ID=0701085

Corruption

German Initiative on Contact Point Network against Corruption

Germany recently submitted an initiative with a view to the adoption of a Council Decision to set up a network of contact points for national law enforcement agencies charged with preventing and combating corruption. The instrument would formalize the existing informal cooperation among key representatives of the competent Member States' police authorities or anti-corruption agencies. The network would also encompass the European Commission, Europol, and Eurojust. The establishment of this network of contact points is expected to make a considerable contribution to a more effective cooperation, better sharing of good practices, and the development of high professional standards in the EU-wide fight against corruption.

➤ eucrim ID=0701086

Commission Blames Member States for Transposition of Anti-Corruption Law

On 18 June 2007, the Commission presented an evaluation report on the implementation of Council Framework

Decision 2003/568/JHA on combating corruption in the private sector. The Framework Decision (FD) was considered necessary in order to prevent distortions of the internal market and strengthen national economies. Art. 2 of the FD obliges Member States to criminalize two types of conduct:

a) promising, offering, or giving a bribe to a person in the private sector in order that he or she do something or refrain from doing something, in breach of that person's duties;

b) requesting or receiving a bribe, or the promise of such, while working in the private sector, in order to do something, or refrain from doing something, in breach of one's duties.

The FD also includes features which have become common in other framework decisions: it prescribes that

- instigating, aiding, and abetting are punished (Art. 3),
- “effective, proportionate and dissuasive” penalties are introduced, including that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment (Art. 4 para. 1 and 2),
- legal persons are held liable and sanctioned with penalties (Art. 5 and 6), and
- jurisdiction is established with regard to the offences referred to in Articles 2 and 3 (Art. 7).

Art. 4 para. 3 is quite innovative as it sets forth that a convicted natural person should, under certain circumstances, be temporarily prohibited from carrying on a particular or comparable business activity in a similar position or capacity.

However, the Commission gave Member States a bad review since most of them have not or have insufficiently implemented the circumstances of the FD. Some Member States, for instance, do not punish all types of corruption, e.g., promising, offering, and giving a bribe. Many do not criminalise the corruption through an intermediary – explicitly foreseen in Art. 2. Furthermore, many Member States do not extend their legislation to cover non-profit organisations (Art. 2 para. 2) and fail to have legislation when it comes to intangible, non-financial benefits. Member States had to comply with the provisions of the FD by 22 July 2005.

►eucrim ID=0701087

G8: Declaration on Fight against Corruption

The Heads of State and Government of the G8 (Group of Eight) adopted a declaration on the fight against corruption at their summit in Heiligendamm, Germany, in June 2007. The declaration, which is contained in the Summit Declaration “Growth and Responsibility in the World Economy”, remarks that the G8 countries “are aware of their leadership role in setting examples in the fight against corruption.” The declaration includes a number of concrete measures to combat corruption more effectively worldwide, inter alia, in view of the full implementation of the international anti-corruption agreements (in particular those of the UN), the commitment to effective monitoring through the peer-review mechanism under the OECD Anti-Bribery Convention, the support of international financial institutions' efforts to combat corruption, the return of illicitly acquired assets, and support for the efforts of the private sector in combating and preventing corruption. Furthermore, the future focus will be put on sharing best practices regarding specific aspects of combating corruption and enhancing assistance in developing countries.

►eucrim ID=0701088

International cooperation in the fight against corruption was also one of the main topics at the meeting of the G8 Justice and Interior Ministers in Munich from 23 to 25 May 2007. The Ministers particularly dealt with the recovery of assets coming from corruption offences. They stressed the need for a common implementation of good practices in this area.

►eucrim ID=0701089

Money Laundering

ECJ: 2nd Anti-Money Laundering Directive Consistent with Right to Fair Trial

On 26 June 2007, the European Court of Justice (ECJ) rendered its judgment on the conformity of the second anti-money laundering Directive 2001 with fundamental rights. A number of Belgian law societies initiated two applications before the Cour d'Arbitrage (Constitutional Court of Belgium) which made reference

to the following question: Does the Directive infringe upon the right to a fair trial when it imposes on members of independent legal professions, including the profession of lawyer [avocat], the obligation to inform those authorities responsible for combating money laundering of any indication of such money laundering?

The ECJ concluded that the principle of fair trial, as enshrined in Art. 6 ECHR, would only be infringed if lawyers were obliged, in the context of judicial proceedings or preparation for such proceedings, to cooperate with the authorities by passing on information obtained in the course of related legal consultations. The Court emphasises that this is not the case under the second anti-money laundering Directive since it delimits the lawyer's obligation in two ways: First, the obligation only applies if specific transactions exhaustively listed in the Directive, are carried out (essentially of a financial nature or concerning real estate). Second, the Directive stipulates that Member States may exempt lawyers from reporting where they are ascertaining the client's legal position or representing a client in legal proceedings. Taking this into account and considering the fact that Belgium implemented both exceptions into its national law, the ECJ concludes that the right of a client to a fair trial is safeguarded and therefore not infringed.

Furthermore, as regards the obligation to report whether the lawyer is acting specifically in connection with the above-mentioned financial and real estate transactions, with no link to judicial proceedings, the Court holds that such obligations are justified by the need to combat the crime of money laundering effectively.

For more information about the history of the case, see eucrim 1-2/2006, p. 11 and 3-4/2006, p. 59. The latter reference analyses the opinion of the Advocate General which comes to the same result as the ECJ. It seems that the ECJ also follows the Advocate General's broader interpretation on the notion of “ascertaining the legal position of a client”.

►eucrim ID=0701090

New Rules on Cash Controls Became Applicable

As from 15 June 2007, the new Regulation on cash controls by customs is

applicable in all Member States. Under the new legislation, persons entering or leaving the EU have to declare money movements if they are carrying €10.000 or more in cash (or its equivalent in other currencies or easily convertible assets such as non-crossed cheques). Customs authorities are empowered to undertake the necessary controls and detain cash that has not been declared. Persons who fail to make a declaration will face proceedings and penalties.

The Regulation intends to close a loophole which emerged because of the different standards in monitoring capital movements among the EU Member States. This factor also undermined the effective implementation of the third anti-money laundering directive which already introduced an obligation for credit and financial institutions to monitor transactions. The Regulation was adopted in October 2005 and entered into force on 15 December 2005 (see eucrim 1-2/2006, p. 12). The following website contains more detailed information on the new cash controls, including a multilingual leaflet explaining the new rules.

►eucrim ID=0701091

Money Counterfeiting

Commission Proposal: Banks Should Be Included in Protection of Euro against Counterfeiting,

The Commission aims at implementing improved measures designed for the protection of the euro against counterfeiting. For this purpose, it tabled a proposal which would amend Regulation (EC) No 1338/2001, laying down measures necessary for the protection of the euro against counterfeiting. In particular, the Commission intends to obligate banks and other relevant establishments (e.g., bureaux de change) to check the authenticity of euro banknotes and coins before they are put back into circulation. Today, agreed uniform and effective methods of detection of counterfeits exist which make this verification easy and perfectly feasible. The authentication procedure should be carried out in line with recommendations of the European Central Bank and the Commission, respectively.

►eucrim ID=0701092

Commission Report on the Framework Decision on Criminal Law Protection of the Euro

The state of play of the legal implementation of “Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro” (OJ L 140 of 14.06.2000) in the EU Member States is detailed in a Commission report from 17 September 2007. It is the Commission’s third evaluation report on this FD.

The report concludes that transposition by all 27 Member States of the FD is globally satisfactory. The penalisation of acts of counterfeiting, as well as the sanctions provided, were generally introduced into the Member States’ legislation, thus achieving a homogeneous level of protection of the euro as required by the FD. A small number of national measures are still necessary for its complete implementation. These cases of non-compliance mainly concern the level of sanctions, as well as the penalisation of specific acts in certain countries.

The Framework Decision ensures that the euro is appropriately protected against counterfeiting by the criminal laws of all Member States. It supplements the 1929 International Convention for the Suppression of Counterfeiting Currency (“Geneva Convention on counterfeiting”) by requiring Member States to introduce effective, proportional and dissuasive penalties for certain offences relating to the counterfeiting of the euro. It also stipulates that the offences of fraudulent making or altering of currency is punishable by terms of imprisonment, the maximum being no less than eight years. Furthermore, the FD contains requirements on the jurisdiction of the Member States and the liability/sanctions of legal persons. The FD was amended by Framework Decision 2001/888/JHA of 6 December 2001 which introduces the mutual recognition of convictions handed down in another Member State.

►eucrim ID=0701093

Protection of Euro Coins in 2006

The Commission/OLAF also released a report on the protection of euro coins in 2006. As regards the situation of euro

coin counterfeiting, the report mirrors the numbers which had already been published by the Commission in January 2007 (see eucrim 3-4/2006, p. 60). The report also outlines the actions to protect euro coins, as well as the activity of the ETSC (European Technical Scientific Centre) in 2006.

In sum, awareness of the need to protect euro coins was raised in 2006, mainly through actions in the framework of the Pericles Programme (e.g., conferences and seminars; for more details on the Pericles Programme see eucrim 3-4/2006, p. 68). The report also highlights that a number of Member States began to implement the Commission Recommendation of 27 May 2005 which provides for common rules on the authentication procedure of euro coins. The report concludes that, in spite of increased efforts in the detection of counterfeit euro coins, increased vigilance and cooperation is also necessary in the upcoming years. Therefore, it is recommended that (1) cooperation increases between all official bodies involved (national law enforcement authorities, Europol, Coin National Analysis Centres, ETSC, European Central Bank, etc.); (2) all Member States use coin authentication procedures; (3) closer cooperation is established with private sector coin-operated industry.

►eucrim ID=0701094

Practice: Europol Helps Dismantle Illegal Print Shop in Colombia

A successful police cooperation in a non-EU country, Colombia, resulted in the arrest of nine criminals and the seizure of more than 400.000 counterfeit euro and 5,5 million US dollar notes. Europol successfully supported the operation from the very beginning by providing analytical and technical support to Spanish, Colombian, and US authorities. The investigation, which lasted eight months, was completed on 14 June 2007. During the eight-month investigation, it was possible to identify the different techniques used by the counterfeiters in the different stages of production as well as the routes used to distribute the bank notes in Europe, United States, Panama, Costa Rica, Venezuela and Ecuador. The Director of Europol, Max-Peter Ratzel,

stated that Europol will continue to support Member States and partner states in this fight (in line with the Council Decision of 2005), designating Europol as the Central Office for combating euro counterfeiting. In this context, it is worth mentioning that Europol works closely with Colombia on the basis of an agreement which allows the exchange of technical and strategic information.

➤ [eucrim ID=0701095](#)

Practice: Joint Blow against Credit Card Fraud Network

The successful operation ‘Clone’, carried out by the Italian Carabinieri and supported by Europol since April 2006, was recently finalised by smashing an international organised criminal group. The criminals were skimming credit card data at manipulated payment terminals inside several shopping centres in Italy for the purpose of subsequent illegal cash withdrawals at automated teller machines within Italy and other European countries. The successful outcome of this operation is the result of cooperation between Italy, Spain, Sweden, France, Romania, Eurojust, and Europol. Eurojust aided the operation and provided all indispensable judicial assistance, while Europol was responsible for the identification and location of various members of the criminal group acting in Italy and abroad. As a result, 42 persons were arrested in various countries and 1020 counterfeited credit cards, 540 blank card data of 1280 skimmed cards, and 41 damaged payment terminals were seized.

➤ [eucrim ID=0701096](#)

Counterfeiting and Piracy

Advocate General: Internet Service Providers Need Not Turn Over Traffic Data to Intellectual Property Owners

Advocate General Kokott gave her opinion in an interesting case about the relationship between the protection of intellectual property rights and data protection law (Case C-275/06 ‘Productores de Música de España (Promusicae) v. Telefonica de España SAU’). A Spanish music association – Promusicae – required the Spanish telecommunications

and Internet service provider Telefonica to hand over the names and addresses of subscribers who had allegedly illegally distributed copyrighted songs, so that Promusicae could take legal action. Promusicae claimed that various Community directives which protect a private person’s intellectual property rights would oblige Internet service providers to hand over the required data to the rights owners. Telefonica refused, since, under Spanish law, it is only allowed to deliver information as part of a criminal prosecution or in matters of public security and national defence.

In the final analysis, the Advocate General agreed with the view of Telefonica. According to Ms. Kokott, EC data protection law prevents private persons from the disclosure of personal traffic data in civil cases. Spanish law is in line with EC law if it restricts the obligation to hand over traffic data to law enforcement authorities only. In particular, Art. 15 of the EC’s electronic communication Directive 2002/58, which allows the transmission of traffic data in cases of unauthorised use of the electronic communication system as an exception of the principal ban, must be interpreted narrowly and cannot serve as a basis for the transmission of data to the intellectual property rights owner. Otherwise, the entire communication would have to be stored in order to check its unauthorised use effectively; then the ‘transparent citizen’ would become reality, Ms. Kokott says.

The online newspaper euobserver reported on 20 July 2007 that ‘the opinion comes only days after the Swedish Justice Department proposed that copyright, patent and trademark owners should be able to request a court to force Internet service providers to reveal the identity of Internet users who have infringed their rights. A Belgian court has in the meantime ruled that one of its national Internet service providers must install a filter to prevent its Internet users from illegally downloading music’.

➤ [eucrim ID=0701097](#)

European Parliament Voted for Criminal Measures IP Directive

The Commission proposal of 2006 for a directive on criminal measures aimed at ensuring the enforcement of intellectual

property rights triggered a new wave of controversial debates when the European Parliament issued its comments on the proposal in spring 2007.

The Commission proposal aims at harmonising the national laws of the 27-member bloc as regards the criminal law enforcement of intellectual property rights. It foresees criminal sanctions, including imprisonment and criminal and non-criminal fines, in cases of intentional infringements of an intellectual property right on a commercial scale.

It is the Commission’s second initiative which amended the original draft of 2005 in the aftermath of the judgement of the European Court of Justice in Case C-176/03 (see [eucrim 1-2/2006](#), p. 13). On 25 April 2007, the MEPs voted for a legislative resolution which proposes several amendments to the draft of the Commission. The main amendments which are backed by the majority of MEPs are:

- reducing the directive’s scope to the extent that industrial property rights under a patent should be excluded;
- introducing a number of definitions, such as ‘intellectual property rights’, ‘infringements on a commercial scale’, and ‘intentional infringements of an intellectual property right’;
- having penalties include an order requiring the infringer to pay the costs of keeping seized goods;
- taking into account repeated offences committed by natural and legal persons in a Member State other than the offender’s country of origin or domicile when determining the level of penalties;
- obliging Member States to ensure that the misuse of rights is prohibited by means of a new article;
- inserting more adequate safeguards of individual rights, e.g. within the framework of cooperation in joint investigation teams;
- ensuring, by means of a new article, that evidence obtained by law enforcement authorities is made available for use in civil proceedings, and, where practicable, that the law enforcement authorities inform the right-holder about the evidence.

The legislative resolution was prepared by Italian MEP Nicola Zingaretti – member of the Committee on Legal Af-

fairs. Opinions were also delivered by the Committee on Industry, Research and Energy, and the Committee on Civil Liberties, Justice and Home Affairs. The Council has not yet adopted a formal position on the proposal. A debate and further examination of the draft in the Council is expected in December 2007 (see also the Council discussion in eucrim 3-4/2006, p. 60).

► eucrim ID=0701098

European Economic and Social Committee Releases Opinion on Proposed Directive

In its opinion of 12 July 2007, the European Economic and Social Committee (EESC) generally supports the proposed directive to combat intellectual property rights infringements with criminal measures. However, the EESC recommends that the European legal act should emphasise large-scale counterfeiting, counterfeiting by organised crime groups, and counterfeiting endangering health, safety and life. These instances should be considered aggravating circumstances in the determination of penalties. In opposition to the EP, the EESC favours that the Directive should cover industrial property rights as a whole, thus including invention patents. The EESC calls for a clearer definition of the elements of the crime (e.g., “commercial scale”, “intent”), also taking account the different practices of counterfeiting. In this context, the EESC suggests that combating IT piracy should be addressed specifically. As regards the determination of maximum penalties in the draft directive, the EESC points out an interesting link to national criminal law systems: according to the EESC, European law must avoid the occurrence of inconsistencies between penalties on single infringements and those on commercial-scale infringements (to which the Directive will be limited only), since some Member States actually sanction or penalise single infringements more severely than commercial ones; thus, a genuine harmonisation must be ensured.

► eucrim ID=0701099

NGOs Propose Alternative Amendments

In the run-up to the above-mentioned resolution of the European Parliament, several NGOs renewed their critical

stance on the draft of the criminal law directive for the protection of intellectual property rights. A coalition of associations representing consumer protection, libraries, and innovators presented a paper with alternative amendments which seek to prevent the extensive criminalisation of users and the creation of vaguely defined criminal offences. Taking into account the preparatory work in the European Parliament, the associations are urging the Parliamentarians to further amend the proposal or reject it in its entirety. They advocate, inter alia, that the scope of the directive be further reduced, definitions of the criminal offences described more precisely, and secondary liability (aiding, abetting, inciting) eliminated. They also stress that the proposal needs clarification in that legitimate commercial enterprises and consumers not be criminalised. It has been criticized that the proposal “is badly drafted” and would put thousands of young Europeans into jail.

► eucrim ID=0701100

On the occasion of the above-mentioned report of MEP Nicola Zingaretti, the Foundation for a Free Information Infrastructure (FFII) – a German non-profit organisation dedicated to establishing a free market in information technology by the removal of barriers to competition – addressed a letter to the Members of the European Parliament in March 2007. In it, the FFII states that the draft report of the Committee of Legal Affairs is not ready for adoption. A reference to the letter as well as to other links with opposing statements to the criminal law IP directive is contained in the following link.

► eucrim ID=0701101

Statement of the MPI for Intellectual Property, Competition and Tax Law on Draft Directive

The Max Planck Institute (MPI) for Intellectual Property, Competition and Tax Law issued a detailed analysis on the redrafted Commission proposal of 2006 as to the protection of IP rights through criminal law. The MPI examined the proposal in relation to legal competence, fundamental rights, elements of crime, and misuse of rights. The drafters, Prof. Dr. Reto M. Hilty, Prof. Dr. Annette Kur,

and Dr. Alexander Peukert, doubt that the conditions for the harmonisation of infringements against intellectual property rights through criminal law measures as drawn up by the European Court of Justice in its judgement C-176/03 and as set forth in Art. 95 TEC are fulfilled. They elaborate that a harmonisation of criminal laws for IP infringements is not necessary with respect to the proper functioning of the internal market.

They also call on the legislator to be aware that a balance must be achieved between the interests of the proprietors of IP rights and public interests as well as conflicting fundamental rights. As regards the elements of crime, it is advocated that the directive should be confined to cases of clear piracy and counterfeiting – a request which was also taken up by the above-mentioned NGOs. The MPI makes a concrete suggestion as to how to formulate the elements of the criminal act. Lastly, the statement points out the necessity for countermeasures if right-holders misuse the threat of criminal penalties. In this context, the drafters express concern about the privatisation of criminal prosecution since right-holders may participate in joint investigation teams, according to the proposal. This issue of the misuse of rights has been taken up by the European Parliament (see above). However, it remains open whether the amendment of the EP is sufficient and will be maintained by the Council.

► eucrim ID=0701102

Customs Statistics on Counterfeiting in 2006

In spring 2007, the Commission published the figures on seized counterfeit products in the year 2006. According to the Commission, the seizure of 250 million counterfeit products – an increase of 330 % compared to 2005 (75 million) – shows the tremendous growth in trade of these goods on the one hand, and, on the other hand, is also a result of better risk management analysis and better cooperation between the customs authorities. In 2006, customs actions succeeded in some large-scale seizures which the Commission exemplified by the joint customs operation “DAN” (see eucrim 3-4/2006, p. 61). Traditionally,

fake cigarettes remain at the top of the list of articles most likely to be counterfeited (60 %). The cigarettes seized (150 million packets – an equivalent to 3 billion single cigarettes) make up an estimated loss of €460 million to the European Community and Member States' budgets. However, the Commission stresses that the increase in seizures of other counterfeit products – such as medicines – is particularly worrying since it doubled compared to 2005 (see eucrim 3-4/2006, p. 60/61 for the statistics on 2005).

As in previous years, China spearheads the list of countries where the most counterfeit goods come from. However, if broken down by sector, India is the main source of counterfeit medicines, Turkey predominates in the food sector, and Malaysia has taken over the top of the list when it comes to electric equipment. In this context, it is worth mentioning that it is becoming more and more difficult to identify the country where the fake articles are in fact produced, since criminals use complicated transport routes. Furthermore, more and more articles are being detected in postal and air traffic due to booming Internet sales. Commissioner László Kovács, responsible for taxation and customs, admonished the consumer to be aware of the problem of counterfeiting and urged avoiding cheap fakes. He also stated that international customs cooperation with the major trading partners of the EU, in particular China and India, needs to be further implemented.

► eucrim ID=0701103

Practice: Joint Customs Operation “Diabolo”

After the joint customs operations “FAKE” and “DAN” (see eucrim 1-2/2006, p. 13 and 3-4/2006, p. 61) the EU can chalk up another joint customs operation against counterfeit products as a success. The code-named operation “Diabolo”, which was carried out in February 2007 and the results of which were presented in April 2007, led to the seizure of 557.000 articles in total and nearly 135 million counterfeit cigarettes. In cigarettes alone, the operation avoided a potential loss of €220 million to the budget of the European Community and its Member States. The opera-

tion was coordinated by OLAF and involved not only the customs authorities of all 27 Member States – Romania and Bulgaria also took part in the operation as EU Member States for the first time – but also Europol, Interpol, and the World Customs Organization. Operation “Diabolo” targeted the maritime routes of branded cigarettes and other counterfeit products which originate from Asian ports. It was based on an initiative by the Member States of ASEM (Asia-Europe Meeting). ASEM is an informal dialogue process which was initiated in 1996. It brings the 27 EU Member States and the European Commission together with 13 Asian countries. The aim of ASEM is to deepen the relationship between Europe and Asia. The dialogue is dedicated to political, security, economic, educational, and cultural issues.

► eucrim ID=0701104

Practice: Successful International Operation against Network of Fake Pills

A first efficient international cooperation in the fight against counterfeit drugs has been reported by Eurojust. The EU's judicial cooperation body prepared and coordinated the simultaneous execution of French rogatory commissions in four EU countries (Sweden, Romania, the Netherlands, and Denmark) in April 2007. The co-ordinated police actions resulted in the dismantling of a network of Internet sales of fake pills, namely the drug “Rimonabant”. The actions led to a series of searches in all four countries and two arrests in Sweden based on European Arrest Warrants. The drug “Rimonabant” made headlines last year when the Commission warned about the danger of counterfeit medicines on the occasion of detected “Rimonabant” fakes (see eucrim 1-2/2006, p. 13).

► eucrim ID=0701105

The actual growing threat of counterfeiting and piracy has also been addressed at the international level during the recent months. The main developments are briefly reported in the following news:

EU-Japan Action Plan on IPR Protection and Enforcement

At the 16th EU-Japan summit, held in Berlin, Germany on 5 June 2007, the EU and Japan adopted an action plan on

intellectual property rights (IPR) protection and enforcement. It renews an earlier joint IP enforcement initiative. In the first part of the new action plan, a range of measures to enhance cooperation in the field of IP enforcement has been formulated, for instance with a view to sharing information, customs cooperation, the assessment of damages resulting from IP infringements, public-private cooperation, or technical assistance. The action plan also suggests exploring the possibility of strengthening the international legal framework to combat counterfeiting and piracy. The second part of the action plan deals with the improvement of IPR protection, inter alia, improvements of patent prosecutions, the strengthening of cooperation relating to geographical identification systems, and the promotion of information exchange on copyrights compensation systems. At the multilateral level, both parties will work together towards the harmonisation of their different patent systems. The text of the action plan is published in the first annex of the joint press statement at the following link:

► eucrim ID=0701106

OECD – Study on Economic Impacts of Counterfeiting and Piracy

Governments should work more closely with companies and strengthen enforcement in the fight against the rising global trade in counterfeit and pirated goods. These are the key findings of a new OECD study on the global economic impact of counterfeiting and piracy. An Executive Summary of phase I of this study was released in early June 2007. The results are limited to the international trade in counterfeit and pirated goods, which, according to the OECD report, accounts for USD 200 billion in total in 2005 (excluding digital piracy).

The study (1) analyses the market for counterfeit and pirated products, (2) shows the magnitude and scope of counterfeiting, (3) assesses the effects of counterfeiting and piracy, (4) presents an eight-point framework for assessing the effectiveness of policies and measures to combat counterfeiting – including a description of the situation of the economies in 12 different countries – and (5) elaborates on the challenges in combat-

ing the phenomenon at the national and international levels. The OECD report, inter alia, recommends:

- increasing the enforcement of existing laws;
- further strengthening the cooperation between governments and industry to make current policies more effective and help identify new strategies to fight counterfeiting;
- strengthening criminal penalties to deter criminals and toughening sanctions to more effectively redress the harm caused to rights-holders;
- educating consumers to raise public awareness of the growing threat to health and safety of substandard counterfeit products;
- making efforts (both governments and business) to invest more in collecting and analysing information in order to obtain reliable and up-to-date information on the extent of counterfeiting and piracy.

➤eucrim ID=0701107

INTA – Request for Criminal Law Action

Taking into account the above-mentioned OECD study on the economic impact of counterfeiting and piracy, the Anti-Counterfeiting & Enforcement Committee (ACEC) of the International Trademark Association (INTA) has requested action concerning the international legal framework for criminal sanctions against trademark counterfeiting. The document of 20 June 2007 suggests prioritizing four criminal law areas where action should be taken at the international level: (1) recognize counterfeiting as a transnational organized crime; (2) criminalize the laundering of proceeds of crime resulting from counterfeiting; (3) remove jurisdictional gaps over counterfeiting offences; and (4) harmonize prosecution, adjudication, and sanctions against trademark counterfeiting so that a harmonized, minimum level of deterrence is applied throughout the world.

The International Trademark Association (INTA) is a non-profit membership association of more than 5,000 trademark owners and professionals from more than 190 countries, dedicated to the support and advancement of trademarks and related intellectual property as ele-

ments of fair and effective national and international commerce. It was founded in 1878. INTA members closely work together in various committees.

➤eucrim ID=0701108

G8 – Declaration on IP Protection

Germany used its presidency of the G8 (Group of Eight) to strengthen the global fight against perpetrators of counterfeiting. In its Declaration “Growth and Responsibility in the World Economy”, issued at the summit in June 2007 in Heiligendamm, Germany, the Heads of State and Government of the G8 countries reaffirmed their commitment to combat counterfeiting and piracy, emphasizing that the “benefits of innovation for economic growth and development are increasingly threatened by infringements of intellectual property rights worldwide”. The leaders endorsed a number of measures which should improve and deepen cooperation among G8 partners and deliver real enforcement results. The measures concern better border enforcement, improved technical assistance, prosecution of organized and serious IP crimes, and a new international legal framework.

➤eucrim ID=0701109

The enforcement of intellectual property rights was also high on the agenda at the meeting of the G8 Justice and Interior Ministers in Munich from 23 to 25 May 2007. In the Concluding Declaration, the Ministers stressed that the rights-holders need to be protected by both civil and criminal law, and be better supported in the cross-border assertion of these rights. For this purpose, national contact points, among other things, are to improve the exchange of information.

➤eucrim ID=0701110

German Economic Associations Present Strategies against Counterfeiting

In April 2007, several German associations which are dedicated to the representation of economic branches and the industry presented a joint paper outlining strategies for the prevention of counterfeiting and piracy. The paper was considered a basis for the negotiations of the political leaders at the above-mentioned G8 summit in Heiligendamm, Germany. The paper contains a wide range of rec-

ommendations for companies on how they can prevent infringements of intellectual property rights. Goods, for example, could be marked with microchips which would prove their authenticity. It was also suggested that more intense cooperation with law enforcement bodies could help better prosecution of fake goods detected at trade fairs and exhibitions.

➤eucrim ID=0701111

Organised Crime

Second Organised Crime Threat Assessment (OCTA) by Europol

Europol recently presented its Organised Crime Threat Assessment 2007. It is the second issue of this comprehensive annual report which identifies and assesses the main organised crime trends in the European Union. It is the core of the so-called “intelligence-led law enforcement”, as advocated by The Hague Programme of 2004. The main aim is to provide a forward-looking, proactive approach to the fight against organised crime. At a practical level, OCTA helps to close the gap between strategic and operational activities. At the policy level, it is one of the instruments by means of which the EU institutions and Member States develop the common area of freedom, security and justice as outlined by the Treaty of Amsterdam. A special feature of OCTA is that information for the assessment is based on contributions from a wide range of persons and organisations: EU Member States; Europol’s law enforcement partners in third countries; European and international bodies, such as Eurojust, OLAF, European Central Bank, Frontex, SECI, Interpol and others; as well as academia, and the private sector were involved.

The present OCTA follows the structure of the first report of 2006 (for more detail see eucrim 1-2/2006, p. 14). OCTA 2007 concludes that OC groups are characterised by dynamic combinations of several threatening features as highlighted in the report. Although most OC groups are acting across the EU and beyond, regional patterns are sometimes discernible, according to OCTA. Hence, it sug-

gests regional initiatives, devised and executed at the local, national, and international levels in a co-ordinated manner. Furthermore, the report suggests measuring the struggle of law enforcement in terms of dismantlement and destruction of the most threatening OC groups accompanied by adequate arrests, seizures, asset confiscations, and penalties. The following link leads to the publicly available version of the OCTA. There is also a second version which is restricted to law enforcement partners only.

➤ [eucrim ID=0701112](#)

Council Sets EU Priorities for the Fight against Organised Crime

Based on Europol's OCTA 2007, the Council defined the EU priorities for the fight against organised crime. Among the criminal markets which should be tackled in 2007 is fraud, especially tax fraud, euro counterfeiting, and money laundering. The Council also came to a conclusion on the approach against organised crime, the implementation of the EU priorities, and the methodology for producing the next OCTA report. An annex lists the measures for implementing the EU priorities in the battle against organised crime together with the responsible party (e.g. the Member States, OLAF, or Europol).

➤ [eucrim ID=0701113](#)

Practice: Joint Judicial and Police Action Smashes OC Network

A positive practical example of the implementation of the EU's strategy in the fight against organised criminal networks is the joint action which took place on 13 June 2007 in six EU countries and dismantled a transnationally operating Albanian criminal network. This criminal organisation was involved in drug trafficking, trafficking in human beings and prostitution, money laundering, illegal arms trafficking, trafficking of stolen vehicles, document fraud, and organised transnational burglary. The action, coordinated by Eurojust and Europol, consisted of house searches and arrests in Belgium, Germany, France, the Netherlands, Italy, and the United Kingdom. The extensive investigation started in July 2006.

➤ [eucrim ID=0701114](#)

Cybercrime

Commission Discusses Common EU Action to Fight Cybercrime

Crimes related to the Internet, as well as the use of the Internet and other information systems as a criminal tool, are becoming an increasingly worrying criminal phenomenon with national legislation and law enforcement operations having difficulties keeping pace. Taking into account this basic assessment, the Commission, in May 2007, launched a Communication entitled "Towards a general policy on the fight against cybercrime". The main objective is to formulate a general EU policy in this field. The Communication assesses which action should be taken in order to clamp down on all forms of cybercrime, such as online fraud and forgery, child pornography, and hacking. The Commission lists a number of actions planned as next steps. Due to the limited powers of the EU in this field, policy will, in a first phase, concentrate on actions to improve transnational cooperation between the law enforcement authorities and to strengthen public-private cooperation in the fight against cybercrime. As a necessary means for the effectiveness of the fight, the latter aspect was particularly highlighted by JHA Commissioner Franco Frattini when he presented the Communication to the public. He also pointed out a more comprehensive conference in November 2007 which will bring together law enforcement experts and representatives of the private sector (especially Internet Service Providers) to discuss how to improve public-private operational cooperation in Europe.

As regards the question of whether legislative action at the EU level should be taken or not, the Commission thinks that "general harmonisation of crime definitions and national penal laws in the field of cybercrime is not yet appropriate, due to the variety of types of offences covered by the notion". However, the Commission will consider EU legislation in specific areas, for example *identity theft*. "Identity theft" is understood as the use of personal identifying information, e.g. a credit card number, to commit other crimes. Since identity theft is not criminalised in the majority of EU States, which prosecute it

in conjunction with other crimes, such as fraud (something much more difficult to prove), the Commission will in 2007 start consultations to assess whether harmonising EU legislation is appropriate.

The Commission also stresses that the Council of Europe's Convention on Cybercrime of 2001 is one of the most important instruments against this criminal phenomenon. It encourages all EU Member States, which have not yet done so, to ratify the Convention and considers the possibility for the European Community to become a party to the Convention.

The Communication is supplemented by an impact assessment report which, inter alia, elaborates on the policy options for the EU to react. It is worth mentioning that the Commission's proposals came just a few days after the state informatics systems of Estonia had become the target of massive cyber attacks.

➤ [eucrim ID=0701115](#)

Illegal Employment

Directive with Set of Sanctions against Illegal Employment of Immigrants Proposed

The Commission tabled a proposal which aims at a significant approximation of national laws in order to curb black-market labour involving illegal immigrants. In principle, all employers who hire undocumented entrants should be sanctioned with fines and, in some cases, with criminal charges. Workers are not targeted with sanctions. The draft Directive contains a general prohibition on the employment of third-country nationals who are illegally staying. As a preventive measure, employers, before recruiting a third-country national, would be required to check that he/she has a residence permit or other authorisation to stay in the country. Employers who are a business or legal person (such as a registered non-profit association) would further be obliged to notify the competent national authorities. Employers who can show that they had carried out these obligations would not be liable to sanctions. Employers who have not carried out the pre-recruitment check would be liable to sanctions consisting of:

- fines (including the costs of returning illegally staying third-country nationals),
- repayment of outstanding wages, taxes and social security contributions, and
- if appropriate, other administrative sanctions, including the loss of subsidies for up to three years and disqualification from public contracts for up to five years, if the employer is acting in the course of business activities.

The Commission proposes that the administrative measures should be accompanied by criminal penalties for four types of serious cases:

- repeated infringements,
- the employment of a significant number of third-country nationals,
- particularly exploitative working conditions, and
- knowledge on the part of the employer that the worker is a victim of human trafficking.

The draft further contains the common provisions on the liability of and sanctions against legal persons. Moreover, the Directive envisages obliging Member States to facilitate complaints made by illegal workers against their employers and to carry out a minimum number of inspections of companies.

The Commission's draft Directive forms part of a package of new Commission initiatives to combat the employment of illegal immigrants and to better manage migration. The Directive aims at enhancing the protection of human rights, as well as promoting fair competition within the EU's internal market. It would supplement other penal EU legislation in the field of illegal immigration, such as the Framework Decision on human trafficking or the criminal law measures against the facilitation of unauthorised entry, transit and residence. It could also serve as a model for future proposals.

EU Employment Commissioner Vladimír Špidla announced that the EU will launch a general initiative against black-market labour this year which will not only concern immigrants from third countries. The Council had a first exchange of views on the presented the Directive at its meeting in June 2007. The Portuguese Presidency put negotiations on the proposal on its agenda.

► eucrim ID=0701116

Racism and Xenophobia

Governments Reach Compromise on Framework Decision

The German Justice Minister was successful in achieving a general approach on the Framework Decision on combating racism and xenophobia with her colleagues from the other 26 EU Member States. The text establishes that the following intentional conduct will be punishable in all EU Member States:

- Publicly inciting to violence or hatred, even by dissemination or distribution of tracts, pictures or other material, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.
- Publicly condoning, denying or grossly trivialising

(i) crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and

(ii) crimes defined by the Tribunal of Nüremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive, or insulting. They will ensure that the conduct is punishable by criminal penalties of a maximum of at least one to three years of imprisonment.

The three Baltic countries as well as Poland and Slovenia wanted to include crimes committed by totalitarian regimes, such as crimes committed under the Stalin regime in the former Soviet Union, into the FD. The Ministers agreed to exclude these crimes for the time being and to decide on an additional instrument after the FD has been assessed. Before the Council can formally adopt the text, the European Parliament, which gave a first opinion on the initial draft

of 2001 in 2002, will be re-consulted. Furthermore, some parliamentary scrutiny reservations have to be lifted and the text must be revised by the legal linguistic group (see also eucrim 3-4/2006, p. 61).

► eucrim ID=0701117

Procedural Criminal Law

Procedural Safeguards

Framework Decision on Procedural Rights Failed

The EU Justice Ministers, at their meeting in June 2007, were not able to agree on a framework decision on certain procedural rights in criminal proceedings which would have required unanimous agreement. A compromise failed because six States – the United Kingdom, Ireland, the Czech Republic, Cyprus, Malta, and Slovakia – persistently opposed the idea that the European Union has the competence to adopt a binding text covering domestic criminal proceedings. The other 21 Member States, on the contrary, shared the view that the FD should cover all proceedings, i.e., domestic and cross-border proceedings. After having tabled a compromise proposal on the content in late December 2006 (see eucrim 3-4/2006, p. 62), the German Presidency attempted to untie the Gordian knot by elaborating models which would have allowed the FD to cover at least cross-border proceedings involving the European Arrest Warrant and, in addition, provide an optional choice to extend it to all proceedings for those Member States willing to comply. However, the Member States were also divided on these options. The “coalition of the unwilling states” finally feared that it would “open up Pandora's box” if the EU is once allowed to legislate on domestic procedural rights.

It is now possible that the issue of an EU legal instrument on procedural rights could become the first precedent in the area of Justice and Home Affairs to use the procedure of “enhanced cooperation” (cf. Art. 40 – 40b TEU). This process would allow eight or more Member States to move ahead with an EU proposal on their own.

The Heads of State and Governments at the European Council on 21/22 June 2007, at which the issue was discussed, “call[ed] for work on procedural rights in criminal proceedings to be continued as soon as possible in order to contribute to increasing confidence in the legal systems of other Member States and thus to facilitate the mutual recognition of judicial decisions.”

Against the background that, in addition, negotiations on a FD on data protection in police and judicial cooperation in criminal matters are still open (see below), critics blame the EU for stalling measures which deal with extra rights for citizens while those which enhance security are waved through.

► [eucrim ID=0701118](#)

Italy: Role and Qualification of the Defence Counsel in Case of Defence Investigations

Act No. 397 of 7 December 2000 introduces a new Title (Title VI bis) into Tome V of the Italian code of criminal procedure. In accordance with this law, the defence counsel can conduct its own investigation. In particular, it can examine witnesses privately. Although this particular investigation can be carried out in the interest of every private participant to the trial and at any time – even post-iudicatum, with the purpose of review of the trial – it is primarily conducted pro reo and parallel with the investigation of the public prosecutor. One of the many issues related to this law concerns the position and the obligations of the defence counsel. The United Sessions of the Court of Cassation (Cass., Sez. Un., 28.09.2006, n. 32009) have addressed the questions related to the role undertaken by the defence counsel while recording the statements of a witness, and the legal consequences deriving from a false transcript. By considering the transcript as a public act, the Court’s decision endorses the qualification of the counsel as a public officer. Moreover, it states that the counsel is not compelled to an impartial search for the truth; but if he manipulates or screens the acquired information (and uses them in the trial), his conduct amounts to the crime of fraudulent misrepresentation (art. 479

of the Italian penal code), in addition to the crime of abetting (art. 378 of the penal code).

By *Dr. Lucia Parlato*

Data Protection

Framework Decision on Data Protection: Ongoing Debates in Council

After the failure of an agreement on a framework decision on data protection in police and judicial cooperation in criminal matters (FD DPPJCC) at the end of 2006, the German Presidency tried to give negotiations a new impulse by trimming down the draft proposal (see eucrim 3-4/2006, p. 63). In doing so, the German Presidency set out a series of basic points for revision in January 2007 and then tabled a revised text in March 2007. This text also contained some new provisions compared to the initial proposal of the Commission of 4 October 2005. The new draft Presidency text was the basis for subsequent negotiations in the respective Council committees with the aim of removing outstanding reservations (there were 250 reservations after one year of negotiations!). The new proposal should contribute to an agreement among the 27 Member States. Meanwhile, the text has been altered in the responsible Council committee. The compromise remained difficult for two main issues: (1) Should the FD also apply to data processing at the national level? (2) What are the conditions for data transfer to states outside the European Union (third countries)?

At the meeting of the Justice and Home Affairs Council in September 2007, the Portuguese Presidency proposed limiting the scope of the FD to the cross-border exchange of personal data only. However, an evaluation by the Commission three years after the application of the FD is now to clarify whether the scope should be extended to purely domestic data-processing operations. As regards the latter, the Council agreed that data transmitted to another Member State may be transferred to third countries or international bodies only if a number of conditions, including prior consent, are met.

► [eucrim ID=0701120](#)

Deep Rifts on Procedural Guarantees Mirrored at Conference in Berlin

At a conference in Berlin in February 2007, many practitioners, in particular defence lawyers, alongside academics, policy-makers from many EU Member States and NGO representatives took the opportunity to use the opportunity offered by the German Ministry of Justice and the Academy of European Law (ERA) to discuss the suggested Framework Decision on common standards in criminal proceedings brought back into the policy spot-light by the German Presidency.

The fundamental rift between the groupings represented became all too clear as many practitioners and academics condemned the lack of reference to the right to silence and the presumption of innocence in the proposed framework decision and remained critical of the failure to provide equal protection for all suspects throughout the EU, in particular during the investigative stage of criminal proceedings.

Amongst the critical voices there was, however, sympathy for the representatives of the European Council calling for agreement to at least this watered-down draft, in the face of the absolute opposition voiced on behalf of (though not exclusively practiced by) Ireland; declaring this Framework Decision a classic example of what the EC should not be doing and has no competence to do.

In a situation of incompatible hard fronts there could be little surprise at Council calls for harmonisation or Franco Frattini’s response to a question from the floor that one might be forced to consider the use of enhanced co-operation mechanisms “as a last resort.”

By *Dr. Marianne Wade*

► [eucrim ID=0701119](#)

At its meeting in June 2007, the Justice and Home Affairs Council adopted conclusions on the FD DPPJCC. It concluded that the Framework Decision “will build upon the minimum data protection principles set by the Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data and its Additional Protocol of 8 November 2001, and take account of Recommendation (87)15

regulating the use of personal data in the police sector, both adopted in the framework of the Council of Europe.” Moreover, the Council announced that it will examine all solutions suggested by the European Parliament (see below). Finally, the Council “intends to reach political agreement on the proposal as soon as possible and at the latest by the end of 2007.”

► eucrim ID=0701121

European Parliament: Second Legislative Resolution on Framework Decision

After having suggested amendments to the original Commission proposal for a FD DPPJCC in September 2006 and adopted a recommendation to the Council in December 2006 (see eucrim 3-4/2006, p. 63 f.), the European Parliament was re-consulted and hence delivered its second legislative resolution on the basis of the new draft text of the German Presidency of March 2007 (see above). As in its first resolution, the EP recommends a series of amendments, including the following main changes:

- It is absolutely necessary to extend the scope of the FD to also cover the processing of personal data within the framework of police and judicial cooperation at the national level. Therefore, the EP proposes setting a time limit of three years, at the end of which the Commission should propose the extension.
- The transfer of data to third countries should only be possible if there is an adequate level of data protection in these countries.
- Subsequent processing of data for purposes different from those for which the data were collected must be limited.
- In view of the debate on data retention, the FD must set the conditions for the transfer of personal data to private persons and for the processing of data by private persons when carrying out a public service remit.
- An assessment and revision clause should be inserted so that the Commission can submit proposals for improving the framework decision in the mid-term.

In its last amendment, the EP lists 15 principles which summarise the existing approach to the protection of personal data processed in the framework of po-

lice and judicial cooperation in criminal matters, derived from the relevant international conventions and European law. They go back to a draft text which was initiated by the Directorate General of Commissioner Frattini, responsible for Freedom, Security and Justice. These principles are to be annexed to the Framework Decision. It is hoped that the European institutions and bodies as well as Member States adopt formal positions on these common principles which could also serve as a basis for negotiations with third countries. The Council stated that it will take these principles into consideration.

► eucrim ID=0701122

EDPS Further Criticizes Work on Framework Decision

In an unusually intense manner, the European Data Protection Supervisor (EDPS), Peter Hustinx, took a stand on the ongoing negotiations as regards the Framework Decision on data protection in the framework of police and judicial cooperation in criminal matters. After the revision of the “December text” by Germany (see above), the EDPS published its third opinion on the proposal in April 2007 (for the first two opinions, refer to eucrim 3-4/2006, p. 64).

He expresses grave concern about a dilution towards the lowest common denominator. He thinks that the new draft not only fails to ensure an adequate protection of the EU citizen as required by the EU treaty, but also falls below the standard of the Council of Europe Convention No. 108 which has been providing the basic minimum standards of data protection in the European countries since 1981. The EDPS strongly advises the Council not to adopt the draft without making significant improvements to it. The EDPS addresses mainly the following concerns, many of which are shared by the European Parliament:

- Extending the scope to also include domestic data processing; otherwise a muddle would be created if a law enforcement body has to deal with a criminal file consisting of information originating from various national, other Member State, and EU authorities.
- Requiring an adequate level of protection for exchanges with third countries

according to a common EU standard.

- Conforming with the principles laid down in the Council of Europe data protection instruments, in particular with regard to: (1) the limitation of the further purposes for which personal data may be processed; (2) the quality of data, e.g., by distinguishing between factual and “soft” data, as well as between categories of data subjects (criminals, suspects, victims, witnesses, etc.); and (3) specific conditions for data exchanges with non-law enforcement authorities and private parties, as well as for access and further use by law enforcement authorities of personal data controlled by private parties.

► eucrim ID=0701123

After the Council, in September 2007, agreed to limit the scope of the FD to only the cross-border exchange of personal data, the EDPS reiterated its stand that a distinction between cross-border exchange and domestic data processing operations is not reasonable. He warned against a dilution of the level of protection for personal data provided in police and judicial cooperation in criminal matters.

► eucrim ID=0701124

After the working group in the Council had continued to discuss the proposal on the FD, the EDPS issued comments on the recent developments (on 16 October 2006). The EDPS brought forward seven points which he thinks need to be taken into consideration during the negotiations. Among these points are (1) the demand that the FD must reflect the minimum protection of the Council of Europe Convention No. 108; (2) the incompatible use of data must be linked to the purpose limitation; (3) the right of access needs to be completed; and (4) a forum of national and European supervisory authorities should be established – analogous to the Article 29 Working Party – with a view to ensuring a harmonised application of the FD and providing advice on legislative proposals within the third pillar.

► eucrim ID=0701125

Data Protection Commissioners Voice Criticism on FD

The Conference of European Data Protection Authorities delivered two opin-

ions on the proposal for a FD DPPJCC. The European Conference convenes the representatives of the data protection authorities of the Member States of the EU and the Council of Europe. They meet annually in the spring. Best practices and other matters of common interest are discussed in plenary sessions, and the conference traditionally ends with the adoption of a number of important documents.

In its first opinion of 24 January 2006 on the issue at stake, the Conference welcomed the Commission proposal for a comprehensive general data protection framework in the third pillar and encouraged the approximation of the laws and regulations of the Member States to this end. The opinion contains specific remarks on the individual articles of the Commission proposal.

➤ [eucrim ID=0701126](#)

In its second opinion adopted at the 2007 Spring Conference (“Cyprus Declaration”), the data protection commissioners criticize that “the version of the draft framework decision as presented by the German Presidency on 13 March 2007 [see above] does not present a solid and high data protection regime and has neither taken on board our European data protection Authorities’ Opinion issued on 24 January 2006 nor the EP’s opinion from May 18, 2006.” The Conference agrees with the European Parliament and the European Data Protection Supervisor that the scope of the FD must also cover processing of personal data at the national level and that the adequacy principle must govern the data transfers to third countries. The Cyprus Declaration also refers to key principles of data protection, such as the purpose limitation, categories of data subject, information of the data subject, and his/her right of access, with which the future EU third pillar legislation must be brought in conformity.

➤ [eucrim ID=0701127](#)

Council of Europe Committee Intervenes in Discussion on Framework Decision

In addition to the EU bodies, the Council of Europe’s Consultative Committee of the Convention for the protection of individuals with regard to automatic

processing of personal data also made some remarks on the proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. The Committee stressed that the EU framework decision should have an added value to the Council of Europe’s Data Protection Convention (ETS No. 108) and advocated as wide as possible a scope, including, in particular, not only cross-border data transfers but also national data processing. As far as the debate on data transfers to third countries is concerned, a clear statement is made in favour of the principle of an adequate level of data protection as enshrined in the Additional Protocol to Convention 108 (ETS No. 181).

➤ [eucrim ID=0701128](#)

EDPS Expresses General Concerns about Politicians’ View on Data Protection

In letters of 11 June 2007 to the incoming Portuguese Presidency, the European Data Protection Supervisor, Peter Hustinx, points out two general concerns in relation to data protection. He first states that, when discussing anti-terrorist measures, the leaders and representatives of the Member States are overlooking data protection legislation. In a press release, Peter Hustinx said: “I fear that messages such as ‘no right to privacy until life and security are guaranteed’ are developing into a mantra suggesting that fundamental rights and freedoms are a luxury that security can not afford. I very much challenge that view and stress that there should be no doubt that effective anti-terror measures can be framed within the boundaries of data protection”.

His second concern refers to the relationship between the Council of the European Union and the EDPS, especially against the background that some Council initiatives are being implemented without sufficient consideration of data protection implications. Just like the Commission, he urges the Council to refer to him as an advisor and involve him in the projects in a timely manner.

➤ [eucrim ID=0701129](#)

Ne bis in idem

Art. 54 of the CISA

Before summarising two further important judgments of the European Court of Justice on the application of the *ne bis in idem* principle enshrined in Art. 54 of the Convention Implementing the Schengen Agreement (CISA), the wording of the article will be reiterated for better understanding: “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”. Art. 54 hinders Member States from prosecuting the same cases twice or more in the Schengen area.

➤ [eucrim ID=0701130](#)

Final Judgment in “Kraaijenbrink” Case

In the “Kraaijenbrink” case, the European Court of Justice (ECJ) again had the opportunity to interpret what constitutes “the same acts” in the meaning of Art. 54 CISA (Case C-367/05). As reported in [eucrim 1-2](#), p. 17, the Belgian Court of Cassation wanted to know whether it could prosecute the laundering of money committed in Belgium, although the money originated from drug trafficking in the Netherlands where the defendant had already been tried for holding the proceeds of trafficking. In particular, the Belgian court raised the question as to whether acts can be regarded as the “same acts” if they constitute the successive and continuous implementation of the same *criminal intention*, even though different acts are involved in the two Schengen countries. As a result in the affirmative, the acts could be dealt with as a single legal act under the Belgian Criminal Code.

In answering the question, the ECJ reiterated its formula as first developed in the “Van Esbroeck-case”, namely that the only relevant criterion for the application of Article 54 CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together. The Court clarified that it is nec-

essary that an *objective* link between the material acts in question is established. A *subjective* link (i.e., “intention”), as held by the Belgian court, does not necessarily mean that an objective link exists, especially if the material acts can be considered as being different in time and space and by their nature. The ECJ leaves it for the national court “to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are ‘the same acts’ within the meaning of Article 54 of the CISA”. The judgment of the ECJ corresponds to the opinion of the Advocate General (see eucrim 3-4, p. 65).

► eucrim ID=0701131

Final Judgment in “Kretzinger” Case

The European Court of Justice (ECJ) replied to several questions which were submitted by the Bundesgerichtshof (German Federal Court of Justice) in a customs fraud case (Case C-288/05; see eucrim 1-2/2006, p. 17 [reference] and 3-4, p. 65 [opinion of Advocate General]). The case involves a German citizen, Mr. Kretzinger, who transported contraband cigarettes by lorry through Italy and Germany. The cigarettes had previously been smuggled into Greece and were bound for the United Kingdom. In February 2001, Mr. Kretzinger had been sentenced in absentia to a custodial sentence of one year and eight months by the Corte d’appello di Venezia/Italy for a first consignment. In January 2001, Mr. Kretzinger was again sentenced in absentia by the Tribunale di Ancona/Italy to a custodial sentence of two years for a second consignment. Both Italian courts found him guilty of failure to declare cigarettes and not paying customs duties arising from their importation into Italy. Whereas the first custodial sentence had been suspended, the second was not.

In awareness of these judgments, the Landgericht Augsburg/Germany sentenced Mr. Kretzinger to imprisonment, taking into account both consignments. The German court found him guilty of evasion of the customs duties which had arisen from the importation of the smuggled goods into Greece. The Bundesgerichtshof, to which Mr. Kretzinger

appealed in view of Art. 54 CISA, expressed doubts on the interpretation of the notions “same acts” and “enforcement” in the meaning of Art. 54. Furthermore, the Bundesgerichtshof wanted to know which impact the Framework Decision on the European Arrest Warrant has on the interpretation of the notion “enforcement”.

As regards the first question of whether the conduct of the defendant constitutes one single act, the ECJ advises that the conduct in question may be covered by the notion “the same acts”. By citing the above mentioned “Van Esbroeck formula”, it argues that the relevant criterion for the purpose of the application of Art. 54 is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together. In the context of the present case, the Court emphasises that the legal classification given to the acts or the legal interest protected is irrelevant. As a result, the argumentation of the Landgericht Augsburg in sentencing the defendant for the illegal importation of goods *into Greece* while the Italian courts’ judgments related to the illegal importation *into Italy* cannot be upheld.

As regards the second question on the “enforcement condition”, the ECJ concludes that, for the purposes of Article 54, it is necessary to consider that a penalty imposed by the court of a Contracting State “has been enforced” or “is actually in the process of being enforced” if the defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State. By contrast, this is not the case if the defendant was taken into police custody for a short time and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.

In the third response, the ECJ had to deal with the defendant’s argument that the option of the sentencing State (here: Italy) to issue a European Arrest Warrant in order to enforce a final and binding judgment (here: judgment of the Tribunale di Ancona) would satisfy the “enforcement condition” of Art. 54, meaning that the German court could no

longer prosecute him. The ECJ objects to this view by arguing that this interpretation would contradict the actual wording of Art. 54 CISA. Thus, the mere fact that a final and binding custodial sentence could possibly be enforced in the sentencing State following surrender of the convicted person by another State cannot affect the interpretation of the notion of “enforcement” according to the meaning of Article 54.

► eucrim ID=0701132

Victim Protection

ECJ’s Second Fundamental Ruling on the FD on the Standing of Victims in Criminal Proceedings

In its judgment of 28 June 2007, the European Court of Justice dealt with questions on the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (Case C-467/05). An Italian court referred two questions to the ECJ which had been raised in criminal proceedings for enforcement following a judgment of embezzlement against Italian Giovanni Dell’Orto. The Italian judge wanted to know whether – by interpreting the Italian law in conformity with the Framework Decision (FD) – he was obliged to order the return of seized money to a company which was damaged by Dell’Orto’s behaviour. The decisive question was whether the concept of victims in the Framework Decision also covers legal persons. Whereas the FD defines in Art. 1(a) that it only covers natural persons, the Italian court relies on Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, which does not contain any definition of victims. The Italian court questions whether the Framework Decision must be interpreted in the light of the Directive and therefore also extended to legal persons.

The ECJ decided that both the wording and the legislature’s objective limited the personal scope of the FD to natural persons only. In addition, the Directive relating to compensation to crime victims is not of such kind as to invalidate this interpretation. The Framework Decision and the Directive govern differ-

ent matters: the Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, whereas the Framework Decision aims to approximate the legislation of the Member States concerning the protection of the interests of the victim in criminal proceedings and ensuring that the offender makes reparation for the harm suffered by the victim. As a result of these findings, the ECJ did not look into the second question of the Italian court on whether the rights of the victim under Art. 2 and 9 of the FD continue to exist even in the course of criminal proceedings for enforcement. More detailed explanations on this issue can be found in the opinion of Advocate General Kokott of 8 March 2007.

Before the ECJ could deal with the question in substance, it had to dispel doubts on the admissibility of the reference. In this respect, the Court gave some fundamental explanations. First, the Court holds that the reference for preliminary ruling on framework decisions is admissible even when it does not mention Art. 35 TEU, but referred only to Art. 234 TEC. Second, the Court transfers its case law on the relevance of references for preliminary rulings under Art. 234 TEC (first pillar) to those under Art. 35 TEU (third pillar) by stating that relevance is presumed and questions can only be rebutted in exceptional cases. Third, the ECJ applies settled case law to the provisions of the FD in question in that procedural rules are generally applicable *ratione temporis* to all proceedings pending at the time they enter into force (Mr. Dell'Orto's conviction dates from 1999 whereas the FD came into effect in 2002).

➤ [eucrim ID=0701133](#)

As in the majority of cases, the Court's judgment follows the opinion of the Advocate General. The Dell'Orto case is the second one which deals with the interpretation of the FD on the standing of victims in criminal proceedings. The first one was the judgment of 16 June 2005 in Case C-105/03 ("Pupino"). There, the Court ruled in a ground-breaking way that the principle that national law must be interpreted in conformity with Community law also applies to framework

decisions, i.e., in the area of police and judicial cooperation in criminal matters.

➤ [eucrim ID=0701134](#)

Greece Blamed for Non-Implementation of Directive Relating to Compensation to Crime Victims

At the suit of the Commission, the European Court of Justice ruled on 18 July 2007 that Greece has failed to fulfil its obligation under the EC Treaty to implement Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. Greece has not yet adopted norms which would transpose the Directive. For the same reason, the Commission also brought a suit against Italy before the Court (Case C-112/07). The deadline for transposition ended on 1 January 2007. Greece is obliged to take the necessary measures to comply with the Court's judgment. Otherwise, the Court, at the specification of the Commission, may impose a lump sum or penalty payment on the country (cf. Art. 228 TEC).

Directive 2004/80 mainly aims at facilitating the access of victims of violent intentional crimes to state compensation, through increased cooperation between the authorities of the Member States, in situations where the crime took place in a Member State other than the victim's country of residence. The Directive complements the above-mentioned Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. The FD, based on the third pillar, allows crime victims to claim compensation from the offender in the course of criminal proceedings.

➤ [eucrim ID=0701135](#)

Cooperation

Mutual Administrative Assistance

Legislation on Anti-Fraud Assistance in Slow Progress

The European institutions and bodies have further proceeded with the creation of a legal framework for general mutual administrative assistance in order to strengthen the protection of the EC's financial interests. After the Commission had tabled a proposal for a re-

spective Regulation in 2004, it issued an amended proposal in September 2006 (COM(2006) 473). This amended proposal incorporates the amendments made by the European Parliament as given at a first reading on 25 May 2005. It also takes into consideration suggestions made by the Member States in the Council Anti-Fraud working group as well as the opinion of the European Court of Auditors (see [eucrim 1-2/2006](#), p. 18). The new legal framework aims at establishing communication and assistance procedures between the Commission and the Member States to allow swift investigations and appropriate actions against EC fraud. It will strengthen the coordinating role of the Commission which acts through OLAF.

In essence, the amended draft makes more clear the Commission's role as a service platform and the added value of OLAF in view of operational and intelligence support. It also clarifies the delineation with respect to criminal law and other instruments of administrative cooperation. The altered proposal includes a new provision concerning the facilitation of recovery, which, *inter alia*, shall make it possible to use information on suspicious transactions in the money laundering sector in order to detect EC fraud activities. The following link contains both the amended Commission proposal as well as the opinion of the European Parliament at first reading. A first reading in the Council on the amended proposal is still pending.

➤ [eucrim ID=0701136](#)

EDPS: Opinion on Amended Proposal on Anti-Fraud Assistance

Following the aforementioned amended proposal, the Commission requested advice on the new proposal from the European Data Protection Supervisor (EDPS). In its opinion of 13 November 2006, the EDPS considers that, on the whole, the amended proposal maintains the level of protection of personal data contained in the EU data protection framework, namely Directive 95/46/EC and Regulation (EC) No 45/2001. However, he also points out that further monitoring will be essentially required at a later stage since a number of provisions require implementing rules which

also involve data protection issues, such as the access of the Commission to national data on value-added tax (Art. 11) or the spontaneous exchange of financial information (Art. 12). The EDPS will be consulted in the implementing phase. The EDPS already gave a first opinion on the initial Commission proposal in 2004.

► eucrim ID=0701137

Commission Proposal on Mutual Administrative Assistance in Customs and Agricultural Matters under Scrutiny

The European bodies further examined the Commission proposal for a Regulation amending Council Regulation (EC) No 515/97 on “mutual assistance between administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters” (COM(2006) 866 final). The proposal intends, on the one hand, to modernize the existing basic legal framework on customs cooperation and, on the other, to strengthen the exchange of information between the Member States and the Commission (see eucrim 3-4/2006, p. 70 on the principal content). In the following two opinions on the proposal are reported:

EDPS Calls for Improvements to Commission Proposal

In its opinion of 22 February 2007, the European Data Protection Supervisor (EDPS) particularly looked into the aforementioned Commission draft relating to the exchange of (personal) information via central databases, i.e., the Commission’s proposals on (1) the creation of the (new) European Central Data Directory, (2) the extended use of the Customs Information System (CIS), and (3) the establishment of rules on the Files Identification Database (FIDE). The EDPS makes a number of suggestions for inclusion into the proposal. As regards the European Data Directory, the EDPS doubts its necessity and points out that the proposal does not deal with security measures of the new system. With respect to the Customs Information System, the EDPS remarks that the regulation needs to define more clearly

the supervision of the system for which the EDPS, together with the national data protection authorities, is responsible. Regarding FIDE, the EDPS suggests an annual review of the retention of data in order to avoid having data that is not needed remain in the system. Lastly, the EDPS recalls that he is entitled to prior checks of the three systems in accordance with Art. 27 of Regulation 45/2001.

► eucrim ID=0701138

European Court of Auditors Comments on Commission Proposal

Following the EDPS, the European Court of Auditors (ECA), on 21 March 2007, gave its opinion on the above-mentioned Commission Proposal to strengthen administrative assistance as regards the correct application of Community customs and agriculture legislation. The ECA generally points out that an overlap between communications to OLAF and those to the Commission’s Directorate General responsible for taxation and customs union (DG TAXUD) ought to be avoided. Furthermore, the Commission should consider measures which make information more reliable and complete – an essential issue for a more effective fight against fraud in the view of the ECA. The opinion also contains some remarks on specific provisions of the proposal.

► eucrim ID=0701139

Customs Cooperation

Modernized Customs Code: Council Reaches Agreement

On 15 October 2007, the Council reached a common position on a new Regulation which would introduce the so-called modern Community Customs Code (MCCC). Together with the electronic customs initiative, the modernised Customs Code is part of the Commission’s global reform aimed at creating a new electronic customs environment. It will simplify customs legislation and streamline customs processes and procedures. At the same time, the electronic customs initiative will provide for more convergence between the IT systems of the 27 customs administrations. As a re-

sult, traders will save money and time in their business transactions with customs. One main feature, for example, will be “centralised clearance” under which authorised traders will be able to declare goods electronically and pay their customs duties at the place where they are established, irrespective of the Member State through which the goods will be brought in or out of the EU customs territory or in which they will be consumed (more details on the MCCC can be found in eucrim 3-4/2006, p. 71). The common position of the Council, on which political agreement was reached on 25 June 2007, endorses a number of the amendments made by the European Parliament, but it also contains new modifications. Now, the EP can start a second reading on the proposal under the co-decision procedure.

► eucrim ID=0701140

Paperless Environment for Customs and Trade: Political Agreement

In July 2007, the Council adopted a common position on the Commission proposal to create a paperless environment for customs throughout the European Union. The new electronic system will interconnect the various Member States’ electronic customs systems in existence and create a single, shared computer portal. Electronic declarations would become compulsory, with paper-based declarations remaining the exception (for more details on the project, see also eucrim 3-4/2006, p. 71, 72). Member States and the Commission favour a step-by-step approach by which electronic systems will be implemented in several phases. The common position was prepared by a political agreement in May 2007. The draft was forwarded to the European Parliament for a second reading under the co-decision procedure.

► eucrim ID=0701141

Customs 2013 Adopted

In April 2007, the Council and the European Parliament put on track the Community Programme “Customs 2013”. The new programme renews for a period of six years the “Customs 2007” programme which ends on 31 December 2007. The new EU programme for 2008–

2013 will have a total budget of €323.8 million. The programme will, inter alia, fund actions which would implement the above-mentioned modernisation of the customs code and help introduce the paperless customs environment. It is also an important tool for the promotion of actions in view of an improved fight against customs fraud and the protection of the financial interests of the EC and the Member States (see also eucrim 3-4/2006, p. 72).

► eucrim ID=0701142

European Community Joins World Customs Organisation

As from 1 July 2007, the European Community has been given membership rights to the World Customs Organisation. In face of the competence of the EC in customs matters, the membership is expected to improve international customs cooperation, inter alia, in the fields of security and intellectual property rights enforcement.

► eucrim ID=0701143

Police Cooperation

Integration of "Prüm Treaty" into EU Law Books Successful

At its meeting on 12 June 2007, the EU Justice and Home Affairs Ministers reached a political agreement on a Decision to step up cross-border cooperation, particularly when combating terrorism and cross-border crime. It will incorporate the substance of the provisions of the Prüm Treaty into the legal framework of the European Union (see eucrim 3-4/2006, p. 72). To this end, the Decision will contain rules on:

- the automated transfer of DNA profiles, dactyloscopic data, and certain national vehicle registration data;
- the supply of data in connection with major events with a cross-border dimension;
- the supply of information in order to prevent terrorist offences;
- other forms which step up cross-border police cooperation (joint operations and assistance in connection with mass gatherings, disasters, and serious accidents). Mutual access to each others' DNA, fingerprint, and vehicle registration in-

formation systems – the main feature of the Decision – is the first step in the implementation of the principle of availability. This principle as set out in the Hague Programme means that information which is available to certain authorities in one Member State must also be provided to equivalent authorities in other Member States. Another important issue concerns the possibility for national police to enter another EU state's territory and operate alongside their colleagues while carrying their usual service weapons and wearing their own national uniforms. However, a provision in the original Prüm Treaty on hot pursuit in the event of imminent danger – in which case national officers cross borders without asking permission from the host country – remains removed.

► eucrim ID=0701144

The German delegation also brought forward a draft Decision in view of the technical and administrative implementation of the above-mentioned norms. A separate manual with factual information for the authorities of the Member States is also in preparation.

► eucrim ID=0701145

The initiative of 14 Member States with a view of adopting a Council Decision which integrates the essential parts of the Prüm Treaty into the legal framework of the EU is published in the Official Journal C 71 of 28 March 2007, at p. 35.

► eucrim ID=0701146

Parliament Resolution on Draft Decision Integrating Prüm Treaty

On 7 June 2006, European parliamentarians adopted a legislative resolution on the initiative of 15 Member States for a decision which would incorporate the Prüm Treaty provisions into EU legislation (OJ C 71, 28 March 2007, p. 35). The resolution, which is based on a report by MEP Fausto Correia of 24 May 2007, proposes 70 amendments to the initial draft.

The EP takes the view that the envisaged measure should be adopted as a framework decision instead of a decision, since the provision on the stepping up of cross-border cooperation seeks to achieve the approximation of the laws and regulations of the Member States. Under these circumstances, only

a framework decision would be the appropriate means under the EU-Treaty, a decision pursuant to Art. 34 para. 2c) TEU would be excluded. In this context, the Parliament thinks that a framework decision would be more advantageous because, in case of a decision, the Council may adopt subsequent implementation measures by a qualified majority without consulting the Parliament (see Art. 34 para. 2c).

Other amendments largely concern the insertion of more data protection aspects into the single provisions of police cooperation. Interestingly, the MEPs favour including provisions on hot pursuit in the event of imminent danger (see aforementioned news item) and on mutual police assistance in accordance with Art. 39 para. 1 of the Schengen Convention. Both provisions are in the Prüm Treaty but were not taken up in the draft decision.

Lastly, the Parliament regrets several issues: (1) the obligation imposed on it by the Council to express its opinion as a matter of urgency, without adequate and appropriate time for Parliamentary review; (2) the absence of a comprehensive impact assessment and evaluation of the application of the Prüm Treaty to date; and (3) the lack of an adequate framework decision for the protection of personal data in police and judicial cooperation, which it considers necessary before any other data processing legislation is adopted under the third pillar. So far, the proposed amendments have not been substantially taken into account by the Council.

► eucrim ID=0701147

European Data Protection Supervisor's Opinion on Integration of Prüm Treaty

In his opinion of 4 April 2007, the European Data Protection Supervisor (EDPS) also recommends amendments to the text of the draft decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. Remaining in line with the European Parliament, the EDPS criticizes the time pressure for the adoption of the legal instrument as set by the German Presidency and the conclusion of the essential elements of the draft decision outside the prerogative under the

third pillar, as a result of which a lack of democracy and transparency is constituted. He also regrets that, in view of the necessity and proportionality of the measure, neither an impact assessment on privacy issues nor a proper evaluation of the existing measures on the exchange of law enforcement information (e.g., via the Schengen Information System) or even of experience with the DNA databases made by the States which already apply the Prüm Treaty has taken place before introducing the system EU-wide. Like the EP, the EDPS requests that the provided Council Decision should not be adopted before the adoption of the general framework on data protection within the EU's police and judicial cooperation (see above). He gives several reasons illustrating the importance of a general legal framework as a *condicio sine qua non* for the exchange of personal data among law enforcement authorities based on special rules (as is the case for the present draft decision). As regards the different types of data, the EDPS welcomes the gradual approach of the initiative and the concept of indirect access via reference data instead of direct access. However, he requires extra safeguards for the use of biometric data (DNA analysis files and fingerprints) and strongly advocates a minimum harmonisation of essential elements regarding the collection and exchange of the different data. It is worth mentioning that the EDPS issued this opinion *ex officio* since no request for advice had been sent to him. He calls on the Council to consult him before adopting implementation measures.

► [eucrim ID=0701148](#)

Reaction of Presidency to European Data Protection Supervisor

There are not many examples in which the Council Presidency immediately comments on the opinions of the EDPS. The German Presidency did so in response to the presentation of the aforementioned EDPS' opinion on the initiative which would incorporate the Prüm Treaty into EU law. In its statement, the Presidency especially contradicts the view that agreement on the Framework Decision on the protection of personal data relating to police and judicial coop-

eration in criminal matters must first be achieved before incorporating the Prüm Treaty into EU legislation.

► [eucrim ID=0701149](#)

European Arrest Warrant

ECJ: Framework Decision on European Arrest Warrant is Valid

On 3 May 2007 the European Court of Justice (ECJ) declared that the Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States is valid. It rejected all arguments against the Framework Decision as brought forward by the *Advocaten voor de Wereld*, a Flemish association of lawyers and the initiator of the proceedings before the Belgian Arbitragehof which referred the questions to the ECJ (for more details refer to A. Weyembergh, *eucrim* 1-2/2006, p. 26 ff.). First, the ECJ rejects the argument that the EAW ought to have been regulated by a convention (Art. 34 para. 2 d TEU). The Court takes the view that it is within the Council's discretion to give preference to the framework decision as a legal instrument in cases where, as in the present, the conditions governing the adoption of such a measure are satisfied.

Second, the ECJ also sees no violation of fundamental rights, such as the principle of legality, as regards the removal of verification of double criminality for 32 offences (Art. 2 para. 2 of the FD). The Court argues that it is up to each Member State to define the offences and penalties applicable for a non-verification of double criminality and therefore must respect the principle of the legality of criminal offences and penalties as one of the fundamental legal principles as enshrined in Art. 6 TEU.

Third, the Court also objects to accepting a breach of the principle of equality and non-discrimination. The *Advocaten voor de Wereld* argued that the distinction between the offences for which "double criminality" is no longer verified and the other offences where double criminality still applies is not objectively justified. The ECJ, by contrast, points out that "(w)ith regard (...) to the choice of the 32 categories of offences

listed in the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality." With regard to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the FD within the various national legal orders, the Court points out that it is not the objective of the FD to harmonise the substantive criminal law of the Member States. On balance, the ECJ follows the opinion of the Advocate General (see *eucrim* 3-4/2006, p. 74).

► [eucrim ID=0701150](#)

"EAW Is a Success", Second Commission Evaluation Report States

The Commission published its second evaluation report on the state of transposition of the Framework Decision (FD) on the European Arrest Warrant. The first report was published in February 2005 and supplemented by a revised version in early 2006 (see *eucrim* 1-2/2006, p. 19). The present report covers the period from 2005 to 2007. The report states that the instrument is well established in practice and generally effective. As in the first report, the considerable reduction in the length of surrender procedures compared with the traditional extradition is highlighted. On average, when the person concerned does not consent to his or her surrender, a surrender request now takes less than six weeks to process. When the person does consent to his or her surrender, the average surrender period is only 11 days, compared to previous extradition arrangements which meant that such requests took over a year to process. However, in 2005, the 90-day time limit as set in Art. 17 para. 4 of the FD was adhered to in scarcely 5 % of the cases. On the basis of figures submitted by 23 EU Member States, nearly 6900

arrest warrants were issued in 2005, twice as many as in 2004. They resulted in the location and arrest of over 1700 persons, of whom 1532 (86 %) were actually surrendered.

The report also states that many Member States' laws still do not fully comply with the requirements of the FD. Numerous shortcomings which had already been revealed by the Commission in the first report remain. The most significant differences exist in the transposition of mandatory and optional grounds for the non-execution of an arrest warrant. The annexed staff working document to the report contains an article-by-article evaluation of the implementation legislation in the Member States. It also encompasses the Bulgarian and Romanian implementing laws that entered into force on 1 January 2007 (for more detail see the article by Isabelle Pérignon in this issue).

►eucrim ID=0701151

Discussions on European Arrest Warrant in the Council

Experts continue to discuss practical improvements to the European Arrest Warrant in the Council working parties. At a meeting on 23 July 2007, they had an exchange of views on the above-mentioned second Commission evaluation report. In this context, a discussion on practical inadequacies was held, e.g., on the reintroduction of the double-criminality test in some Member States' law and in practice, grounds for refusal not compatible with the FD, and the surrender of country's own nationals. Delegations also agreed to draft an EU manual on how to fill in the form for the European Arrest Warrant as annexed to the FD. The manual is aimed at assisting authorities by giving practical orientation.

Moreover, another important issue arose on the occasion of mutual evaluation rounds on the practical application of the EAW which are carried out by national experts on behalf of the Council. Experience showed that European Arrest Warrants are issued for very minor offences, such as the theft of a piglet or the possession of 0.15 grams of heroin. The question is whether the principle of proportionality is upheld in these cases. The issuing and execution of EAWs

in minor cases is not prohibited in the Framework Decision which does not include any grounds for refusal in relation to it. However – against the background of judgment of the European Court of Justice in Case C-303/05 “Advocaten voor de Wereld” and judgments of the Court in cases on the freezing of assets – the principle is to be respected. It can be expected that discussion on this matter will continue at the EU level.

►eucrim ID=0701152

Statistics for 2006

The Council published statistics on the practical operation of the European Arrest Warrant in 2006. The picture is somewhat fragmented since several Member States did not deliver data by the deadline. A special annex contains figures on the grounds for refusal.

►eucrim ID=0701153

European Evidence Warrant

Conclusions on So-Called “Horizontal Approach”

In the context of negotiations on the draft Framework Decision on the European Evidence Warrant (EEW), Germany initiated discussions on how to apply at least 6 undefined offences for which Member States must waive double-criminality checks. These offences are terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion, and swindling.

Germany reserved the right to double-check evidence requests relating to these offences, except in cases where the issuing authority has declared that the offence concerned falls within the scope of criteria indicated in a specific declaration (see eucrim 1-2/2006, p. 20).

The issue was further pursued during the Finnish and German Council Presidencies. Germany proposed finding a common understanding of the six categories of offences by defining them more precisely. If the core conditions of the definitions are met, the executing authority is obliged to enforce the judgment of another State without examining double criminality. In doing so, Germany is attempting to meet constitutional law concerns at the supranational level.

The concerns were expressed during the proceedings against the European Arrest Warrant before the German Federal Constitutional Court (see eucrim 1-2/2006, p. 18-19 and p. 39 ff.). There it was doubted whether some categories of offences from the list of 32 offences, for which double-criminality checks are waived in the course of the execution of a European Arrest Warrant, would be compatible with the principle of legal certainty.

With the exercise, as proposed to the other Member States in the Council, Germany intends to make state action more foreseeable and transparent, particularly in view of offences which greatly differ in substance and coverage across the bloc's 27 legal systems. The approach does not envisage a full harmonisation of the offences in question, but it sets criteria for a common understanding in the horizontal instrument of the EEW. Notwithstanding, this “horizontal approach” would also affect other legal instruments which implement the principle of mutual recognition, such as the European Arrest Warrant, or orders freezing property or evidence.

However, the opinions of the Member States on the German approach differed considerably, e.g., on how to specify criteria for the precise definition of the offences (reference to international instruments and/or autonomous definition?), or on the nature of the horizontal instrument (definition in a binding instrument or by general guidelines?). At its meeting in June 2007, the Justice and Home Affairs Ministers came to the conclusion to postpone the implementation of a horizontal concept until the European Evidence Warrant has been implemented and further experience gained in the application of other similar legal instruments, such as the European Arrest Warrant.

►eucrim ID=0701154

European Supervision Order / Transfer of Sentenced Person

Mutual Recognition of Non-Custodial Decisions: Council Conclusions

As mentioned in eucrim 3-4/2006, p. 74-75, two proposals on framework decisions are currently on the table which

aim at implementing the principle of mutual recognition for non-custodial judicial decisions. They both seek to prevent recidivism and enable the suspect to remain in his/her social and legal environment.

The first proposal (COM(2006) 468) – the “European Supervision Order” – refers to the pre-trial phase and aims at setting rules under which the Member State of residence would supervise obligations imposed on a person awaiting trial in another EU Member State.

The second legislative instrument, which is based on a German-French initiative, refers to the post-trial phase and aims at setting common rules under which the Member State of residence would supervise probation measures or alternative sanctions imposed on a person in another Member State. While progress has already been made on the second proposal on “probation”, work on the “European Supervision Order” is stuck in the initial stage in the relevant Council working groups.

After the Council had carried out a survey among the Member States, the Justice and Home Affairs Ministers, at their meeting on 18 September 2007, concluded that the text on the European Supervision Order needs to be redrafted. In particular, it turned out that some practical aspects need to be reconsidered, such as the return mechanism of suspects to the issuing State, as well as greater respect for specific features of the national systems of criminal justice and criminal procedure as regards the criteria and conditions for issuing a European Supervision Order. Furthermore, special attention should be paid to achieving coherence between the legal instruments on mutual recognition of non-custodial decisions in the pre-trial and post-trial phases (FD on “probation”).

➤eucrim ID=0701155

Framework Decision on Suspended Sentences: Council Endorses Key Elements

The EU Justice Ministers, at their Council meeting on 12/13 June 2007, reached a common understanding on the major cornerstones of the aforementioned German-French draft Framework Decision (FD) on the recognition and supervi-

sion of suspended sentences, alternative sanctions and conditional sentences. The instrument will allow a person to live and work in his/her residential Member State whose authorities also supervise probation measures following a conviction issued in another Member State. The agreed cornerstones concern the scope of the FD, its scope of application, the types of suspensory measures and alternative sanctions, and the division of competences between the issuing State and executing State. The latter issue was particularly controversial in the Council working groups. The Ministers are now in agreement that, as a general rule, it is the executing Member State which is responsible for taking all subsequent decisions relating to the judgment, e.g., revocation and pardon. This common understanding is the preliminary stage of a political agreement and does not commit delegations to specific wording of the articles. However, it is hoped that negotiations can be quickly finalised.

➤eucrim ID=0701156

E-Justice

Ambitious EU Project on E-Justice Progresses Well

During 2007 further progress was made in the area of e-Justice. The project, which is one of the priorities of the German, Portuguese, and Slovenian Council Presidencies in 2007 and 2008, involves developing an electronic system at the EU level by taking advantage of modern information and communications technology both in criminal matters as well as civil and commercial matters. It is envisaged, for instance, that citizens and companies have easier access to the law of different legal systems, facilitate cross-border communication between parties to judicial proceedings, or exchange information from national registers more effectively. The German Presidency invited experts to a conference, entitled “Work on e-Justice”, that took place in Bremen from 20 to 31 May 2007.

➤eucrim ID=0701157

A “Council Working Party on Legal Data Processing” carried out initial work in three meetings in February, April, and May 2007. It released a report in June

2007 which also contains comparative information on the use of IT in the justice systems of the EU Member States.

➤eucrim ID=0701158

The JHA Council, at its meeting in June 2007, adopted conclusions on the subject. The Council set priorities for future work. It was also agreed that the system should be decentralised and pilot projects, in which not all Member States necessarily take part, be set up in the field of e-Justice (see also eucrim 3-4/2006, p. 76).

➤eucrim ID=0701159

Further progress was made at the informal meeting of the Justice Ministers in Lisbon on 1 and 2 October 2007. The Portuguese Presidency is working on presenting a prototype of the Internet site for European Justice by the end of the year, which will allow the user single access to several electronic instruments and tools. The targeted users are not only professionals in the area of Justice (magistrates, lawyers, police authorities, etc.) but also citizens and businesses.

➤eucrim ID=0701160

Exchange of Information on Criminal Records

Framework Decision on Exchange of Criminal Records is on the Way

The EU is going ahead with a better exchange of information on criminal records (see eucrim 3-4/2006, p. 76-78). At its meeting on 13 June 2007, the EU Justice Ministers reached a general approach on the Framework Decision (FD) on the organization and content of the exchange of information extracted from criminal records between Member States, which was proposed by the Commission in 2005. The FD still has to be formally adopted by the EU Member States before it enters into force. The aim of the FD is to improve the quality of storage and transmission of convictions EU-wide. In the future, national criminal records will serve as the central authority for the EU-wide exchange of information; a new centralized European criminal records register will not be created. The convicting Member State will be obliged to transmit to the Member State of the person’s nationality information on the convictions handed down

against its national as soon as possible. The home state is then required to store the information in its national records as the EU central authority. Additionally, the national judicial authorities can obtain information from the criminal records of other EU Member States within a period of 10 working days.

The information exchange will be based on a uniform format which is planned as a template for the electronic data exchange – as is already exercised by Germany, France, Belgium, Spain, Luxembourg, and the Czech Republic within the framework of a pilot scheme for a network of judicial registers.

► [eucrim ID=0701161](#)

Belgian Initiative on Mutual Recognition of Prohibitions Integrated

It is worth mentioning that Belgium has agreed to make its initiative of 4 November 2004 part of this Framework Decision. Belgium at that time reacted to the Fourniret case, in which the offender confessed to kidnapping, raping, and murdering girls in France and Belgium in the 1980's and 1990's. The Belgium initiative envisaged making it an EU-wide obligation to recognize and enforce prohibitions arising from convictions for sexual offences committed against children. The planned FD on the exchange of criminal records will ensure that full information can be made available on a EU-wide basis if applications for a certificate of good conduct are made. The following link leads to the original Belgium initiative.

► [eucrim ID=0701162](#)

European Parliament: Legislative Resolution on the Framework Decision on Criminal Records

The European Parliament issued its opinion on the Commission's draft text of the above-mentioned Framework Decision on 21 June 2007. The amendments mainly aimed at making the proposal more inclusive and clarifying its wording. Some of the amendments are intended to bring it into line with the Framework Decision on the taking into account of convictions in the Member States of the EU in the course of new criminal proceedings. It also aims at deleting obligations which are difficult for Member States to comply with.

► [eucrim ID=0701163](#)



Council of Europe

Reported by Julia Macke

Foundations

Membership

Accession of Montenegro to the CoE

On 11 May 2007, Montenegro became the 47th Council of Europe (CoE) Member State.

Montenegro was formerly a member of the CoE as part of the State union of Serbia and Montenegro. However, following the dissolution of the state union in June 2006, Montenegro became an independent state and thus had to apply for membership again.

► [eucrim ID=0701164](#)

PACE: Some Conditions Still to Be Fulfilled

Following its declaration of independence on 3 June 2006, Montenegro directly submitted a request to accede to the CoE. The Committee of Ministers transmitted the request to the Parliamentary Assembly for its opinion, in accordance with the usual procedure. In April 2007, the CoE's Parliamentary Assembly, PACE, thereupon gave green light to Montenegro's request for accession. The Committee of Ministers followed the approval.

However, Montenegro has to fulfill some conditions in the near future: It should adopt, within a year, a new Constitution which incorporates seven minimum principles, including a total ban on the death penalty, the independence of the judiciary, and measures to protect minority rights. The Assembly further set deadlines for Montenegro to sign and ratify a long list of CoE conventions. Montenegro agreed to these commitments.

On 23 October 2007, Montenegro has fulfilled the first condition and promulgated its new constitution.

► [eucrim ID=0701165](#)

Relations between the Council of Europe and the European Union

Memorandum of Understanding Finally Signed

The Council of Europe and the European Union finally signed a Memorandum of Understanding on 23 May 2007 (see also [eucrim 3-4/2006](#), p. 81/82). The Memorandum creates an institutional framework to reinforce the cooperation in areas of common interest, in particular the promotion and protection of pluralistic democracy, the respect for human rights and fundamental freedoms, the rule of law, political and legal cooperation, culture, education, and social cohesion.

The Memorandum confirms the role of the CoE as the benchmark for democracy, human rights, and the rule of law in Europe. It stipulates the need for coherence between EU legislation law and CoE conventions in the fields of human rights and fundamental freedoms. Importantly, the relevant CoE norms will be cited as a reference in EU documents because the European Union regards the CoE as the Europe-wide reference source for human rights. The Memorandum underlines that early accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms would greatly contribute to coherence in the field of human rights in Europe. It further points out the relationship between the new European Union Agency for Fundamental Rights and the CoE (see above).

Furthermore, the Memorandum envisages the possibility of consultation between the CoE and the EU at an early stage with regard to the elaboration of common standards. It likewise announces the development of joint activities and deepened cooperation through

specialized CoE structures, processes and initiatives as well as appropriate institutions of the EU. Ongoing cooperation will be reinforced in the framework of the joint programmes. The implementation of the Memorandum will be subject to a regular evaluation. In the light of this evaluation, it will then be decided by common agreement, no later than 2013, to, if necessary, revise the Memorandum with a view to including new priorities for their cooperation.

►eucrim ID=0701166

Council of Europe Further Works on Juncker Report

At the ministerial session of 11 May 2007, the high-level group published a report concerning the follow-up to the so-called Juncker report. Stressing Juncker's twin-track approach, which combines long-term with short-term recommendations, the report underlines that follow-up action on the Juncker report needs to proceed at two parallel levels – first, that of examining the long-term recommendations concerning Europe's future shape, and, secondly, the follow-up to the practical, short-term recommendations. It welcomes the concrete recommendations Juncker made in his report, urges the CoE to make this issue one of its chief priorities, and suggests that progress made with the follow-up to the Juncker recommendations be subject to regular review at the future ministerial sessions.

In an addendum, the high-level group identifies some measures that have already been taken or are underway to implement Juncker's recommendations. Juncker's recommendation that the EU bodies should recognise the CoE as the Europe-wide reference source for human rights is, for instance, already recognised by the above-mentioned Memorandum of Understanding.

The high-level follow-up group was set up at the ministerial session in May 2006 to intensify the work concerning the relations between the CoE and the European Union. The Juncker report, entitled "Council of Europe – European Union: A sole ambition for the European continent", was published in April 2006 and includes different proposals on how to improve the relationship between

the CoE and the European Union (see eucrim 3-4/2006, p. 81 and 82 for more information on the high-level group and the Juncker Report).

►eucrim ID=0701167

The Committee of Ministers agreed to continue work on the follow-up to the Juncker report. The work should be regularly reviewed at the future sessions, on the basis of updated reports prepared by the high-level group.

►eucrim ID=0701168

Commissioner for Human Rights Comments on Juncker Report

Beyond the high-level group, the Commissioner for Human Rights, Thomas Hammarberg, also discussed the Juncker report. His report especially refers to Juncker's recommendation that the resources and budget of the Commissioner for Human Rights at the Council of Europe need to be substantially increased if he is to do his job properly. He illustrates that the Office of the Commissioner does not have the capacity to fully utilise his potential and to meet the growing expectations. In order to make fuller use of the potential of the Office, he holds the view that the following is needed: (1) a systematic, professional cooperation with other structures in the Council of Europe and with other bodies working in Europe for human rights, (2) an effective management and administration of the Office of the Commissioner, and (3) an increase of the number of staff and other resources for the Office.

►eucrim ID=0701169

Reform of the European Court of Human Rights

Increased Pressure on Russia

At the 117th session of the Committee of Ministers from 10 to 11 May 2007 in Strasbourg, and in several statements afterwards, the CoE urged Russia to finally ratify Protocol No. 14 without delay to allow for its rapid entry into force. The Protocol is the major legislative instrument which will achieve a more effective operation of the European Court of Human Rights (see eucrim 3-4/2006, p. 82).

Protocol No. 14 has to be ratified by all CoE Member States to enter into force.

In the meantime, Russia is the only Member State which has not yet ratified Protocol No. 14. Critical voices assume that the Russian blockade intends to exert pressure on the CoE and the European Court of Human Rights (ECtHR). Finally, it is a fact that an extremely high number of applications lodged before the ECtHR comes from Russian people and that Russia often does not accept the correspondent judgments of the Court.

►eucrim ID=0701170

Talks in San Marino Pave Way for Discussing Future of the Court

From 22 to 23 March 2007 a colloquy, entitled "Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report", was held in San Marino. San Marino at that time held the chairmanship of the CoE's Committee of Ministers. In preparation for the 117th Ministerial Session of the Committee of Ministers of the CoE, it was the first opportunity for a broad and open exchange of views at a high technical level on the various measures recommended in the report by the Group of Wise Persons, including, e.g., the immediate ratification and entry into force of Protocol No. 14.

The report of the Group of Wise Persons which was published in November 2006 contains proposals making the judicial system of the Convention more flexible. The Group of Wise Persons was set up by the Third CoE Summit in Warsaw in May 2005 to draw up a comprehensive strategy for securing the long-term effectiveness of the European Convention on Human Rights and its control mechanisms (more details in: eucrim 3-4/2006, p. 82-83).

►eucrim ID=0701171

Way out of Impasse Due to Non-Ratification of 14th Protocol Reflected

Against the background that only Russia still has not ratified Protocol No. 14, experts are looking for ways to overcome the deadlock. While presenting the results of the discussion of the above-mentioned colloquy in San Marino, Maud de Boer-Buquicchio, Deputy Secretary General of the CoE, listed a number of possible measures which could be implemented in the short term without Protocol No. 14, including:

- the use of the potential of the Court's developing practice of adopting pilot judgments,
 - the required redefinition of what constitutes an application,
 - the equipping of CoE Information Offices in high case-count countries with an information desk to provide practical assistance to applicants or translation services,
 - wider dissemination to target groups of the Court's key judgments in languages other than French or English, and
 - closer collaboration of the Commissioner for Human Rights with national human rights institutions and ombudsmen.
- As to long-term measures, Maud de Boer-Buquicchio stressed that two proposals of the Wise Persons' Report proved controversial: First, the proposal on just satisfaction which would refer the decision on the amount of compensation to the concerned state, would risk complicating and prolonging the procedure and creating divergent standards, and would not fit in well with domestic judicial infrastructures for dealing with damages. Second, the proposal to institute a judicial committee which would be responsible for filtering applications was criticized. However, some other proposals of the Wise Persons were largely welcomed, such as the proposal to make it easier to adapt the Convention machinery by making it possible for the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions, without an amendment to the Convention being necessary each time, and the proposal to adopt a new Council of Europe Convention containing obligations for CoE Member States as regards the availability, functioning, and effectiveness of domestic remedies, in particular concerning the excessive length of proceedings.

➤ [eucrim ID=0701172](#)

Report on Court's Future under Scrutiny at NGOs

In January 2007, a number of NGOs presented a joint response to the proposals in the above-mentioned report of the Group of Wise Persons. While basically welcoming the commitment of the CoE Member States to ensuring the long-term effectiveness of the European Court of

Human Rights and therefore supporting most of the proposals made by the Group of the Wise Persons, the NGOs also expressed their opposition to some of them. For instance, they do not accept the proposal to add a treaty provision obligating state parties to the ECtHR to introduce domestic legal mechanisms to redress the damage resulting from any violation of the ECtHR. Furthermore, they consider it problematic that the CoE Information Offices should take on the function of advising individuals about existing domestic and other non-judicial remedies. They also reject the plan that the information necessary for the determination of admissibility of an application should be submitted only on the Court's application form and the referral of decisions on awards of compensation be returned to the state concerned.

➤ [eucrim ID=0701173](#)

New Web Features Bring about Better Transparency of ECtHR

Independent of the above-mentioned reform debate, the ECtHR launched two initiatives on 25 June 2007 which at least improve the Court's web presence. First, a webcast of its public hearings enables journalists and the public to view the Court's hearings from anywhere in the world and to download extracts of interest. Second, the Court provides new information about pending cases on its website. In this regard, a report appears on the Court's Internet site every Monday, giving a list of cases which have been officially communicated to the government of the country against which the applicant's complaints are directed. For each case, there is a link to a summary of the facts, the applicants' complaints, and the questions put by the Court to the parties.

➤ [eucrim ID=0701174](#)

New Website for Training on Human Rights to Help Reduce the Influx of Cases

On 9 October 2007, the CoE launched a new website containing materials and tools for education on the European Convention on Human Rights (ECHR). It is aimed at supporting the CoE Member States in the integration of human rights into their training of judges and prosecu-

tors in order to strengthen the implementation of the ECHR at the national level and simultaneously reduce the influx of cases coming to the ECtHR.

The site therefore especially contains standard curricula on the ECHR, a manual on training methodology, a collection of 'e-learning courses' and further training materials as slide shows, case studies, and moot courts. Although the site is open to the public, there is a restricted area for judges, prosecutors, and trainers which is only accessible with a password.

The website was developed as part of the European Programme for Human Rights Education for Legal Professionals, the so-called "HELP" Programme. The HELP Programme, launched in March 2006, is a 3-year initiative aimed at integrating the ECHR into the national training structures of judges and prosecutors in CoE Member States.

➤ [eucrim ID=0701175](#)

Election of 12 Judges to the European Court of Human Rights

Incidentally, on 2 October 2007, the Parliamentary Assembly of the CoE elected twelve judges to the European Court of Human Rights. Six new judges were elected, who will begin their work on 1 February 2008, and six sitting judges were re-elected, who will begin their new term of office on 1 November 2007 already.

➤ [eucrim ID=0701176](#)

Specific Areas of Crime

Corruption

GRECO: Italy and Monaco New Members

On 30 June 2007, Italy became the 45th Member State of the Group of States against Corruption (GRECO). On 1 July 2007, Monaco followed as 46th Member State of GRECO.

GRECO is the CoE's anti-corruption monitoring mechanism which aims at improving its members' capacity to fight corruption by monitoring the compliance of states with their undertakings in this field. GRECO monitors all its members on an equal basis through a dynamic

process of mutual evaluation and peer pressure. It therefore works in evaluation rounds, each covering specific themes. GRECO's first evaluation round (2000–2002) dealt with the independence, specialisation, and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003–2006) focused on the identification, seizure, and confiscation of corruption proceeds, the prevention and detection of corruption in public administration, and the prevention of legal persons (corporations, etc.) from being used as shields for corruption. The third evaluation round started in January 2007 (see the following news items).

➤ [eucrim ID=0701177](#)

GRECO: Third Evaluation Round Launched

As already mentioned in [eucrim 3-4/2006](#), p. 84, GRECO launched its third evaluation round in January 2007. The third evaluation round addresses (a) the incriminations provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding. In this context, it held a training workshop on incriminations at its 33rd plenary meeting from 29 May to 1 June 2007. The main topics were the monitoring of the implementation of international anti-corruption standards in the criminal law sector and the practical aspects of applying criminal legislation in the investigation and prosecution of corruption at the domestic level. The Member States also examined reports in the framework of the first and second evaluation rounds at the meeting. The Plenary held two round table discussions on the following topics: "Recent developments in anti-corruption institutions and strategies" and "Actual and potential obstacles to the ratification of the Civil Law Convention on Corruption".

➤ [eucrim ID=0701178](#)

Russia: RUCOLA 2

A series of meetings in the framework of the so-called RUCOLA 2 project looked into the issue of the Russian approaches towards assessing and preventing corruption risks in such areas of legislation as healthcare, education, and public

procurement. Two meetings took place in March and February 2007 where the State Duma Anti-Corruption Commission, the Council of Europe, and the European Commission further discussed the issue of the development of national anti-corruption strategy. At their last meeting in April 2007, Russian experts presented legislative proposals to strengthen the anti-corruption effort in specific areas. They further finalized discussions on the issue of the development of national anti-corruption strategy and the creation of a specialized body responsible for the coordination of national efforts in the sphere of combating and preventing corruption. These issues of the project have run since October 2006. The RUCOLA 2 project, which is a joint project of the European Commission and the CoE, aims at supporting the State Duma Anti-Corruption Commission in the development of legislative and other measures for the prevention of corruption (see also [eucrim 3-4/2006](#), p. 84).

➤ [eucrim ID=0701179](#)

New Anti-Corruption Projects Launched in Three Countries

In September 2007, three new Anti-Corruption Projects were launched by the CoE to support the governments of Azerbaijan, Georgia, and Turkey in the next 24 months in their ongoing reforms and efforts to constrict and prevent corruption, and to enhance and strengthen good governance, including ethics safeguards, in line with European and other international standards.

The project in Georgia, called GEPAC, will support the new anti-corruption strategy as well as the new Georgian anti-corruption action plan by means of technical assistance.

➤ [eucrim ID=0701180](#)

Similarly, the CoE will provide technical assistance in Azerbaijan in order to support the ongoing legislative and institutional anti-corruption reforms.

➤ [eucrim ID=0701181](#)

In Turkey, the CoE will primarily strengthen the Council of Ethics, support the implementation of the new Code of Ethics across public administration, and develop codes of ethics for other categories of officials or holders of public office.

➤ [eucrim ID=0701182](#)

Money Laundering

First Joint Plenary Meeting of FATF and MONEYVAL

From 21 to 23 February 2007, a first joint plenary meeting of the Financial Action Task Force (FATF) and the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) took place in Strasbourg. With the aim of strengthening international cooperation in the fight against money laundering and terrorist financing, the approximately 400 participants studied the FATF's mutual evaluation report on Turkey, MONEYVAL's third-round mutual evaluation report on Georgia, and a progress report submitted by Cyprus. Reports from Armenia and Azerbaijan have been considered also by MONEYVAL.

The FATF is an intergovernmental body, the purpose of which is the development and promotion of national and international policies to combat money laundering and terrorist financing. It was founded in 1989 by the G7. The Secretariat of the FATF is housed in the headquarters of the Organisation for Economic Co-operation and Development (OECD) in Paris. Most common are the 40 recommendations of the FATF which set the international standard for measures against money laundering. They are designed to be implemented into national legislation.

MONEYVAL, by contrast, is an expert committee of the Council of Europe responsible for evaluating anti-money laundering measures. MONEYVAL was founded in 1997 in order to monitor and facilitate the implementation of the 1990. CoE anti-money laundering convention. For its evaluation activity, MONEYVAL considers the practice and rules of the FATF. The Committee's task is to perform evaluation of the Member States which are not members of the FATF as regards their compliance with the international standards to counter money laundering and the financing of terrorism. MONEYVAL and the FATF have already been cooperating more closely for some years: The Secretariat of the FATF has a regular observer status with MONEYVAL and MONEYVAL became an Associate Member of the FATF in 2002.

➤ [eucrim ID=0701183](#)

MONEYVAL: Several Country Reports Published

MONEYVAL also published a series of country reports on Latvia, Georgia, Poland, and Albania which contain information about their compliance with the relevant international standards on anti-money laundering and countering terrorist financing. They are listed in the following link:

➤ [eucrim ID=0701184](#)

Russia: MOLI-RU-2

A Follow-up Project against Money Laundering and Terrorist Financing in the Russian Federation, called MOLI-RU-2, started in 1 January 2007. The start-up conference on the new project took place on 24 May 2007 in Moscow. This project is funded by the European Union and co-funded and implemented by the Council of Europe. Its aim is to contribute to the prevention and control of money laundering and terrorist financing in the Russian Federation in accordance with European and other international standards and best practices. The follow-up action continues two former projects in this area which helped build up a functional system against money laundering and terrorist financing in the Russian Federation. MOLO-RU-2 is intended to maintain the efforts already made.

➤ [eucrim ID=0701185](#)

Ukraine: MOLI-UA-2

This twin project which seeks to implement European standards on anti-money laundering and combating terrorist financing in the Ukraine, the MOLI-UA-2 project (see [eucrim 3-4/2006](#), p. 84, and [eucrim 1-2/2006](#), p. 22), continued with several seminars – e.g., a seminar for prosecutors and legal drafters and a seminar for the Ukrainian banking sector. In addition, a workplan for 2007 was adopted. It contains a detailed timeframe for the events planned for the entire year 2007.

➤ [eucrim ID=0701186](#)

Cybercrime

Octopus: Annual Conference 2007

The annual conference of the Octopus programme, the so-called Octopus Interface 2007, was dedicated to cybercrime

this year. More than 140 cybercrime experts from some 55 countries, international organizations, and the private sector met in Strasbourg, France, from 11 to 12 June 2007 to analyze the threat of cybercrime, review the effectiveness of cybercrime legislation, promote the use of the Cybercrime Convention and its Additional Protocol, and strengthen international cooperation in the fight against cybercrime.

Furthermore, a series of country profiles on cybercrime legislation was published during the conference. The country profiles allow a survey of the current state of the implementation of the Convention of Cybercrime, that is, the implementation of the provisions of the Convention under national legislation. They were prepared within the framework of the Council of Europe's Project on Cybercrime which enables the sharing of information on cybercrime legislation and assessment of the current state of implementation of the Convention on Cybercrime under national legislation.

The Octopus programme of the CoE is an umbrella technical cooperation programme against economic crime. Additional information about the Octopus Interface 2005 and 2006 can be found in [eucrim 1-2/2006](#), p. 21, and [eucrim 3-4/2006](#), p. 83.

➤ [eucrim ID=0701187](#)

PACE Resolution: How to Prevent Cybercrime against State Institutions?

The Parliamentary Assembly of the CoE also addressed the topic of cybercrime. At its third session from 25 to 29 June 2007 in Strasbourg, France, it adopted Resolution 1565 (2007) on "How to prevent cybercrime against state institutions in Member and Observer States?".

Due to the fact that cybercrime is a real threat to democratic stability and national security, which raises fundamental issues as regards the respect for human rights and the rule of law, PACE stresses that this issue should be treated as a matter of top priority. It further points out that politically motivated attacks against the military or government websites of a number of CoE Member and Observer States are becoming increasingly frequent and sophisticated and that criminal cyber attacks have already targeted a

State as a whole, attempting to paralyse the functioning of its vitally important infrastructure (Republic of Estonia). It therefore urges that an efficient protection and reaction system has to be developed at the international level and makes some concrete proposals.

➤ [eucrim ID=0701188](#)

Counterfeiting

Call for Stronger Measures against Counterfeiting

At the spring session of the Parliamentary Assembly of the Council of Europe from 16 to 20 April 2007, a call for stronger measures against counterfeiting was raised. Recommendation 1793 (2007) contains the recommendation for a Council of Europe convention on the suppression of counterfeiting and trafficking in counterfeit goods. According to the Parliamentary Assembly, given the accelerating pace of globalization, counterfeiting, which forms a significant part of the shadow economy and accounts for up to 9 % of world trade, is increasingly affecting European countries and is closely linked to organized criminal networks (see [eucrim 1-2/2006](#), p. 13 on the impact of counterfeiting on the EU). All CoE Member States are affected as countries of origin, transit, or destination for counterfeit goods. Not only fake medicines but also many other products – such as spare parts, toys, personal care products, electric appliances, foodstuffs, alcoholic beverages and other goods – when counterfeited, can endanger consumers health and safety, seriously damage the European economy as well as state budgets, and nurture criminal networks.

The Assembly therefore believes that the time has come for the Council of Europe and its Member States to tackle the problem of counterfeiting in a more comprehensive manner than has been the case until now. Thus, the Assembly welcomes the prospect – as a first step – of elaborating a European convention on the fight against pharmaceutical- and health-care-related crime and is convinced that a further similar initiative is necessary to fight all counterfeiting and trafficking in counterfeit goods. In this

respect, it has been recommended that the Committee of Ministers instruct the competent intergovernmental committee to work, in consultation with the European Union and other stakeholders, on the preparation of a European convention on the suppression of counterfeiting and trafficking in counterfeit goods, covering both civil and criminal law aspects of the problem.

► eucrim ID=0701189

Call for a Convention to Combat Pharmaceutical Crime

In close connection to the above-mentioned topic is Recommendation 1794 (2007), entitled ‘The quality of medicines in Europe’ and adopted at the same session, which calls for a convention to combat pharmaceutical crime. As already noted by the participants at the conference on ‘Europe against Counterfeit Medicines’ held in Moscow on 22 and 23 October 2006, counterfeiting has been tackled mainly from the angle of industrial property rights rather than the protection of the rights of the individual. As yet, there is no legal instrument on matters relating to crime in the pharmaceutical field (see also eucrim 3-4/2006, p. 84f.). The Assembly therefore underlines the need to make provisions for an international legal instrument establishing specific offences relating to counterfeiting in this field so that counterfeiters can be arrested and prosecuted.

► eucrim ID=0701190

Procedural Criminal Law

Justice Organisation

CEPEJ: Evaluation of Judicial Systems

The in-depth exploitation of the Report “European judicial systems – Edition 2006” continues. Specific studies will be finalized before the end of the year on access to justice, administration and management of judicial systems, use of IT in courts, training of judges and prosecutors, and execution of court decisions. These in-depth analyses are the result of a report on the evaluation of European judicial systems which the Council of Europe’s Commission for the Efficiency

of Justice (CEPEJ) released in October last year (see also eucrim 3-4/2006).

► eucrim ID=0701191

CEPEJ: 2nd Meeting of the Network of Pilot Courts

On 19 March 2007, a meeting of the Network of Pilot courts of the CEPEJ took place in Strasbourg. The first year of experience has been reviewed and the working programme for 2007 presented. The CEPEJ set up this network composed of so-called pilot courts reflecting the judicial situation in the Member States. These pilot courts will regularly be invited to answer questionnaires on their practice regarding judicial organisation and judicial procedures with respect to timeframes. The aim of the network is to promote innovative projects regarding the reduction and management of the length of proceedings, quality of justice, and mediation.

► eucrim ID=0701192

CEPEJ: Timeframes of Proceedings

The CEPEJ also looks into the length of time for proceedings which often give rise to complaints before the European Court of Human Rights. The SATURN Centre – Study and Analysis of judicial Time Use Research Network – is a Centre for judicial time management which was set up by CEPEJ at the beginning of the year. Therefore, the CEPEJ SATURN Centre has started working towards a better knowledge of judicial timeframes, per type of cases, in the Member States. Indeed, the CEPEJ noticed that only few detailed figures were available on length of proceedings although the violation of the concept of reasonable time (Article 6 ECHR) is the first reason for complaining before the European Court of Human Rights.

Therefore, the SATURN Centre shall collect specific information necessary for the knowledge of judicial timeframes in the Member States and detailed enough to enable Member States to implement policies aiming to prevent violations of the right to fair trial within a reasonable time as protected by Article 6 of the European Convention on Human Rights. It therefore aims to gather and process the largest possible amount of information relevant to the management and calculation of judicial timeframes. To this day,

a questionnaire has been fine-tuned and will be sent to the pilot courts.

► eucrim ID=0701193

Cooperation

South-Eastern Europe: New Network to Improve Sharing of Information on Financial Crime

On 20 June 2007 in Belgrade, Serbia, the heads of police from six South-Eastern European countries – Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia, and “the former Yugoslav Republic of Macedonia” – plus the United Nations Interim Administration Mission in Kosovo (UNMIK) signed a Memorandum of Understanding on regional cooperation and exchange of information related to identification, seizure, and confiscation of proceeds of crime. The Memorandum is designed to facilitate an effective, easy, and prompt exchange of information for the purpose of identifying, tracing, seizing and confiscating proceeds of crime. It will strengthen informal networking in the region. In order to facilitate this goal, the six countries and UNMIK appointed contact persons to encourage this process. The implementation of the Memorandum will be subject to an evaluation in 2008 in which Europol is also involved.

The Memorandum is the result of the regional police project against serious crime in South Eastern Europe, “CAR-PO”, which is jointly founded by the CoE and the EU. It aims at strengthening police capacities against serious crimes in South-Eastern Europe, developing a regional strategy against economic and organized crime in this area, and providing law enforcement institutions with the tools necessary to implement this strategy (see also eucrim 1-2/2006, p. 22).

► eucrim ID=0701194

South-Eastern Europe: Update of 2006 Situation Report on Organized and Economic Crime

The last Situation Report on Organized and Economic Crime in South-Eastern Europe has been further updated. The update was published in June 2007. Based on contributions from the project areas, it allows a 3-year overview on the situation

of organized and economic crime. The report arrives at the main conclusions that economic crime continues to evolve but remains fuzzy and unclear, that all project areas have set up a Financial Intelligence Unit or similar bodies by recognizing the negative impact of serious crime on their economy, and that corruption appears to be the main tool for influencing and penetrating political, commercial, and law enforcement structures.

The report, which is expected to provide additional guidance to policy makers in Europe, further contains information about drug trafficking, trafficking in human beings, and illegal migration and makes several proposals to overcome the detected shortcomings. More information about the 2006 report can be found in eucrim 3-4/2006, p. 86.

► eucrim ID=0701195

Ukraine: International Cooperation in Criminal Matters

As already mentioned in eucrim 1-2/2006, p. 22, and eucrim 3-4/2006, p. 86, a series of events accompany the UPIC project about 'International Cooperation in Criminal Matters'. In the past several months, several seminars have been held, e.g., a 'Human Rights and Judicial Co-operation Training Seminar', a 'Human Trafficking Legislative Workshop', and a 'Conference on International Co-Operation', all in Kyiv, Ukraine. Of particular interest in this context is that the Ukraine ratified the CoE Convention on Cybercrime on 10 March 2006 and its additional Protocol on the criminalization of acts of racist and xenophobic nature committed through computer systems on 21 December 2006.

► eucrim ID=0701196

Legislation

Convention on the Prevention of Terrorism in Force

The new CoE Convention on the Prevention of Terrorism came into force on 1 June 2007, as a result of its ratification by Romania in February 2007. The Convention is the first international treaty to establish as criminal offences several activities which may lead to acts of terror-

Ratifications and Signatures (Selection)

Council of Europe Treaty	State	Date of ratification (r) or signature (s)
European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)	Monaco	19 March 2007 (s+r)
European Convention on the International Validity of Criminal Judgments (ETS No. 70)	Serbia	26 April 2007 (s+r)
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)	Andorra	31 May 2007 (s)
Convention on the Transfer of Sentenced Persons (ETS No. 112)	Russia Mexico	28 August 2007 (r) 13 July 2007 (r)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167)	Russia Germany Croatia	28 August 2007 (r) 17 April 2007 (r) 28 March 2007 (r)
Criminal Law Convention on Corruption (ETS No. 173)	Monaco	19 March 2007 (s+r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and trans-border data flows (ETS No. 181)	Andorra France Latvia	31 May 2007 (s) 22 May 2007 (r) 22 May 2007 (s)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Serbia	26 April 2007 (r)
Convention on Cybercrime (ETS No. 185)	Finland Latvia	24 May 2007 (r) 14 February 2007 (r)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)	Latvia	14 February 2007 (r)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Moldova	22 August 2007 (r)

► eucrim ID= 0701199

ism, such as incitement, recruitment and training. It also reinforces international co-operation in the prevention of terrorism by modifying existing arrangements for extradition and mutual assistance. The Convention has been open for signature since 2005. For its entry into force, six ratifications (including four CoE Member States) were necessary. So far, it has been signed by 39 countries, seven of them have already ratified it. To date, it has entered into force in the following countries: Albania, Bulgaria, Denmark, Romania, Russia, Slovakia, and the Ukraine.

► eucrim ID=0701197

CoE Compiled its Co-Operation Conventions in the Criminal Law Field

The CoE recently published a new book on "Co-operation against crime: the conventions of the Council of Europe (2007)". It compiles the main CoE conventions on such co-operation mechanisms as extradition, mutual legal assistance, the transfer of sentenced persons, etc. It also includes conventions addressing specific forms of crime which have a cross-border dimension, such as cybercrime, money laundering, terrorism, trafficking in human beings, and corruption.

► eucrim ID=0701198

Der Kommissionsbericht über die Umsetzung der Instrumente zum Schutz der Finanzinteressen der Europäischen Gemeinschaften

Dr. Bernd-Roland Killmann*

I. Einleitung

Der Bericht der Kommission vom 25. Oktober 2004¹ über die Umsetzung des Übereinkommens zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften und seiner Protokolle durch die Mitgliedstaaten reiht sich in die von der Kommission ausgearbeiteten Umsetzungsberichte von Instrumenten der sogenannten dritten Säule – zumeist von EU-Rahmenbeschlüssen – ein. Er geht insofern über diese hinaus, als er versucht, sich mit allen Aspekten des Wirtschaftsstrafrechts zu Lasten der EG-Finanzinteressen auseinanderzusetzen. Der Bericht weist das Übereinkommen zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften vom 26. Juli 1995² (EU-Betrugsabkommen) und seine Protokolle – das erste Protokoll vom 27. September 1996,³ das EuGH-Protokoll vom 29. November 1996⁴ sowie das zweite Protokoll vom 19. Juni 1997⁵ – als zwar auf Grundlage der dritten Säule erlassene, aber auch die Verpflichtungen nach Art. 280 EGV konkretisierende Materie aus. Obwohl der Bericht sich mit der Umsetzung eines Instruments, nämlich des EU-Betrugsabkommens und seiner Protokolle, beschäftigt, lässt er sich in Bezug setzen zu dem Bemühen einer Auseinandersetzung mit einer teilweisen Strafrechtsharmonisierung zum Schutz der Finanzinteressen mittels einer EG-Richtlinie.⁶ In gewisser Weise ergänzt der Bericht den Richtlinienvorschlag um die Bewertung des Notwendigkeitserfordernisses, wie es vom EuGH im Urteil C-176/03⁷ aufgestellt wurde. Er besitzt daher eine für die Kommission politisch bedeutsame Ausrichtung. Während der Bericht lediglich die Ergebnisse zusammenfasst, enthält das nur auf Englisch verfügbare Dienststellenpapier⁸ eine vertiefte, vergleichende Gegenüberstellung der verschiedenen nationalen Umsetzungsmaßnahmen.

II. Ausgangslage und Auswirkung des Berichts

Der Bericht und das Dienststellenpapier beurteilen den Umsetzungsstand betreffend die fünfzehn Mitgliedstaaten vor der Erweiterung 2004 und 2007. Nach wie vor stellt sich die Lage so dar, dass das EU-Betrugsabkommen, das erste Protokoll und das EuGH-Protokoll am 17. Oktober 2002 in Kraft getreten sind, das zweite Protokoll dagegen noch nicht. Seit dem Bericht haben sowohl Luxemburg als auch Österreich das zweite Protokoll ratifiziert. Für dessen Inkrafttreten fehlt es nach wie vor an der Ratifikation durch Italien.

Auch die neuen Mitgliedstaaten müssen dem EU-Betrugsabkommen und seinen Protokollen beitreten. Bisher haben Zypern, Slowenien, die Slowakei, Litauen und Lettland alle Abkommen, Estland alle bis auf das EuGH-Protokoll ratifiziert. Die tschechische Republik, Polen, Ungarn und Malta haben die Ratifizierungsschritte noch nicht abgeschlossen. Und dies, obwohl alle Kandidatenländer bereits zur materiellen Einführung entsprechender Straftatbestände während der Beitrittsverhandlungen verpflichtet waren. Für Bulgarien und Rumänien sehen die Beitrittsakte vor, dass der Rat noch einen Beschluss zu erlassen hat, in dem er den Tag festlegt, an dem die betreffenden Übereinkünfte für diese neuen Mitgliedstaaten in Kraft treten.

Die Kommission sah die Notwendigkeit der Erstellung eines Berichts, auch ohne dass das EU-Betrugsabkommen oder seine Protokolle eine derartige Verpflichtung vorsahen, darin, dass bereits nahezu zehn Jahre nach deren Aushandlung im Rat vergangen waren und ein gleichwertiger und wirksamer Strafrechtsschutz – dessen Fehlen aufgrund der vorangegangenen, sogenannten „Delmas-Marty-Studie“⁹ belegt war – nunmehr zumindest in den alten Mitgliedstaaten erreicht hätte werden müssen. Wie schon der Vorschlag der Richtlinie, hat der Bericht erneut alten und neuen Mitgliedstaaten vor Augen geführt, wie ernst es der Kommission mit der Einführung eines effizienten strafrechtlichen Schutzes der EG-Finanzinteressen ist.

III. Methode des Berichts

Auffällig im Vergleich zu anderen Umsetzungsberichten ist der Aufwand der Erklärung der Methode bei der Beurteilung der Umsetzung des EU-Betrugsabkommens im Dienststellenpapier. Zuerst werden die Bestimmungen des EU-Betrugsabkommens und seiner Protokolle nicht einfach in ihrer vorgegebenen Ordnung beurteilt, sondern – entsprechend kontinentaleuropäischer Strafrechtskodifizierungen – thematisch neu geordnet, indem die materiellen Strafdelikte von den allgemeinen Strafrechtsbegriffen und den ergänzenden, das Strafverfahrensrecht betreffenden Normen abgegrenzt werden. Für jede dieser Gruppen gilt ein unterschiedlich strenger Beurteilungsmaßstab, wobei vor allem bei den Strafdelikten auf die Anforderungen der Rechtssicherheit zu achten ist. Bei den allgemeinen Strafrechtsbegriffen und dem Strafverfahrensrecht wird dagegen auf die Einbettung in die bestehende und historisch gewachsene natio-

nale Strafrechtskultur Rücksicht genommen, ohne dass auf eine Effizienzbeurteilung der Umsetzung verzichtet würde.

Als Bewertungsmaßstab zieht der Umsetzungsbericht die erwähnte „Delmas-Marty-Studie“ heran. Es war die Absicht des EU-Betrugsabkommens, die von der Studie aufgezeigten strafrechtlichen Regelungslücken zwischen den Mitgliedstaaten zu beseitigen. Nur insofern, als die in dieser Studie aufgezeigten Bedenken nicht mehr bestehen, wird angenommen, dass das EU-Betrugsabkommen erfolgreich umgesetzt wurde. Die Methodik des Berichts und des Dienststellenpapiers beschränkt sich jedoch im Wesentlichen auf eine Analyse der Normsetzungstätigkeit der Mitgliedstaaten und beurteilt nur die Übereinstimmung des nationalen Strafrechts mit den Anforderungen des EU-Betrugsabkommens und seiner Protokolle. Die Rechtswirklichkeit und konkrete Rechtsanwendung durch Verfolgungsbehörden wird ausnahmsweise in Betracht gezogen, nicht aber systematisch verglichen. Eine vollständige System- und Funktionsanalyse jedes Mitgliedstaates würde den Rahmen eines Umsetzungsberichts in Umfang und Arbeitsaufwand wohl sprengen und könnte sicher nicht alle Mitgliedstaaten zugleich erfassen. Dennoch wäre es wünschenswert, über einen solchen vollständigen Vergleich der konkreten Rechtsanwendung zu verfügen, um gezielter die Lücken im Strafrechtsschutz der EG-Finanzinteressen schließen zu können.

IV. Wesentliche Erkenntnisse des Berichts

1. Allgemeines

Natürlich können an dieser Stelle weder der Bericht noch das umfangreiche Dienststellenpapier vollständig dargestellt werden. Die wesentlichste Folgerung der Kommission lässt sich jedoch in einem Satz zusammenfassen: Das EU-Betrugsabkommen und seine Protokolle haben zwar zur Verbesserung des strafrechtlichen Schutzes der Finanzinteressen beigetragen und eine Gleichstellung gemeinschaftsrechtlicher Finanzinteressen mit nationalen nahezu erreicht, doch ist das von den Abkommen beabsichtigte, lückenlose, gesamteuropäische Mindestschutzniveau aufgrund der nach wie vor bestehenden Unterschiede in der Ausgestaltung der nationalen Strafnorm nach wie vor nicht erreicht. Im Ergebnis kommt der Bericht zum Schluss, dass die Umsetzung unterschiedlich weit fortgeschritten ist und keiner der Mitgliedstaaten eine vollständige Umsetzung erreicht hat. Trotz der positiven Entwicklungen wird es daher noch ein langer Weg sein, bis die Kommission europaweit einen wirksamen Schutz der EG-Finanzinteressen erreicht haben wird.

2. Betrug

Eine wesentliche Neuerung für nationale Strafrechte brachte Artikel 1 Abs. 1 des EU-Betrugsabkommens durch die Vorgabe, auch die missbräuchliche Verwendung von EG-Ausgaben zu sanktionieren.¹⁰ Die Mehrzahl der Mitgliedstaaten sah sich

gezwungen entsprechende Strafvorschriften einzuführen und setzte sich erstmals mit der Problematik des Unterschiedes zwischen Betrug als rechtswidrigem Erlangen eines Vorteils und missbräuchlicher Verwendung nach bereits erfolgtem, rechtmäßigem Erlangen eines Vorteils auseinander. Dies führte dazu, dass zugleich auch der Schutz der nationalen Finanzinteressen verbessert wurde, denn keiner der Mitgliedstaaten beschränkte den Missbrauchstatbestand nur auf EG-Finanzmittel allein. Was den einnahmenseitigen Betrug betrifft,¹¹ hat die Kommission einmal mehr ihre Ansicht klargestellt, dass aufgrund des EU-Betrugsabkommens auch eine Verpflichtung zum Schutz der Einnahmen besteht, die sich aus der Anwendung eines einheitlichen Satzes auf die Umsatzsteuer-Eigenmittelbemessungsgrundlage eines jeden Mitgliedstaats ergeben. Der Rat der Europäischen Union gab im Erläuternden Bericht zum EU-Betrugsabkommen an, dass die Umsatzsteuereinnahmen deshalb vom Anwendungsbereich des EU-Betrugsabkommens ausgeschlossen seien, weil sie „nicht zu den Eigenmitteln gehören, die unmittelbar für die Gemeinschaft erhoben werden“.¹² Die Kommission hat bereits mehrmals ihre Auffassung zum Ausdruck gebracht, dass der Schutz der Gemeinschaftsfinanzen vor widerrechtlichen Handlungen den Bereich Umsatzsteuer einschließt,¹³ und so hat sie konsequent auch eine Beurteilung der einschlägigen Umsatzsteuerbetrugsbestimmungen vorgenommen. Sie kommt dabei zu einem durchaus positiven Ergebnis, wohl aus dem einfachen Umstand heraus, dass Umsatzsteuereinnahmen in allen Mitgliedstaaten als eine Hauptquelle des nationalen Budgets strafrechtlich geschützt sind.¹⁴

3. Korruption und Geldwäsche

Hinsichtlich der Bekämpfung der Korruption und der Geldwäsche lässt sich erkennen, dass die Umsetzung in den Mitgliedstaaten weiter fortgeschritten ist, wohl weil inzwischen auf internationaler Ebene eine Vielzahl von Rechtsinstrumenten zu diesen Deliktsformen geschaffen wurden. Bei den Vorfällen zur Geldwäsche zeigt sich aber einmal mehr ein Auffassungsunterschied zwischen der Kommission und den Mitgliedstaaten: Die Kommission geht davon aus, dass „schwerer“, d.h. ein die Wertgrenze von 50.000 Euro überschreitender Betrug eine Vortat darzustellen hat, wogegen manche Mitgliedstaaten aufgrund des Wortlauts des Artikel 1 Buchst. e) des Zweiten Protokolls davon ausgehen, dass der Begriff „Betrug, zumindest in schweren Fällen“ es dem Umsetzungsgesetzgeber offen lässt, welche Betrugsformen schwer genug sind, um als Vorfälle für Geldwäsche angesehen zu werden.¹⁵ Es ist dabei unvermeidlich, dass die Umsetzungsbewertung der Kommission insofern strenger ausfällt.

4. Strafmaß

Besonders schwer tut sich der Bericht bei der Bewertung der Wirksamkeit, Verhältnismäßigkeit und Abschreckungswirkung der vorgesehenen Strafen, da diese Kriterien zwar vom EuGH entwickelt,¹⁶ aber bisher nicht weiter konkretisiert wurden.

Rechtsvergleichend fällt vor allem der Unterschied der Sanktionierung von ähnlichen Deliktsformen, nicht nur zwischen den Mitgliedstaaten, sondern auch innerhalb der Mitgliedstaaten, etwa bei ausgaben- und einnahmenseitigen Betrug, auf.

5. Verantwortung von Unternehmensleitern und juristischen Personen

Die Pflicht zur Einführung der Verantwortung von Unternehmensleitern ist ein allein im EU-Betrugsabkommen auftretendes Konzept. Die Kommission gibt an, dass sich die Beurteilung der Umsetzung als äußerst schwierig erweist, handelt es sich doch zumeist um eine Bewertung der allgemeinen Beteiligungsformen und deren Vergleich untereinander in Bezug auf die möglichen strafrechtlichen Haftungsfolgen. Die Kommission sieht selbst Bedarf zur Abdeckung dieser Problematik in vertiefter Form. Bisher sind jedoch kaum wissenschaftliche Abhandlungen dazu erschienen.¹⁷

Eine „Erfolgsgeschichte“ des Zweiten Protokolls ist die Einführung der Haftung juristischer Personen für Straftaten – ein Konzept, das sich seitdem in nahezu allen EU-Strafrechtsinstrumenten sowie auch in anderen internationalen Abkommen findet. Der Bericht gibt einen Überblick über die verschiedenen von den nationalen Gesetzgebern gewählten straf- oder verwaltungsrechtlichen Methoden der Einführung einer solchen Haftung an, kommt insgesamt zu einer positiven Beurteilung, allerdings nur aufgrund der formalen Überprüfung der bestehenden Rechtsregime. Jedoch sind die Regelungen in den Mitgliedstaaten – sowohl was die Voraussetzungen der

Verantwortlichkeit, als auch was die angedrohten Sanktionen anlangt – derart unterschiedlich, dass einmal mehr nur ein Vergleich der Rechtswirklichkeit es zulassen würde, die Wirksamkeit, Verhältnismäßigkeit und Abschreckungswirkung der getroffenen Maßnahmen zu beurteilen.

V. Ausblick

Der Bericht stellt einen zweiten Bericht zur Umsetzung in den neuen Mitgliedstaaten in Aussicht. Dabei werden sich die politischen Vorhaben der Kommission, wie etwa der Richtlinienvorschlag über den strafrechtlichen Schutz der finanziellen Interessen der Gemeinschaft auf der Grundlage von Artikel 280 EGV, im gesamteuropäischen Kontext neu bewerten lassen.¹⁸

Der vorliegende Bericht beurteilt letztlich nur die bloß formelle Erfüllung der Umsetzung des EU-Betrugsabkommens und seiner Protokolle und kommt selbst zum Ergebnis, dass der Mindeststrafrechtsschutz in den Mitgliedstaaten noch verbesserungswürdig ist. Der geringe Fortschritt bei der Angleichung der Sanktionsvorschriften wirkt überdies auf die Verjährungsbestimmungen in den Mitgliedstaaten zurück, deren große Unterschiedlichkeit nach wie vor dazu führt, dass dieselben Verhaltensformen in einem Staat strafbar bleiben, im anderen aber verjährt sind.¹⁹ Allein dieser Überblick zeigt, dass der Bericht nicht eine Beurteilung abschließt, sondern erst erlaubt aufzuzeigen, wo noch mehr auf Gesetzgebungsebene, im praktischen und im akademischen Bereich zu leisten ist.



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* Diese Untersuchung wurde vom Autor unabhängig verfasst und gibt nicht die Meinung der Europäischen Kommission, ihrer Dienststellen oder des Europäischen Amtes für Betrugsbekämpfung (OLAF) wider. Für wertvolle Hinweise bedanke ich mich herzlich bei Dr. Lothar Kuhl.

1 KOM (2004) 709 endg., verfügbar auf:

http://ec.europa.eu/comm/dgs/olaf/mission/legal/709final_de.pdf

2 ABl. C 316 vom 27.11.1995, S. 48.

3 Protokoll zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften (ABl. C 313 vom 23.10.1996, S. 2).

4 Protokoll betreffend die Auslegung des Übereinkommens über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften durch den Gerichtshof der Europäischen Gemeinschaften im Wege der Vorabentscheidung (ABl. C 151 vom 20.5.1997, S. 2).

5 Zweites Protokoll zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften (ABl. C 221 vom 19.7.1997, S. 12).

6 KOM (2001) 272 endg. vom 23.5.2001 (ABl. C 240 E vom 28.8.2001, S. 125), zuletzt geändert durch KOM (2002) 577 endg. vom 16.10.2002 (ABl. C 71 E vom 25.3.2003, S. 1).

7 EuGH, Urteil vom 13.9.2005 (C-176/03) – Kommission/Rat – Slg. 2005 S. I-7879.

8 SEK (2004) 1299 vom 25.10.2004, verfügbar auf: http://ec.europa.eu/comm/dgs/olaf/mission/legal/annex709final_en.pdf.

9 Mireille Delmas-Marty, Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community, in: European Commission (ed.), The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989, Brussels 1993, p. 59 et al.

10 Zu den EG-Ausgaben als finanzielle Interessen der Gemeinschaft Prieß/Spitzer in: von der Groeben/Schwarze, EU-/EG-Vertrag, 6. Auflage, Art. 280 EG Rn. 23.

11 Zu den EG-Einnahmen als finanzielle Interessen der Gemeinschaft Prieß/Spitzer a.a.O.

12 ABl. C 191 vom 23.6.1997, S. 4.

13 Zuletzt in der Mitteilung der Kommission hinsichtlich der Notwendigkeit der Entwicklung einer koordinierten Strategie zur Verbesserung der Bekämpfung des Steuerbetruges, KOM (2006) 254 endg. vom 31.5.2006, S. 4.

14 Weiterführend zum deutschen Recht Martin Kemper, Umsatzsteuerkarusselle (§ 370 VI AO und Art. 280 IV EGV), NSZ 2006, 593 ff.

15 So etwa Matthias Korte, Der Schutz der finanziellen Interessen der Europä-

ischen Gemeinschaft mit den Mitteln des Strafrechts – Das „Zweite Protokoll“, NJW 1998, 1464 f.

16 EuGH, Urteil vom 21.9.1989 (Rs. 68/88) – Griechischer Mais – Slg. 1989, S. 2965 Rn. 24.

17 Z.B. wie jene von *Henrike Stein*, Die Regelung von Täterschaft und Teilnahme im europäischen Strafrecht am Beispiel Deutschlands, Frankreichs, Spaniens, Österreichs und Englands – Zugleich eine Untersuchung zur strafrechtlichen Verantwort-

tung des Unternehmensleiters für deliktisches Verhalten seiner Untergebenen (2002).

18 Weiterführend *Lothar Kuhl/Bernd-Roland Killmann*, The Community Competence for a Directive on Criminal Law Protection of the Financial Interests, eucrim 3-4/2006, 100 ff.

19 Ausführlich schon zum im EU-Betrugsabkommen gar nicht angesprochenen Verjährungsproblem *Mireille Delmas-Marty*, Fn. 9, S. 78.

The Level of Implementation of the Convention on the Protection of the EC's Financial Interests and of the Follow-up Protocols in the Czech Republic

Prof. Dr. Jaroslav Fenyk

I. Introductory Remarks

It is common knowledge that there is a great movement of significant financial means from the European Communities' constantly increasing budget (with regard to the total budget of the EC, for example, revenues and expenditures in 2005 amounted to 106.3 billions of Euros). That is why it is not surprising that the supranational nature of "the European legal space" is abused in the form of unauthorized enrichment, misuse, and wasteful use of financial means, to the detriment of the EC budget. The assessment of the European Court of Auditors found that approximately 10 % of EC funds are used contrary to European legislation and about 1–2 % of the contributions from these funds are obtained fraudulently (the Commission estimates the share of fraud at 1–4 %).

From a general point of view, under Article 280 (ex Art. 209a) of the EC Treaty, the Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures assuring effective protection in the Member States. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests (principles of assimilation and equivalence). The text of the Treaty does not explicitly specify what kind of legal measures (if only non-criminal) Member States shall take. Only par. 4 stipulates that the above-mentioned measures shall not concern the application of national criminal law or the national administration of justice.

The protection of financial interests through criminal law has been emphasised as a high priority for the European Community since the middle of the 1970s. The first concrete and legal

instruments adopted for this purpose were the PFI Convention of 26.7.1995,¹ the (first) Protocol of 27.9.1996,² the European Court of Justice Protocol of 29.11.1996,³ and the second Protocol of 19.6.1997.⁴ All were adopted according to Title VI of the EU Treaty. In spite of the fact that the PFI instruments are intergovernmental and therefore placed under the third pillar, they pursue aims also stipulated by Article 280 of the EC Treaty.

II. The PFI Convention and its Protocols⁵

The PFI Convention presumes the Member States shall compare, above all, texts containing criminal law definitions of fraud according to national law with the PFI Convention texts and change domestic law, if necessary.⁶ For the purposes of the protection of the financial interests of the EC, the PFI Convention⁷ defines fraud as it affects the European Communities' financial interests (Article 1). According to the PFI Convention, all Member States shall take the necessary measures (1) to ensure that the conduct referred to above – including participation, instigation, or attempt – is punishable by effective, proportionate, and dissuasive criminal penalties, (2) to allow heads of businesses or any persons having the power to take decisions or exercise control within a business, to be declared criminally liable in accordance with the principles defined by national law in cases of fraud affecting the European Community's financial interests, and (3) to establish jurisdiction over the above-mentioned offences.

The (first) Protocol to the PFI Convention enshrines the following obligations for the EC and Member States: In order for the relevant provisions of the Convention on the protection of the European Communities' financial interests of 26 July 1995

to be made applicable to the criminal acts covered by this Protocol, the States have agreed on (1) common definitions of the Community or national “Officials” (Article 1), and (2) passive and active corruption (Articles 2–3). Each Member State shall take the necessary measures to ensure that, in its criminal law, the descriptions of the offences constituting conduct of the type referred to in Article 1 of the Convention, committed by its national officials in the exercise of their functions, apply similarly in cases where such offences are committed by Community officials in the exercise of their duties (assimilation, Article 4 par. 1). Targeted is the corruption committed by enumerated officials in the exercise of their functions – Government Ministers, elected members of its parliamentary chambers, the members of its highest Courts, or the members of its Court of Auditors. The relevant provisions need to be applied similarly in cases where such offences are committed by or against members of the Commission of the European Communities, the European Parliament, the Court of Justice, and the Court of Auditors of the European Communities (Article 4 par. 2).

The European Court of Justice Protocol contains mainly the obligation to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the PFI Convention and the first Protocol to the Convention pursuant to the conditions specified in either paragraph 2 (a) or paragraph 2 (b).

The second Protocol to the PFI Convention convinces the addressees of the need for national law to provide that legal persons can be held liable in cases of fraud or active corruption and money laundering committed for their benefit which damage or are likely to damage the European Communities’ financial interests.

III. Implementation of the Convention on the Protection of the EC’s Financial Interests and of the Follow-up Protocols in the Czech Republic

The following economic and financial crime development trends can be observed in the Czech Republic:

- Crimes committed by bankruptcy trustees and liquidators of trade and investment companies,
- Crimes committed by the management of companies administering entrusted assets,
- Crimes related to awarding and implementing public contracts of the state, local and regional authorities, and municipalities,
- Crimes related to unauthorised allocation and misuse of subsidies and financial support of the state and the EU (drawing on money from EU structural funds).

Czech criminal law is essentially compatible with the standards of the European Union and its Member States. The compatibility prevails mainly in the general definition of fraud, corruption, money laundering, jurisdiction, extradition, and the *ne bis in idem* principle. However, the accountability/responsibility of legal persons based on the Czech administrative law, seems

to be particularly unsatisfactorily regulated. The compatibility level with the PFI Conventions and the Protocols is not sufficient in this matter.

It was presumed that full compatibility with the PFI Convention and its Protocols would be achieved through amendments and re-codification of the existing Czech legal framework by the date of accession by the Czech Republic to the EU at the latest. In this context, an analysis of the PFI Convention, its Protocols, and documents regarding simplified extradition proceedings among the Member States was carried out. The analysis proved that certain adjustments of the Criminal Code would have to be enacted from the point of view of the principle of assimilation (Article 280 of the EC Treaty) no later than the Czech Republic’s accession to the European Union.

Neither the PFI Convention nor the Protocols have been published in the Official Journal of the EU in the Czech language, hence their official translation is not available. The Ministry of Justice was engaged in drafting the official translation of the text of the Convention in 2004. The first translated versions of these documents were commented upon by the Supreme Public Prosecutor’s Office. The translations were, of course, subject to an external comment procedure and subject to the Council Secretariat translators’ opinion. Then, the PFI Convention and the first Protocol should have been submitted to the Government of the Czech Republic alongside the proposal for accession. Nevertheless, neither the Convention nor the Protocols were delivered to the Parliament of the Czech Republic with the proposal for the accession of the Czech Republic. This means that the Czech Republic has not commenced the process of ratification yet. The reasons for the translation delay are not of a technical nature but are due to political points of view and have a historic context. The special section of the Czech Criminal Code on protection of socialist common (state) property was implemented during the Communist era. It was a special section within the section of crimes against individual property.⁸ The sanctions protecting socialist property were more severe than sanctions concerning private property offences. The proposed section of the draft Criminal Code about the financial protection of EC interests (see the following extract from the legal text) was compared with the above-mentioned former regulation by right-wing deputies of the Parliament.

In spite of the obstacles, the necessity to implement a special provision into the Czech Criminal Code seems obvious. Contemporary provisions of the Czech Criminal Code on fraud and associated crimes do not cover all the acts stipulated by the Convention. The crimes of fraud under sections 250 (Fraud)⁹ and 250b (Credit Fraud)¹⁰ or 248 (Embezzlement)¹¹ of the Czech Criminal Code do not refer to all the types of acts covered by Article 1 of the PFI Convention and it could be difficult to prosecute negligent acts as well. The Criminal Code protects state subsidies and revenues by a special provision of section 127 (Breaches of Mandatory Rules in Economic Relations)¹². However, it does not directly target funds

coming from the EC budget. The penalties for committing the above-mentioned crimes would not correspond with the penalties imposed in other Member States.

In the recent past (2005–2006), the draft Criminal Code has been discussed in Parliament. Regardless of the lack of PFI ratification, a partial success had been achieved. Under the influence of the Czech Association for the Protection of the Financial Interests of the EC,¹³ and in accordance with the Resolution of the Government on approval of the National Strategy Protecting the Financial Interest of the EC,¹⁴ when drafting the new Criminal Code (2001–2006), the Ministry of Justice of the Czech Republic took into consideration the necessity of instruments for penal protection of the financial interests of the EC. The Ministry implemented into the special part of the draft code a draft section prosecuting acts affecting the European Communities' financial interests. As a follow-up to the Convention on the protection of the European Communities' financial interests, the draft defines a new criminal offence of harm done to the European Communities' financial interests (section 238). Thereby Articles 1 and 2 of the Convention would be implemented in the Czech legislation. Although the said Convention mentions fraud affecting the European Communities' financial interests, the nature of acts described in Article 1 of the Convention is that of economic discipline infringement rather than fraud in the Czech sense: although they are premeditated criminal acts, the said Article 1 still does not require a fraudulent intent. That means that the conception of fraud under Article 1 of the Convention is based both on intentional and negligent acts. Since the Czech criminal law does not recognize a negligent act as a subjective element of fraud at all, the offence was included in Part 3, Chapter VI on economic offences. Any negligent act should be prosecuted in accordance with sections protecting not only financial interests of the EC.

The criminal offence of harm done to the European Communities' financial interests (section 238) would apply to various criminal practices, and Article 1 also requires a harmful effect to be caused in the fields of expenditures, incorrect use of funds, or withholding of funds either from the European Communities' basic budget or from a budget administered by or on behalf of the European Communities, or even in the field of diminution of such budget resources.¹⁵ The latest wording of the draft is as follows:

Section 1

Harm done to the European Communities' financial interests¹⁶

Every person who, in the fields of expenditures or receipts of the European Communities' basic budget or budgets administered by or on behalf of the European Communities, uses or presents untrue, incorrect or incomplete information or documents or conceals such information or documents, and thereby enables inadequate use of funds or the withholding of funds of such a budget or diminution of such budget resources, shall be punished by a term of imprisonment of six months to three years or by prohibition to undertake activities.

The same punishment shall be imposed on every person who, in the fields of expenditures or receipts of the European Communities' basic budget or budgets administered by or on behalf of the European

Communities, uses without authorization funds of such a budget or receipts lawfully acquired for such a budget.

A term of imprisonment from one year to five years or a fine shall be imposed on every offender who

a) commits the offence described in paragraph 1 or 2 as a member of an organised group, or
b) causes major damage through such an act.

A term of imprisonment from two years to eight years shall be imposed on every offender who

a) commits the offence described in paragraph 1 or 2 as a person charged with a special duty to defend the European Communities' interests, or
b) causes major damage through such act.

A term of imprisonment from five to twelve years shall be imposed on every offender who causes extensive damage through the offence described in paragraph 1 or 2.

Unfortunately, a draft of the Criminal Code was not accepted by Parliament in 2006.¹⁷ The reasons did not concern the problems of the section on protection of the financial interests of the EC, but rather a general conception of criminal liability. This first issue was the replacement of the material conception of crime based on social dangerousness by a so-called formal conception of crime. The second issue was a disagreement among deputies of the Parliament regarding several new types of crime, e.g., euthanasia, etc.

As regards the implementation of other elements of the PFI Convention and its Protocols, the following observations can be made: The problem of criminal responsibility of heads of businesses (Article 3 of the PFI Convention) is not to be found in legal works (e.g., draft code) at all so far. General forms of criminal participation in crime are not applicable because of the necessity of intent and the limitation of criminal acts. The next problem seems to lie in definition of the term "head of business". The territoriality and active personality principles (Article 4 of PFI Convention) are covered by sections 17 and 18 of the Czech Criminal Code. Moreover section 18 covers the principle *aut dedere aut judicare* without any problems.¹⁸ The same conclusion can be reached concerning the *ne bis in idem* principle.¹⁹ section 11, par. 4 of the Czech Code of Criminal Procedure (as amended) stipulates the *ne bis in idem* principle for all pertinent decisions of the courts or judicial bodies of all EU Member States. All of these rules were implemented in the draft Criminal Code.

The situation relating to the first Protocol is more or less positive. The Czech Criminal Code stipulates a special definition of the term "Public Official" for all acts of corruption committed by officials of international organisations in section 162a par. 2 lit. c).²⁰ However, it is not clear if such a definition pertains to EU officials because it is not evident whether the European Union is an international organisation or not. Better clarification was achieved within the project introducing a new common definition for foreign or international officials by means of sections 309–313 or, more precisely, 411 of the draft Criminal Code of the Czech Republic. The question of jurisdiction (Article 6 of the Protocol) is an explicit demand for the introduction of the principles of territoriality and active

personality (sections 17 and 18 of the Czech Criminal Code). The Czech law is not in contradiction with such requirements. However, the principle of passive personality – also mentioned in Article 6 of the Protocol – is not directly applied in Czech Criminal Law. It can be used only as a modification of the subsidiary universality principle (under section 20 of the Czech Criminal Code). According to the draft Criminal Code (section 7 par. 2), the principle of passive personality would be introduced.

The Czech Criminal Law is compatible with the European Court of Justice Protocol. Under section 9a of the Czech Code of Criminal Procedure, any court can send a request to the European Court of Justice to answer a preliminary question within the framework of criminal proceedings if the question lies in the power of the Court.

The assessment of the implementation of the second Protocol to the PFI Convention is more critical. It has not yet been submitted to the Government. On the one hand, the Czech Criminal Code contains sections 251a on money laundering and associated crimes. On the other hand, the question of criminal responsibility/accountability of legal persons has not been conclusively dealt with in the Czech Republic. The proposal to provide for this form of collective liability was rejected by the House of Deputies of the Parliament of the Czech Republic.

Major reasons for the rejection of the draft law lay not only in the conflict between two known opinions, i.e., whether the responsibility should be an administrative or a criminal one. Some deputies stressed the lack of the subjective element of the offence if committed by a legal person. Several objections have concerned the too wide a list of offences for legal persons. The Ministry of Justice proposed not only a list of offences corresponding to international treaties or conventions, but

unfortunately also added several crimes typical for commission by physical offenders and therefore subject to a system of individual liability (rape, etc.). Several lobbying associations declared that the criminal responsibility of corporations is obviously the overzealous tendency of the state to criminalise commercial operations. The Minister of Justice was not well prepared for discussions in Parliament and his reactions and answers were not adequate and fruitful.²¹ The absence of the liability of legal persons for criminal offences is one of the most significant failures of the Czech legislator to fulfil its obligations to the European Union.²²

IV. Conclusions

According to Chapter 1 Article 1, par. 2 of the Czech Constitution, the Czech Republic shall observe its obligations resulting from international law. In the case of the European Convention on the Communities' Financial Interests and its Protocols, this means that the Czech Republic is acting against its own Constitution if the procedure of ratification is so time-consuming, and it is uncertain when the ratification process will be accomplished. However, in spite of the lack of ratification, the protection of the financial interests of the European Communities in the Czech Republic is, generally speaking, established. Provisions of the Criminal Code, activities on the part of the Anti-Fraud Co-ordinating Service (AFCOS) system in the framework of administrative investigations of cases, and the co-operation of competent authorities with OLAF are safeguards for the basic protection of EU funds and the common currency. Nevertheless, a higher level of protection of the Communities' financial interests in the Czech Republic could be achieved by accomplishing the ratification of the PFI Convention and its Protocols and introducing a new common definition of crime against the financial interests of the EC.



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1 Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49.

2 Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 313, 23.10.1996, p. 2.

3 Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, OJ C 151, 20.5.1997, p. 2.

4 Second Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 12.

5 It is necessary to add that considerable further instruments and measures concerning the subject had been taken till the time being, but none were so important as the PFI Convention and its Protocols.

6 Article 10 PFI Convention requires Member States to transmit to the Commission the text of the provisions transposing the PFI instruments into their domestic law.

7 Entry into force: 17. 10. 2002.

8 Section 132 of the Czech Criminal Code 1961 (text till the end of the year 1989).

9 Fraud occurs when a person enriches himself or another to the detriment of another person's property by misleading another person, by taking advantage of another person's mistake, or by withholding substantial facts, and thereby causing damage to another person's property which is not negligible (CZK 5,000).

10 Credit fraud occurs when a person provides false or grossly distorted data or conceals substantial data when concluding a credit (loan) contract or applying for a grant (intentional crime).

11 Embezzlement occurs when a person who has been entrusted with the administration, management, or care of someone else's property appropriates it. If the damage caused by embezzlement is less than CZK 5,000, it is dealt with under provision 50(1)(a) of the Misdemeanours Act. There is one main difference between Embezzlement and Fraud crimes: In an embezzlement case, an offender is not

sure that he will deceive somebody at the moment the act is committed. In the case of fraud, an offender has the intent to deceive the other person before/or at the moment the act is committed at the very latest (intentional crime).

12 The offence occurs when a person essentially breaches the rules of economic relations, as stipulated in generally binding statutory provisions, with the intention of acquiring for himself or someone else a substantial unjustified advantage. An offender shall be sentenced to up to two years of imprisonment, or to pecuniary penalty or to a prohibition of activity. An offender shall be sentenced to a more severe penalty (6 months to 3 years of imprisonment) if, by committing the above-mentioned crime, he causes a serious disruption of economic activity or supplies of a substantial curtailment of state income (revenue).

13 Founded 1998.

14 Resolution No. 456 of 12 May 2005, drafted mainly by the Czech Anti-Fraud Co-ordination Service (AFCOS).

15 Explanatory report to draft code of criminal procedure of Ministry of Justice (www.justice.cz).

16 Official English translation of the text is not available, therefore an unofficial version has been provided by author of this article.

17 At present, the new draft Criminal Code is in preparation. It is mainly based on a previous draft including a draft section protecting the financial interests of the EC.

18 Art. 5 of the PFI Convention. Because of the implementation of the European Arrest Warrant, the text of the PFI Convention's provision on extradition became redundant.

19 Cf. Article 7 of the PFI Convention.

20 The general definition of "Public Official" for Czech public officials is covered by section 89 par. 9 of the Czech Criminal Code.

21 The protocol of the 37th meeting of the House of Deputies of the Czech Parliament in the first reading – Resolution 1327 (Parliament Press 745) on 2.11.2004.

22 According to OLAF representative, *L. Kuhl*, the Second Protocol was ratified at the meeting of the EU Council working group for criminal substantive law by the following new Member States: Cyprus, Lithuania, Latvia, Estonia, and Slovakia on 30.5.2005.

Why Delays the Ratification of the PFI Convention in Hungary?

Prof. Dr. Ákos Farkas

I. Introduction

Twelve years have passed since the PFI Convention of 26 July 1995 was signed.¹ During this period, there were permanent efforts on the part of the EU to urge the Member States to ratify the Convention and its Protocols.² These efforts were successful in the case of 15 Member States. These states had ratified the Convention and the 1st Protocol by the end of 2002. The Convention entered into force on 17 October 2002. Three years after the accession, the willingness to ratify the PFI Convention in the new Member States has decreased. This statement is also true for Hungary. In order to search for the reasons for the non-ratification, we have to go back before the accession date of 2004. In the pre-accession period, Hungary attempted to fulfil all the requirements of the EU which were prescribed in the regular reports of the Commission and to respond to the new challenges posed. At the end of the 90's and beginning of the 21st century, Hungary introduced several new regulations into Act IV of 1978 of the Hungarian Criminal Code (hereinafter: HCC). The last modifications, which concern our topic, were undertaken in 2001 by Act CXXI.

II. Corruption

Hungary ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 17 December 1997 and the Council of Europe Criminal Law Convention on Corruption on 22 November 2000.

Concurrently, with the ratification of the OECD Convention, Hungary amended its Criminal Code by Act LXXXVII of 1998 and the new Title VIII on Crimes against the Propriety of International Affairs was inserted in Chapter XV containing provisions on the purity of state administration, administration of justice, and public life. A new amendment by Act CXXI of 2001 widened the scope of this chapter by separately criminalizing the bribery in justice and public administration in both active and passive forms (Article 255 of HCC).

Sections 258/B-258/E regulate the criminal act of bribery within international relations. Without going into detail, I would like to emphasize that the already existing factual elements of bribery have been adopted in the regulations. This corresponds to the requirements of both the above-mentioned conventions and the EU Convention on the fight against corruption.³ Moreover, it goes beyond those requirements, which did not require the declaration and punishment of passive bribery as crime; the Hungarian law renders it punishable as well (Section 258/D). The scope of foreign officials was extended to all kinds of foreign officials. Prior to Act CXXI of 2001, the circle of foreign officials was comprised only of (1) persons who served in international organizations as established by international treaties, provided that their activity was integral to the proper functioning of these organizations, or (2) persons who were elected members of the assembly, public bodies of international organizations, or who were members of an international court, provided that their activity was integral to the proper functioning of the

court; in all cases it was a prerequisite that the Republic of Hungary has jurisdiction on its territory or over its citizens.

Act CXXI of 2001 narrowed the scope of "advantage", which is one of the elements of the legal definition of bribery. Prior to this Act, the notion of "advantage" included all types of advantages. The Act limited them to "unlawful" advantages.

III. Money Laundering

Hungary also ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on 2 March 2000. Money laundering has been a crime in Hungary since 1994. Since then, the definition of the offence was amended four times. Chapter XVII Sections 303–303/B on Money Laundering was last amended by Act CXXI of 2001. The characteristics of these provisions are that not only the laundering of the proceeds of crime by the offender is punishable, but also the laundering of the proceeds of crimes committed by persons other than the money launderer himself.

IV. Criminal Liability of Legal Persons

The debate on the liability of legal persons began at the end of the 90's. By then, the main obstacle to the liability of legal entities was the classical doctrinal system of criminal law which was and is based on the constitutional principle of culpability of natural persons. The second counter-argument was that the international conventions – except for the Council of Europe Criminal Law Convention on Corruption – do not require the creation of criminal liability of legal persons. These arguments were supported by several leading law experts and academics.⁴

The solution – which was also politically motivated – was a compromise. The individual liability of natural persons remained the basic principle of the criminal law, but Act CXXI of 2001 introduced a new criminal measure into the HCC against legal entities. Act CIV of 2001 to amend the criminal law introduced measures against legal persons in Section 70 point 8 HCC. The detailed rules of these measures are contained in Articles 1–6 of Act CIV of 2001 on the criminal law rules applicable to legal persons. Potential sanctions against legal persons are the termination of the legal person, restriction of its activity, and fines.

As far as the personal scope is concerned, these rules are applicable to legal entities if the crimes were intentionally committed in order to gain pecuniary advantage for that entity and the crime was committed in the sector of activity of the entity by an executive director, a member of the supervisory board, an official, a member of the legal person who has the power to represent the legal person or is an authorized person of the legal person. The second group of offenders can be the members/employees who committed the crime in the sector of activity of the legal person, provided that the crime could have been

prevented by fulfilling the obligation of supervision and control of the leading official of the legal person.

V. Financial Control and Subsidy Fraud

By the end of the 90's, the regular Commission reports on Hungary's progress towards accession criticized that only a basic system of control and recovery of EC funds existed in Hungary and proposed more expedient procedures.⁵ The 2002 Report already stated that an anti-fraud inter-ministerial co-ordination Committee had been created in November 2001, which is to contribute to safeguarding the financial interests of the Community.⁶ The AFCOS unit now exists within the organization of the Hungarian Customs Service under the Ministry of Finance. By the end of 2000, the definition of fraud did not fulfil the criteria of protecting the Communities' financial interests. The definition of fraud, which is based on the classical criminal law elements, did not provide a solution for this problem. The requirements for the accession of Hungary to the EU were the creation of new criminal rules in this field. This problem was resolved by the above-mentioned Act CXXI of 2001 which amended Chapter XVII on Economic Crimes. Title IV of the HCC now contains a new section on the "breach of the financial interests of the European Communities".⁷ Section 314 practically repeats the wording of the definition of fraud of Article 1–3 of the PFI Convention.

The offence can be punished with no more than 5 years of imprisonment. According to paragraph 3, the offender can be punished with no more than 5 years of imprisonment if he or she is the head of a business, or a member or employee of a firm entitled to supervise or control its activity according to the firm's statutes, assuming that he or she committed the breach of financial interests of the EC in favour of the firm and that the crime could have been prevented by fulfilling the obligation of supervision and control.

VI. Conclusions

These regulations were positively evaluated by the 2002 Regular Progress Report of the Commission. However, since 2001, no criminal law provisions have been created. It would have been logical for the Hungarian Government to submit the PFI Convention and its Protocols to Parliament for ratification shortly after Hungary's accession to the EU, as it did in other cases, even though there is no deadline for transposition of the PFI Convention in the new Member States.

The silence has three main reasons: The first general reason must be seen in close connection to national sovereignty. It seems obvious that, in the Member States of the European Union, complete national sovereignty in the field of criminal law no longer exists. The various framework decisions of the past eight years relating to criminal law and criminal procedural prove that the approximation of the rules of criminal law and procedure is

unavoidable. Despite this development, the Member States are attempting to preserve the remains of their sovereignty as long as it still can be done. One of the techniques is to remain silent and act as if the PFI Convention had been forgotten.

The second reason is that the transformation of the legal system was only intended for accession purposes. It was a task which had to be fulfilled. Hungary did it and is now inside the doorway as a member of the EU. After the accession, Hungary is in no hurry in this field. If the EU urges the ratification, it can refer to the rules of the Hungarian criminal law which guarantee a solid basis for the protection of the ECs' financial interests.

The third reason – being synonymous with the official standpoint of Hungary – is that Hungary has fulfilled the obligations of harmonization of criminal law rules concerning the protec-

tion of the ECs' financial interests. Leading to the current criminal law, the Act CXXII of 2001 is the clause for the harmonization of the area of the protection of the financial interests. It takes into consideration the following:

- Articles 1–3 of the Convention on the protection of the European Communities' financial interests,
- Articles 1–3 of the First Protocol to the Convention on the protection of the European Communities' financial interests, and
- Articles 1–2 and 5 of the Second Protocol Convention on the protection of the European Communities' financial interests.

It should be noted that approximately thirty investigations were initiated by either the Hungarian Police or Customs Services under these new rules in the past three years but, so far, only one case has been brought before the court.

1 Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49.

2 Protocol to the Convention on the protection of the European Communities' financial interests, OJ C313, 23.10.1996, p. 2; Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities' financial interests, OJ C151, 20.5.1997, p. 2; Second protocol to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 12.

3 Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25.6.1997, p. 2.

4 Erdei, Árpád (2000) Hogyan lehet terhelt a jogi személyből avagy a jogi felfogás változásának ára. In: (ed.Gellért,Balázs) Békés Imre Ünnepi Kötet, ELTE Állam- és Jogtudományi Kar, Budapest; Sárközy, Tamás (2002) Büntetőjogi intézkedések a jogi személyekkel szemben? Magyar Jog 7

5 2000 Regular report from the Commission on Hungary's progress towards accession of 8 November 2000 p.77.

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6 2002 Regular Report on Hungary's progress towards accession, COM(2002) 700 final, p. 113.

7 The regulation came into force after the accession of Hungary to the EU.

The Implementation of the European Arrest Warrant into National Law

The Second Evaluation Report of the Commission

Isabelle Pérignon¹

I. Introduction

On 11 July 2007, the Commission adopted its second report on the implementation of the Framework Decision on the European arrest warrant and surrender procedures between Member States (the “Second Report”).² This is the first time that a report has covered the implementation of the Frame-

work Decision in all 27 Member States until 1 June 2007.³ Indeed, since 1 January 2007, Bulgaria and Romania have begun applying the European Arrest Warrant. The first evaluation by the Commission was made in accordance with Article 34 of the Framework Decision⁴ and revised by a report on Italy published in January 2006.⁵ The evaluation criteria used by the Commission for these reports are the general

criteria now normally applied in order to evaluate the implementation of framework decisions (practical effectiveness, clarity and legal certainty, full application, compliance with the time limit for transposition) and criteria specific to the arrest warrant; principally, the fact that it is a judicial instrument, its efficiency, and its rapidity. This Second Report is particularly important since it not only details both the content of the implementing laws in all 27 EU Member States, but also refers to the situation in practice with the support of the practical evaluations led by the General Secretariat of the Council and in which the Commission participates.⁶

II. The European Arrest Warrant in Practice: Success in the Face of Initial Transposition Hurdles

The Commission confirms that the European Arrest Warrant is a success.⁷ The Commission refers in its Second Report to the widespread use of European Arrest Warrants in all Member States. Indeed, the number of European Arrest Warrants issued for the year 2005 was over 6900. This represents more than a doubling compared to 2004. Unofficial figures for 2006 confirm this upward trend from year to year. Of the 6900 EAWs, 1770 persons were identified and arrested and 1532 persons were effectively surrendered in 2005, corresponding to a very good rate of 86 % (60 % in 2004).⁸ In addition, persons were surrendered within the time limits set out by the Framework Decision: 42 days in practice if the person does not consent to his/her surrender, 10 days if the person consents. Surrenders are being effected within much shorter time periods than in the past. On average, the time taken to execute requests, which used to be approximately one year under the old extradition procedure, has been sharply reduced. However, despite this average, it cannot be overlooked that certain countries (Ireland and the United Kingdom) take much longer and even exceed the maximum time limits set out in the Framework Decision – a fact that the Commission very much regrets. In 2005, the Commission noted approx. 80 cases (scarcely 5 % of surrenders) where the 90-day time limit set in Article 17(4) of the Framework Decision had not been respected. The Commission also outlines that more than one fifth of the persons surrendered in the year 2005 pursuant to the European Arrest Warrant procedure were nationals of the executing Member State. This is an important and interesting figure since, under the old regime of extradition, nationals were not extradited.

The total number of requests exchanged between Member States has risen sharply. The European Arrest Warrant has therefore not only virtually replaced the extradition procedure within the European Union, but its use is now much more widespread thanks to its advantages. The remaining cases of non-application mainly concern certain restrictions on:

- *the transitional application of the European Arrest Warrant*: France, Italy, and Austria made the appropriate statements as set out in Article 32 of the Framework Decision; as a result, these states will apply the previous extradition

arrangements for offences committed prior to a certain date. Three Member States, namely the Czech Republic, Luxembourg, and Slovenia, apply transitional provisions in breach of the Framework Decision. The Italian implementation law states, however, that its provisions apply only to requests for the execution of European Arrest Warrants issued and received after the entry into force of the Italian law, i.e. prior to 14 May 2005; this is not in conformity with the Framework Decision.

- *the surrender of nationals*: Austria notified the Council that it will make use of the special clause in Article 33 which explicitly allows Austria to suspend the extradition of its own citizens. Due to the decision of the German Federal Constitutional Court, Germany stopped the surrender of German citizens between 18 July 2005 and 2 August 2006. The Czech Republic and Cyprus authorise the surrender of their nationals only for offences committed after certain dates (see III. below).

All the constitutional difficulties that occurred in several Member States and especially in Germany⁹, Cyprus¹⁰, and Poland¹¹ have now been overcome. Today, there are no longer any obstacles to the application of the European Arrest Warrant. Some provisions of the implementing laws of Cyprus and Poland and the whole of Germany's law¹² had indeed been declared unconstitutional in 2005 by their respective Constitutional courts. Following these decisions, Cyprus and Poland amended their Constitutions, respectively. Germany had to pass a second law in order to implement the Framework Decision, the first having been declared unconstitutional and void by the Bundesverfassungsgericht (German Federal Constitutional Court) on 18 July 2005 (Darkazanli Case).¹³ Cyprus also initiated a revision of its constitution which came into force on 28 July 2006.

In Poland, despite its ruling against some provisions of the implementing law, the Polish Constitutional Court delayed the entry into force of its judgment for 18 months from its date of publication so that the Parliament would have enough time to amend the Constitution and the provisions could be enacted properly. However, difficulties still exist since a EAW issued against a Polish national can only be executed if the offence for which the European Arrest Warrant is issued has not been committed on Polish territory and constitutes an offence under Polish law.

In addition, the constitutionality of the Framework Decision was upheld by the European Court of Justice on 3 May 2007 in the 'Advocaten voor de Wereld' case.¹⁴ In this case, a non-profit association, Advocaten voor de Wereld, lodged an appeal before the Belgian Court of Arbitration against the law of 19 December 2003 which transposed the Framework Decision in Belgium on the grounds that it was incompatible with Articles 10 and 11 of the Belgian Constitution. The Constitutional Court stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling. The first question dealt with the Framework

Decision's compatibility with Article 34(2)(b) TEU, which provides that framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States. The second issue was the conformity of the abolition of double criminality checks with Article 6(2) TEU; more particularly the Belgian court questioned the conformity with the principles of legality in criminal matters as well as equality and non-discrimination guaranteed by that provision.¹⁵ In his conclusions, Advocate-General Colomer stated that the Framework Decision was not contrary to Articles 34(2)(b) TEU and 2(2) of the Framework Decision on the European arrest warrant and that it infringed neither the principle of legality in criminal matters nor the principle of equality and non-discrimination. In its judgment, the Court followed the Advocate-General's opinion and rejected all the arguments advanced by the Belgian association.

As an interim analysis, it can be concluded that the balance sheet regarding the surrender system introduced by the Framework Decision is largely positive but difficulties remain.

III. Remaining Difficulties: More Still Needs to Be Done

The Commission underlines in its Second Report, however, that some issues remain which had already been identified in the first report. The first remaining issue is the reintroduction of the double criminality requirement for offences listed in the thirty-two categories of Article 2(2) of the Framework Decision.¹⁶ It is worrying to see that some Member States have reintroduced this requirement in their implementing national laws. In addition, a double criminality check is sometimes still carried out in practice by the judge, even if the implementing national law is correct.

Additional grounds for refusal have been incorporated by some Member States. Indeed, the Framework Decision provides for limited grounds for refusal that have been strictly enumerated. In contrast, several Member States have added grounds for refusal that are not provided for in the Framework Decision. In transposing the Framework Decision, Italy, for instance, multiplied the grounds for refusal.¹⁷ For example, an Italian judge can refuse to execute a European Arrest Warrant if the requested person is pregnant or the mother of a child younger than three years of age, except in extremely serious circumstances, or if the requested person is an Italian citizen who did not know that the conduct was prohibited. An Italian judge can also refuse to execute a European Arrest Warrant if the requested person is subject to an indefinite period of preventive custody, a situation which causes difficulties for Belgium and Luxemburg for example.¹⁸

Another problematic issue is the surrender of nationals. As mentioned above, nationals are now surrendered thanks to the Framework Decision. However, some countries restrict this possibility *ratione temporis*, such as Cyprus and the Czech Republic.¹⁹ The situation in Germany also needs to be

carefully taken into consideration. Indeed, the new German implementing law, in effect since 2 August 2006, provides for the surrender of nationals only in exceptional cases. In its new implementing law, which followed the guidelines given by the Federal Constitutional Court in the above-mentioned judgment, Germany makes a distinction between three categories of cases. First, cases which contain predominantly "national elements" should not give rise to surrender. Second, cases which contain predominantly "foreign elements" automatically justify surrender to the requesting Member State. Third, in "mixed cases", i.e., cases where national and foreign elements of the case are in balance, the German judge must verify the double criminality requirement before ordering execution of the European Arrest Warrant. It is this third category of cases that worries the Commission.

The Commission report also finds fault with the imposition of additional conditions as regards the guarantees to be given by the issuing Member State in particular cases (cf. Article 5 of the Framework Decision). Malta²⁰ and the United Kingdom impose conditions not envisaged in the Framework Decision in relation to decisions rendered in absentia (Article 5(1)); conditions set by the Netherlands and Italy run counter to Article 5(3) which regulates the guarantee on the return of nationals or residents of the executing Member State. The request for particulars or documents not mentioned on the form (cf. Article 8(1) of the Framework Decision) is also worrying (this is the case for the Czech Republic, Italy, and Malta). In practice, some countries (the United Kingdom and Ireland) seem to almost systematically ask for additional information or even insist on the arrest warrant being reissued – a requirement which poses problems for certain countries whose legislation does not allow such a request. The requirements also lengthen proceedings considerably.

Without going into detail, the following issues are also worthy of mention. Some Member States have appointed an executive body as the competent judicial authority for issuing and/or executing a European Arrest Warrant (cf. Article 6); Denmark is not in conformity in whole, and Germany and the Baltic countries (Estonia, Latvia, and Lithuania) in part. In addition, the role of central authorities is problematic. Bearing in mind that Article 7 of the Framework Decision only assigns the mere role of facilitating cooperation to central authorities, several Member States (for instance, Estonia or Ireland) are not in line with the norm because they entrust decision-making powers to the central authorities. Finally, insufficiencies are apparent as regards the implementation of time limits and procedures for the decision to execute the European Arrest Warrant (Article 17): the stipulated maximum period of 90 days within which a EAW must be executed may be exceeded in the event of a final appeal (France, Italy). Due to the absence of a maximum time limit for the decision of higher courts in several Member States (the Czech Republic, Malta, Portugal, Slovakia, and the United Kingdom), the adherence to the time limits of Article 17 is thus rendered impossible.

IV. Conclusion

In its second report on the implementation of the Framework Decision on the European arrest warrant, the Commission confirms the general conclusions drawn with respect to 2004. Despite an initial delay of up to 16 months (Italy) and hiccups caused by constitutional difficulties in at least two Member States (Germany, during part of 2005 and 2006, and Cyprus), the implementation of the Framework Decision has indeed been a success. The European Arrest Warrant has been operational throughout all the Member States, including Bulgaria and Romania since 1 January 2007. Its positive impact is witnessed daily in terms of judicial control, efficiency, and speed

– always with full respect for fundamental rights. Nevertheless, the list of Member States which need to make an effort to comply fully with the Framework Decision (in particular, the Czech Republic, Denmark, Estonia, Ireland, Italy, Cyprus, Luxemburg, Malta, the Netherlands, Poland, Slovenia, and the United Kingdom) is still a long one. Given its nature, the present evaluation is without prejudice to any future in-depth analysis of practice. Hence, the Commission is also fully taking part in the mutual evaluation exercise (peer review) concerning the application of the European Arrest Warrant and seeks in the presented report and its enclosed annex to underscore the practical aspects of the Framework Decision's implementation in the 27 Member States.

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1 The opinions expressed in this article are personal views and do not bind the institution to which the author belongs.

2 Framework Decision on the European Arrest Warrant and surrender procedures between Member States of 13 June 2002, OJ L 190 of 18 July 2002, p. 1.

3 COM(2007) 407 and its Annex SEC(2007) 979.

4 The first report was published on 23 February 2005, COM(2005) 63 final and SEC(2005) 267.

5 The revised report on Italy was published on 24 January 2006, COM(2006) 8 final and SEC(2006) 79.

6 The Commission used the declassified evaluation reports produced for Belgium (16454/1/06 REV1 COPEN 128 dated 3 January 2007), Denmark (13801/1/06 REV1 COPEN 106 dated 6 December 2006), and Estonia (5301/01/07 REV1 COPEN 6 dated 20 February 2007).

7 S. *Combeaud*, Premier bilan du mandat d'arrêt européen, *Revue du Marché Commun et de l'Union Européenne*, n°495, 114–124 (2006); S. *Combeaud*, Implementation of the European Arrest Warrant and the Constitutional Impact in Member States, in: Elspeth Guild (Ed.), *Constitutional challenges to the European Arrest Warrant*, Nijmegen 2006, p. 187–194.

8 Statistics for the year 2005 as communicated by 23 Member States (COPEN 52 REV 4 and COPEN 52 REV 5 of 18 January 2007).

9 The Bundesverfassungsgericht (German Federal Constitutional Court) on 18

July 2005 decided that the implementing law was null and void on the grounds that it was contrary to Article 16(2) and Article 19(4) of the Basic Law. The judgment can be downloaded via the following link: <http://www.bundesverfassungsgericht.de/en/press/bvg05-064en.html>. The new implementing law entered into force on 2 August 2006 (see: <http://www.bgbportal.de/BGBL/bgb1f/bgb1106s1721.pdf>).

10 Decision of the Cypriot Supreme Court of 7 November 2005. The Cypriot constitutional amendment entered into force on 28 July 2006.

11 In Poland, the Constitutional Court on 24 May 2005 struck down Article 607t(1) of the Code of Criminal Procedure on the grounds that it was contrary to Article 55 of the Constitution which prohibited the extradition of nationals. Article 55 of the Polish Constitution was amended on 7.11.2006 and the Polish Code of Criminal Procedure accordingly on 26 December 2006.

12 S. *Molders*, The European Arrest Warrant in the German Federal Constitutional Court, *German Law Journal* 1/2006, p. 45–57.

13 F. *Geyer*, The European Arrest Warrant in Germany – Constitutional Mistrust towards the Concept of Mutual Trust, in: Elspeth Guild (Ed.), *Constitutional challenges to the European arrest warrant*, Nijmegen 2006, p. 101–124. See also H. *Ahlbrecht*, *Europäischer Haftbefehl im Interim*, *eucri* 1-2/2006, p. 39–44.

14 Case C-303/05 *Advocaten voor de Wereld*, 3 May 2007, judgment has not yet been published in the Report of Cases (see www.curia.europa.eu).

15 L. *Walley*, The Belgian Court of Arbitration and the European Arrest Warrant, in Elspeth Guild (Ed.), *Constitutional challenges to the European Arrest Warrant*, Nijmegen 2006, p. 137–139; A. *Weyembergh*, *Les juridictions belges et le mandat d'arrêt européen*, *eucri* 1-2/2006, p. 26–29.

16 The thirty-two categories of offences are extracted from the Europol Convention and its annex.

17 Law No 69/2005, *Gazzetta Ufficiale* No. 98, which came into force on 14 May 2005.

18 See article by E. *Selvaggi* in this issue.

19 A Cypriot national cannot be surrendered for facts committed prior to the 1st May 2004, whereas a Czech national will not be surrendered for facts committed before 1 November 2004.

20 Malta meanwhile modified its domestic legislation, so that it is now in line with Art. 5(1).

Euroscepticism versus Building a Common System for the Surrender of Fugitives

The Implementation of the European Arrest Warrant in Italy

Eugenio Selvaggi

Italy was one of the latest countries, together with the Czech Republic, which implemented the Framework Decision (FD) on the European arrest warrant and the surrender procedures between Member States (hereinafter: EAW) in its domestic system. Since the new provisions of the Italian law appeared to be inconsistent with the European decision in several parts, Italian courts, in particular the Italian Supreme Court of Cassation, interpreted the national legislation in such a way as to ensure consistency with the new European system of the surrender of fugitives that has replaced the traditional system of extradition among the Member States of the European Union. The present contribution intends to give an overview both on the way Italy has implemented the European decision as well as on the said decisions made by Italian courts.

I. Preliminary Remarks: From a Domestic to a Multilevel System

It is nowadays widely accepted among judges, prosecutors, and other practitioners that domestic legal systems are of a multilevel nature: not only are provisions that have originated elsewhere than in one's own country to be applied but the case law and jurisprudence of other European countries are also to be taken into account. This is true, in particular, as regards the new system for the surrender of fugitives from one jurisdiction to another within the new framework of the European Arrest Warrant. In fact, one might say that a common European procedure on a small scale has been created with the EAW.¹

In this context, the Court of Justice of the European Communities comes into consideration first. In particular, reference must be made to the Court's recent decision on the EAW in response to a request of the Belgian Constitutional Court (Arbitragehof). However, other judgments are important too, including the one stating the need for national courts to apply domestic legislation in conformity with framework decisions (Pupino case) and those on the *ne bis in idem* principle.² Likewise, the European Court of Human Rights (ECtHR) plays an important role in this respect, in particular its case law on article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³

Yet the scenario is not limited to the above-mentioned European courts alone. Decisions of national courts in other EU Member States should also be taken into account, i.e., constitutional

courts and courts which ordinarily deal with the surrender of fugitives should be duly considered. If one accepts the idea of a common legal system in this domain, it goes without saying that courts applying mutually agreed upon laws must aim to interpret them in line with common principles.⁴

A conclusion may be drafted to this extent: when interpreting and applying the FD on the EAW, it appears crucial and unavoidable to have this more general scenario in mind. This is why – unlike the practice in the past – almost all legal reviews in Italy now have sections which report on decisions of European and foreign courts.

II. Positions as to the Implementation of the European Arrest Warrant in Italy

Italy implemented the Framework Decision by means of law no. 69 of 22 April 2005.⁵ It is worth mentioning that the Framework Decision itself was subjected to a great deal of criticism in Italy immediately following its adoption. Some criticism was the result of a eurosceptical attitude, i.e., particularly politicians, but also lawyers, were not ready to accept the idea that, in criminal matters, the sovereignty of States is no longer the golden rule. Leaving aside these rather political criticisms, academics put forward more substantial concerns. They argued that the establishment of a common platform would have implied first ensuring (at least a certain degree of) uniformity in substantive criminal law among different legal systems in the EU. This issue becomes even more crucial if the lack of democracy in the decision-making process in the EU is taken into account; fundamental decisions are not taken by the Parliament whereas it is a general and standard rule in national legal systems.

Although I would not rule out that the original idea behind the EAW was a revolutionary one – i.e., a “foreign” arrest warrant can be executed identically in any place of the European judicial space – it already became clear during the preparatory works on the Framework Decision that the delegations could more easily reach an agreement on the grounds that extradition should be simplified and streamlined among the Members of the EU: the surrender of a fugitive should not be treated in the same way within the European Union (e.g., between Italy and France) as it is regulated between EU Member States and other countries outside the EU (e.g., between Italy and Azerbaijan).

Of course, the idea of mutual recognition was – and indeed is – the “cornerstone” of the entire system, so it is difficult to say whether the EAW is a modernized fashion of extradition (a species of a genus that comprises the surrender of a fugitive from one jurisdiction to another jurisdiction) or something entirely new. However, this discussion seems rather theoretic.

Most judges and prosecutors and other practitioners in Italy looked at the novelties of the EAW in a favourable way. In particular, they accepted the essence of the new system, i.e., when deciding on whether a person is to be surrendered to another jurisdiction, all political assessment is eliminated and everything put in the hands of the judicial authorities.⁶

III. Major Inconsistencies with the Framework Decision in Italy

As implied before, most Members of the Italian Parliament were not supporters of the new system. As a result, law no. 69/2005 did not appear to be in line with requirements of the Framework Decision.⁷ This is the case, for instance, as to the grounds for refusals which had been listed as discretionary in the Framework Decision but were implemented as mandatory in the Italian law. Furthermore, other grounds for refusal have been introduced that were not included in the Framework Decision, such as the grounds for refusal in cases in which the person sought is a pregnant woman. In the following, I will describe in more detail two issues which also became relevant in the decisions of the Italian Court of Cassation (see IV).

a) *Evidential requirement.* According to article 17, para 4 of Italian law no. 69/2005, surrender is to be refused in the absence of adequate evidence of the crime (this, of course, applies in a case where the surrender is requested for prosecution). In substance, this means that a requirement of *prima facie* (or probable cause) was introduced by Italy. If one considers that such a prerequisite is not even provided for by the Council of Europe Convention on Extradition of 1957, it appears that the Italian law even went backwards in respect of the extradition system which the EAW had intended to improve upon! In addition, the evidential requirement leads to an evaluation of criminal liability by the executing Italian court.⁸ Normally, this is something which pertains to the judge who is competent for the criminal trial because the ratio of the (extradition and) EAW procedure is a sort of complementary procedure which is instrumental in facilitating the procedure establishing criminal liability and based on solidarity among the States of the International Community in fighting crime. This also matches the interest of the State where the crime was committed in pursuit of justice and the interest of other States in avoiding their countries becoming dens of criminals.

b) *Pretrial detention.* According to the Italian implementation, a European Arrest Warrant must be refused if the legal system of the issuing State does not provide for legal provisions that stipulate maximum terms of pre-trial detention. This consti-

tutes a further specific ground for refusal, the background of which is based on the Italian Constitution: according to article 13 of the Italian Fundamental Charta, deprivation of liberty is possible only where expressly provided for by law, and the law itself has to establish strict terms for pre-trial detention.⁹ According to some experts¹⁰ the Italian “EAW provision” on pre-trial detention is a clear example of an *italocentric* attitude. This means that one’s own system is considered the best in the world. The latter comment is not ill-founded if one takes into account particularly the jurisprudence of the ECtHR on this issue and the fact that other legal systems – in contrast with the Italian one – are considered to be more respectful of the freedom of individuals and more in line with the case law of the ECtHR in practice.

IV. Reaction of the Italian Court of Cassation

The aforementioned two issues were also the subject of decisions rendered by the Italian Supreme Court of Cassation. As a result, the Italian Court of Cassation limited the impact of the domestic provisions on the EAW cited above. The decisions must be considered as favouring an interpretation of the national law in line with the scope of the Framework Decision.

a) As to the *evidential requirement*, the Court of Cassation rendered two decisions which were the first ones on the EAW in Italy. With the decisions of 13 and 23 September 2005¹¹ the Court of Cassation clarified that the assessment of evidence provided for by the Italian law cannot to be interpreted as a fresh assessment regarding whether there is a *probable cause* (that the person sought did commit the crime) because this is a matter for the judge of the State where the trial is to be carried out. The Italian judge (the court of appeal, according to the domestic system) can only check whether the foreign arrest warrant (the one of the issuing State) contains a reference to evidence, so as to make sure that the foreign authority considered the probable cause when issuing the warrant domestically. As a result, the Italian law providing for a refusal on grounds of evidence would be applicable according to the case law of the Court of Cassation if (1) a foreign arrest warrant expressly indicates that no evidence was taken or found against the person sought or (2) there is evidence that he/she did not commit the crime. Apparently, both considerations are more or less hypothetical. In my view, the Italian law would also apply if the foreign arrest warrant is based only on evidence that is considered illegal in the Italian system – for example, a statement taken by means of a lie detector (not to mention cases where the mental and physical integrity of the accused was gravely violated, such as statements gained by torture).

b) On 30 January 2007, the Court of Cassation delivered a Grand Chamber (Sezioni Unite) judgment on the ground for refusal as to *pre-trial detention* (Ramoci case).¹² The facts of the case can be summarised as follows: Mr. Ramoci, a Serbian citizen, was arrested in Italy after an EAW had been issued by a German judge on the basis of a domestic

arrest warrant (*Haftbefehl*) for attempted homicide. The Italian Court of appeal, which was competent as to the execution of EAW, rendered a decision in favour of the surrender. It noted that, in reference to the ground of refusal stated in article 18, lit. c of law no. 69/2005 (surrender is to be refused if the legal system of the issuing State does not provide for maximum terms of pre-trial custody), it is up to the arrested person to prove that the foreign legislation does not contain such provisions. The accused then lodged an appeal with the Court of Cassation arguing that the Italian law did not have to be applied. The Court of Cassation rejected the appeal on the following grounds:

1. The judgment of the European Court of Justice in the Pupino case had to be taken into account. Domestic provisions are to be interpreted in conformity with the relevant European acts. This is particularly true where the national law led to its implementation. As a consequence, the domestic provision providing for a refusal where the legal system of the issuing State does not provide for maximum terms of pre-trial custody, is to be interpreted in a way that does not contradict the FD on the EAW which does not indicate such a ground for refusal.

2. The FD (recital no. 12) expressly mentions the common principles indicated in article 6 of the European Union Treaty, which also makes reference to the European Convention on Human Rights. According to the latter (article 5), no fixed terms for pre-trial custody are prescribed and, even where this occurs in given legal systems, a violation of the convention is not therefore excluded, provided that the delay of custody may nonetheless be ascertained¹³. The Court of Cassation also mentions Recommendation (06) 13 of the Council of Europe where it was recommended that States insert in their legislations “continuous review” as to pre-trial detention – “at regular intervals” – noting that systems that provide for maximum periods only may not sufficiently ensure (although perhaps facilitate) the respect of the fundamental right at stake.

3. Looking at the systems of the European Union (or of the Council of Europe), one might say that there is no uniformity in legislations to this extent. It is then crucial to make reference to the jurisprudence of the ECtHR on this item, which is not incompatible with the provision (article 13) of the Italian constitution.

4. It is important and decisive that the legal system of the issuing State provide for a periodical evaluation as to the need to retain the person concerned in custody and provide for a release of the person should such a prerequisite be lacking, and this was the case in the German legislation.

V. Conclusion

The reason for this brief presentation is not only to provide information as to the Italian law and the relevant case law, but also to give evidence on the need to make reference to a wider scenario than the one resulting only from domestic provisions. Of course, not everything which glitters is gold. *Lacunae* are not only in the Italian law implementing the FD on the EAW, but also in the European instrument itself. As an example: if the person whose surrender is requested is a citizen of the executing State, questions arise as to the mechanism to be used in order to have the person returned back to his/her country of origin in order to serve the sentence or have that person serve the sentence directly in the country of origin. Is the FD on the EAW the only legal basis for the return or must a reference be made to the Council of Europe Convention of 1983 on the Transfer of Sentenced Persons? In the latter case, is the convention applicable *in toto* or would it be applied *mutatis mutandis*? The Italian experience is that the provision contained in the Framework Decision is not applied in practice. This might also depend on the lack of specific provisions in the Italian law of implementation, but it seems that the surrender of citizens gives rise to problems in many jurisdictions. Therefore, a reflection on this matter appears necessary.

1 There is no doubt that the European Convention on Extradition of 1957 (ETS No. 24) already contained some common basic provisions, but they were poor in number; for instance, the one providing for a release of the person arrested in view of extradition if the requesting State hadn't sent the request within the term set in article 16 para 4.

2 The judgment on the European Arrest Warrant dates from 3 May 2007; the one in the *Pupino* case was delivered on 16 June 2005; the first judgment on *ne bis in idem* dates from 11 February 2003 (*Gözütok and Brügge*) and the latest decisions were rendered in the *Kretzinger* and in the *Kraaijenbrink* cases, both on 18 July 2007.

3 It is well known that, according to the European Court of Human Rights, article 6 (fair trial) does not apply to extradition; the question is whether this case law can be maintained in relation to the EAW.

4 Relevant is, for instance, the decision of the House of Lords (UK) of 11 February 2007 which states that domestic provisions implementing the Framework Decision on the EAW should not be applied if they were inconsistent with it. It is also interesting to cite two decisions of the Dutch court (Rechtbank-Internationale Rechtshulpkamer) of 10 and 31 March 2006. In these cases, persons were sought by means of

an EAW by Italy where they had been sentenced *in absentia* and surrendered to the issuing State. The Dutch authority did not ask for guarantee as to the renewal of the trial; this was decided on the basis of the fact that the persons concerned, although not notified in person, were nevertheless familiar with the criminal

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proceedings in Italy. Such a decision appears to be in line with the latest decisions of the ECtHR on the balance between fair trial and trial *in absentia* (see *inter alia* ECtHR, Grand Chamber judgment of 1 March 2006, *Sejdovic v. Italy*).

5 Cf. *S. Manacorda*, Notes sur la loi italienne portant mise en oeuvre du mandat d'arret européen (loi du 22 avril 2005, n° 69) in *eu crim* 1-2/2006, p. 33–35.

6 However, some States maintained a political involvement when they implemented the EAW. In doing so, they simply stated that, to this extent, the relevant authorities are considered as judicial authorities (see the way the FD has been implemented in Denmark or Germany, for instance).

7 See, in particular, the Commission's evaluation report of 24 January 2006 (COM(2006) 8) and the annexed Commission Staff Working Document SEC(2006) 79.

8 According to Italian law no. 69, the assessment includes possible discriminating circumstances.

9 In Italian law, pre-trial detention is related to the type of crime and to the stage of the proceedings; for example, whether it is in the investigation phase, where an indictment has been filed, or whether a first instance sentence has been passed and the defendant lodged an appeal. The issue of pre-trial detention is a concrete

example of a national constitution going even further than the principle stated in the European Convention on Human Rights as interpreted by the ECtHR. Some experts consider the introduction of this specific ground for refusal possible because recital no. 12 of the FD on the EAW ensures the right of Member States to respect the principles of national constitutions.

10 See *E. Selvaggi*, L'attuazione del mandato europeo d'arresto, in *Cassazione penale*, 2003, p. 3651.

11 The decisions have been published in the review *Cassazione penale*, 2005, p. 3766 and p. 3772 respectively.

12 Published in *Cassazione penale*, no. 5/2007, p. 1911. The case was brought before the Grand Chamber because one chamber previously gave a different decision stating that the Italian authority had to refuse the surrender. Oddly, the issuing State was Belgium, which has a system of automatic continuous review of pre-trial custody; experts suspected that such a decision (of 8 May 2006, no. 16542, *Cusini* case) led towards making clear that the provision contained in law no. 69 was unreasonable.

13 The Court of Cassation mentions the decision of the ECtHR in the *Sardinas Albo v. Italy* case (17 February 2005).

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