

# eucrim

ISSUE / ÉDITION / AUSGABE **1–2/2008**

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

SUCCESSOR TO AGON



## Focus on the Future European Criminal Law Framework

Dossier particulier sur le cadre du futur droit pénal européen

Schwerpunktthema: Der Rahmen für das zukünftige Europäische Strafrecht

Eurojust – The Heart of the Future European Public Prosecutor's Office  
*José Luís Lopes da Mota*

La perspective de réforme des traités européens et la lutte contre la fraude  
*Prof. Dr. Lorenzo Picotti*

Folgen der Bindung des mitgliedstaatlichen Strafgesetzgebers  
an die europäischen Regelungen und das Verhältnismäßigkeitsprinzip  
*Dr. Nuria Pastor Muñoz*

EU Terrorism Lists in the Eye of the Rule of Law  
*Dr. Frank Meyer, LL.M.*

# Contents

## News\*

### European Union

#### Foundations

- 2 Community Powers in Criminal Matters – Data Retention
- 3 The Hague Programme Review
- 5 Reform of the European Union
- 7 The Enlargement of the Schengen Area
- 8 Legislation

#### Institutions

- 10 Council
- 10 European Court of Justice (ECJ)
- 11 OLAF
- 13 Europol
- 14 Eurojust
- 16 European Judicial Network (EJN)
- 16 Agency for Fundamental Rights (FRA)

#### Specific Areas of Crime / Substantive Criminal Law

- 17 Protection of Financial Interests
- 20 Corruption
- 21 Money Laundering
- 22 Non-Cash Means of Payment
- 22 Counterfeiting & Piracy
- 22 Organised Crime
- 24 Cybercrime
- 25 Environmental Crime
- 26 Illegal Employment
- 27 Racism and Xenophobia

#### Procedural Criminal Law

- 27 Procedural Safeguards
- 28 Data Protection
- 31 Ne bis in idem
- 32 Victim Protection
- 33 Freezing of Assets

#### Cooperation

- 35 Police Cooperation
- 36 Judicial Cooperation
- 36 European Arrest Warrant
- 40 European Evidence Warrant
- 43 European Supervision Order/ Transfer of Sentenced Persons
- 44 Taking Account of Convictions
- 44 Criminal Records
- 45 Law Enforcement Cooperation

### Council of Europe

#### Foundations

- 46 Relations between the Council of Europe and the European Union
- 47 Relations between the Council of Europe and the United Nations
- 47 Reform of the European Court of Human Rights
- 48 Execution of Judgments of the European Court of Human Rights
- 49 Other Human Rights Issues

#### Specific Areas of Crime

- 50 Corruption
- 54 Money Laundering
- 57 Counterfeiting
- 57 Cybercrime

#### Procedural Criminal Law

#### Legislation

#### Cooperation

## Articles

### The Future European Criminal Law Framework

- 62 Eurojust – The Heart of the Future European Public Prosecutor’s Office  
*José Luís Lopes da Mota*
- 66 La perspective de réforme des traités européens et la lutte contre la fraude  
*Prof. Dr. Lorenzo Picotti*
- 73 Folgen der Bindung des mitgliedstaatlichen Strafgesetzgebers an die europäischen Regelungen und das Verhältnismäßigkeitsprinzip  
*Dr. Nuria Pastor Muñoz*
- 81 EU Terrorism Lists in the Eye of the Rule of Law  
*Dr. Frank Meyer, LL.M.*

## Imprint

\* 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](http://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 pleased to introduce this new issue of eucrim on the new European criminal law framework. In the context of the development of European criminal law, accurate implementation, both of international agreements and European legislation in national law, is a key element of effective action against serious cross-border organised crime.

In a globalised world national criminal systems are facing complex challenges when working to ensure the appropriate balance between efficiency and respect for individual rights. Action against transnational crime requires an appropriate legal basis and more intrusive measures affecting individual rights that must be respected by law enforcement authorities dealing with cross-border investigations and prosecutions. In this context, implementation of international conventions and European rules in criminal matters is a condition sine qua non for an overall, comprehensive, balanced and coordinated approach to cross-border crime at both a legal level and in practice.

Serious criminal offences such as trafficking in drugs and human beings, money laundering, fraud and corruption linked to organised crime, terrorism and cybercrime are, by definition, transnational activities. Although instruments agreed upon at an international level and within the European Union already provide a consistent basis for this new approach to transnational crime, and significant results have been achieved, efforts must still be made to increase the level of implementation of these instruments. In this regard the Treaty of Lisbon provides a new institutional and legal framework to improve the effectiveness of European legislation.

Criminalisation and establishment of jurisdiction are major issues to be addressed. They allow national authorities to investigate, prosecute, and punish offences and provide the basis for international cooperation, especially when dual criminality is required. Establishment of jurisdiction on the basis of the principles of territoriality and extraterritoriality must ensure that there is a mechanism available to facilitate coordination between national authorities. Effective coordination allows successful prosecutions, prevents conflicts of jurisdiction and ensures a proper implementation of legislation in practice.

Implementation of legal instruments must address other issues, such as confiscation of proceeds of crime, liability of

legal persons, protection of witnesses and victims, special investigative techniques and measures to facilitate mutual legal assistance, extradition, joint investigation teams and exchange of information.

Despite the progress that has been made within the European Union after the Treaty of Amsterdam entered into force, there appears to be a potential that

is not being fully exploited. This is particularly true of Eurojust, whose experience clearly shows that better results can be achieved if national authorities coordinate between themselves from an early stage when dealing with cross-border investigations and prosecutions, thus making better use of the existing legal and practical instruments of cooperation. Yet there is still significant work to be done regarding the implementation of the Council Decision setting up Eurojust and other legal instruments in national legal systems. Coordination is also crucial for the implementation of EU legislation: this must be based on the principle of complementarity and occur between Eurojust and other EU entities and bodies, such as the EJM, Europol and OLAF, with a view to supporting national authorities.

Complex issues can then be addressed and solved without delay, for example those related to direct exchange of information, initiation and coordination of parallel investigations, definition of coordinated actions to gather evidence, implementation of simultaneous or conflicting European Arrest Warrants, prevention of conflicts of jurisdiction, setting up of joint investigation teams, and concentration and transfer of criminal proceedings. The implementation of international and European legal instruments is not only a task for lawmakers; it is also a task for practitioners who are responsible for filling the gap between the “law in book” and the “law in action”.

José Luís Lopes da Mota  
President of the College of Eurojust



José Luís Lopes da Mota



## European Union

Reported by Thomas Wahl and Sabrina Staats\*

### Foundations

#### Community Powers in Criminal Matters – Data Retention

##### Advocate General: No Concern as to Data Retention Directive

In a long-awaited statement, Advocate General (AG) Bot concluded that Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks was taken on the correct legal basis. It is the answer to the action of Ireland against the Parliament and the Council seeking clarification on whether the controversial measure – is a matter of the third pillar (Art. 29 et al. TEU) and thus had to be taken by a framework decision (see eucrim 1-2/2006, p. 4). The measure in question obliges providers of publicly available electronic communications services or public communications networks to store traffic and location data for up to two years in order to ensure that this data is available for the purpose of the investigation, detection, and prosecution of serious crime and terrorism.

The starting point of the analysis of the AG is Art. 47 of the TEU, which requires the examination of whether the Community act in question could have been based on the EC Treaty (first pillar). The AG finds that the conditions of Art. 95 TEC, which is the appropriate legal basis for the approximation of Member States' laws for the establishment and functioning of the internal market, have been fulfilled and Directive 2006/24 was correctly founded on this Article. The AG argues that the Directive intends to eliminate disparities in the Member States' national laws concerning the retention of service providers, which involves significant costs for them. Such differences could constitute obstacles for the free movement of electronic service communications and therefore hinder the establishment and functioning of the internal market.

Referring to Art. 95 para. 3 TEC, the AG emphasizes that a measure based on Art. 95 TEC does not exclude pursuing objectives of public interest, such as security, which is undoubtedly the case in the said Data Retention Directive. The dividing line between measures coming under the first and third pillars, according to the AG, is whether the measure would also harmonise conditions for the access

and use of data by law enforcement authorities. In the affirmative, a third pillar action would have been necessary. The AG concludes, however, that this is not the case with the Data Retention Directive, since it is up to the Member States to regulate the right of access and use of data stored by law enforcement authorities in their own legislation.

Finally, the AG does not see a contradiction between his conclusions in the present case and the Passenger Name Records judgement of the European Court of Justice (see eucrim 1-2/2006, pp. 3-4), in which the Court annulled two EU decisions based on the first pillar and paving the way for access of US authorities to the passenger data of airlines. The AG justifies the contradictory result with the particular characteristics of the PNR case. Mainly, the international dimension of cooperation and the methods of collaboration between air carriers and US law enforcement authorities distinguish the “PNR case” from the “data retention case”. Since the subject of the case is only the legal basis, the AG did not deal with fundamental rights issues of the Data Retention Directive (see also the following news item). It will be interesting to see whether the ECJ follows the opinion of the AG as it has done in the vast majority of cases so far.

► eucrim ID=0801001

#### European NGOs Ask ECJ to Clear Up Violation of Human Rights by Data Retention Directive

After the aforementioned opinion of the Advocate General, the hopes of civil liberties organisations are probably shattered that the European Court of Justice (ECJ) will also examine fundamental

rights violations of the Data Retention Directive. 43 civil liberties NGOs and professional associations based in 11 European countries submitted a statement to the ECJ in which they urge the Court not to base its decision only on the incompatibility of the directive 2006/24 with the competence of the EC (as argued by Ireland), but to declare it incompatible with human rights. In doing so, the Court would avoid being called upon a second time for its opinion on the legality of a framework decision which might be adopted with contents identical to the present directive. After a detailed analysis, the statement concludes that the data retention directive infringes (1) the rights of the citizens under Art. 8 (the right to respect for private life and correspondence) and Art. 10 (freedom of expression) of the ECHR as well as (2) the rights of telecommunication companies under Art. 1 of the first protocol to the ECHR (protection of property).

►eucrim ID=0801002

#### Data Retention Directive before Constitutional Courts

The implementation of the data retention directive has also sparked actions before constitutional courts of the Member States. In Germany, actions were brought before the Federal Constitutional Court (Bundesverfassungsgericht) which has yet to decide on the constitutionality of the German implementation law. In total, more than 34,000 citizens filed a constitutional complaint before the Federal Constitutional Court. On 11 March 2008, the Court decided as an interim measure that the German implementation law for the prosecution of crimes can only be applied in a modified way: traffic and location data which are gathered and stored by the telecommunications companies may only be submitted to the law enforcement agencies if cases of serious crimes according to a catalogue (under § 100a para. 2 of the German Procedural Criminal Code) are investigated.

►eucrim ID=0801003

In a decision of 6 November 2008, the Federal Constitutional Court extended the above-mentioned interim measure to data retentions for the purposes of intelligence and the prevention of crimes: the Court fixed restrictive conditions under which retained data may be submitted by the telecommunications companies to police or intelligence services.

►eucrim ID=0801004

Another German court decision is worth mentioning: On 17 October 2008, the Verwaltungsgericht Berlin (administrative court of Berlin) stopped the obligation of a telecommunication service provider to store data at its own expenses as foreseen in the German telecommunications law implementing the data retention directive. The service provider argued that the law would require him to afford at least €720,000 to establish the infrastructure of the storage and surveillance in addition to €420,000 operational costs. Since the law does not provide for state compensation, the financial burden is inappropriate as long as the Federal Constitutional Court has not affirmed the constitutionality of the new telecommunications law, according to the administrative court. The judges emphasised, however, that they did not verify the constitutionality of the German telecommunications law and will wait for a final decision in its case until the judgement of the Federal Constitutional Court has been rendered. The ruling does not apply to other service providers who must address administrative courts on their own.

A final decision of the Federal Constitutional Court on the constitutionality of the German legislative implementation of the Data Retention Directive is expected in 2009, i.e., after the European Court of Justice has delivered its judgement on the Directive (see above).

►eucrim ID=0801005

Short after the entry into force of the Hungarian data retention regulations implementing Directive 2006/24 in May 2008, a constitutional complaint was filed before the Hungarian constitutional

court, too. The Hungarian Civil Liberties Union, which filed the complaint, is mainly concerned about the possibility to store data without pre-defined purposes according to the new Hungarian law.

►eucrim ID=0801006

#### The Hague Programme Review

##### Third Annual Report on the Implementation of the Hague Programme

The Commission adopted its 2007 annual report on the implementation of the Hague Programme. It is meanwhile the third report to give an overview of the achievements of the multi-annual Hague Programme and its respective Action Plan of 2005, with a set of measures and a calendar to implement the objectives of the programme adopted in The Hague. The present report also covers measures in the area of freedom, security and justice that were not originally foreseen but were added due to events or shifts in policy priorities, such as the Counter Terrorism Package of 2007. The report continues the approach of the Commission to not only review the measures taken at the EU level, for which EU institutions are responsible (annex 1), but also to evaluate the state of play of implementation of the EU measures at the national level (annex 2).

In the overall conclusions, the report confirms the results and trends of the first two implementation reports: Progress is considered somewhat satisfied as regards measures adopted in the “first pillar”, relating to asylum, migration, and border policies as well as judicial cooperation in civil matters. An insufficient level of achievement is attested for “third pillar actions”, such as police and customs and judicial cooperation in criminal matters, the prevention and fight against organised crime, and information-sharing among law enforcement authorities. An exception is witnessed in measures for the fight against terrorism. Especially

as regards legislative measures adopted in the third pillar, Member States very often fail to comply with the deadlines for transposition, or they implement the provisions incompletely or incorrectly.

As a consequence, the Commission calls the legislative framework in police and judicial cooperation in criminal matters “virtual” only. As expressed in the previous reports, the Commission calls on the need to improve decision-making in the third pillar areas where the unanimity rule in the Council seems to be one of the main hindrances to better achievements. The rate of achievements further decreased compared to the previous years. In 2007, it was only 38% compared to 53% in 2006 and 65% in 2005 (for the previous two reports of 2006 and 2005, see eucrim 1-2/2007, p. 11 and 3-4/2006, p. 46).

The reports on the implementation of the Hague Programme will also serve as a basis for setting the future priorities of justice, freedom and security. The Commission plans to launch an important Communication in the first half of 2009 which will pave the way for the new multi-annual programme for the period of 2010-2014 – the successor to the Tampere and the Hague Programmes (and likely to be called the “Stockholm Programme”).

► eucrim ID=0801007

### Report of Future Group on European Justice Programme

At the end of the Slovenian Presidency in June 2008, the “Future Group on Justice” presented its final report. It is to serve as an incentive for the Commission when developing a programme to succeed the Hague Programme, which ends in 2009. The group had to prepare priorities for EU action in the field of the EU’s justice policy for the period from 2010-2014 (for more background information on the Group and its objectives, see eucrim 3-4/2007, p. 79). In parallel, another high-level group discussed the future of home affairs policy (see below). The final report refers to new pos-

sibilities for action, which could be envisaged in a new legal framework. This reference is without prejudice to the outcome of the process of ratification of the Lisbon Treaty.

In a first part, the report deals with five horizontal issues and makes proposals for possible future solutions. These issues are:

- Future role, structure, and working methods of the Justice and Home Affairs Council
- Communication of achievements in the justice field to citizens in a more positive and convincing way
- Improvements concerning quality of legislation and clearer language of legal acts
- Resolution of implementation shortcomings, impact assessment, and evaluation of EU legislation
- Adjustment of financial instruments, e.g., for research in the justice area.

In a second part, the report identifies five main areas, where, in the view of the Future Group, concerted action within the EU has the greatest added value to offer. Here, the EU is to pursue strategic objectives, complete actions which have already begun and undertake new actions. The five areas include the following:

- Improving the protection of citizens. Here, the same level of minimum rights in criminal proceedings throughout the Union should be established, the protection of children stepped up, data protection improved, and victims’ rights strengthened.
- Increasing legal certainty in family, commercial, and civil law
- Promoting access to justice within the EU, including better exchanges of information with Eurojust and the facilitation of contacts via the European Judicial Network, better communication between practitioners and better training for them, the realisation of E-Justice with the creation of – ideally – one-stop access points to both European and national law, and the possibility of electronic access to registers.

■ Advancing in the fight against organised crime, including terrorism, within the rule of law. Recommendations in this area target the enhancement of judicial cooperation while respecting the principle of proportionality and a high level of fundamental rights protection. Emphasis is put on pursuing efforts to achieve greater convergence in procedures and methods for obtaining and utilising evidence; the Group is considering extending the scope of the European Evidence Warrant and entering into discussions with specific third countries as regards the gathering of admissible evidence.

■ Meeting future challenges in the external dimension of justice policies. In this field, the Group is considering a wide range of instruments. In particular, the extension of legal and judicial partnerships with neighbouring countries and “strategic partners” is strongly recommended.

► eucrim ID=0801008

### Report of Future Group: European Home Affairs Policy

On 7 July 2008, at the informal Justice and Home Affairs Meeting in Cannes/France, the “High Level Advisory Group on the Future of European Home Affairs Policy” presented its final report, including the outcome of discussion on the future shape of the post-Hague Programme (2010-2014) as regards the European Union’s internal security policy (for more information on the Future Group on Home Affairs, see eucrim 3-4/2007, p. 79 with further references). Like the aforementioned report of the Group on Justice, the report refers to new possibilities for action, which could be envisaged in a new legal framework. This reference is without prejudice to the outcome of the process of ratification of the Lisbon Treaty. The Group found three horizontal challenges to which the concrete recommendations have been adjusted:

■ Growing interdependence between internal and external security, such that

increased cooperation with third countries is particularly needed

- Importance of sharing information in European-wide information networks
- Development of a “European model” in view of reconciling the protection of privacy with the growing mobility of individuals, the employment of technology to manage immigration and border controls, and the combating of terrorism and organised crime.

In essence, the report draws up 25 recommendations on how to meet these challenges. The recommendations address the topics of (1) security, (2) migration, asylum, external borders, and integration, (3) civil protection, (4) new technologies and European information networks, and (5) the external dimension of European home affairs policy.

For the future 2010-2014 programme, the Group proposes two main guiding ideas: First, while the principle of availability was the core piece in the Hague Programme of 2004, the new period should have as its underlying thread the *principle of convergence*. This means that Member States’ law enforcement authorities should be brought together much more closely, both by means of standardisations and by operational means (e.g., training measures, exchange networks, pooling of equipment, simpler cooperation procedures, etc.). This principle is based on making full use of existing instruments rather than developing new ones, and it intends to make shared values more visible, so that national reservations can be overcome. In the second run, a consolidated codification of the “acquis” as to the EU’s home affairs legislation is envisaged. It should contribute to more transparency and understanding vis-à-vis the EU citizen.

► eucrim ID=0801009

### Council Determines Future Principle of Convergence

In a first official reaction to the future policy on internal security in the EU, the Ministers of Home Affairs of the EU Member States, at their Council meet-

ing on 27 October 2008, outlined more precisely the principle of convergence as proposed by the Future Group (see aforementioned news item). They highlighted the operational aspect of cooperation among law enforcement agencies and promoted a series of measures to foster the convergence principle in the near future. The idea behind the measure is, inter alia, to enable European citizens to visualise the added value of action undertaken at the European level. The Council conclusions also stressed the importance of regular evaluations of the actions undertaken in the area of the internal security of the EU for better effectiveness and coherence.

The Commission still has to draft a proposal for the new 5-year programme on Justice and Home affairs (2010-2014). The final content will likely be decided on and adopted by the 27 EU governments in the Council during the Swedish Presidency in the second half of 2009.

► eucrim ID=0801010

### Critical Echo by NGO and Press on Future Group Report on Home Affairs

The aforementioned report of the Future Group on Home Affairs Policy was received rather negatively by the general public. In particular, the proposal of the Future Group to “realise a Euro-Atlantic area of cooperation with the United States in the field of freedom, security and justice” met with criticism. The fear concerns not only an incalculable transfer of vast volumes of information to US authorities, thus impinging upon the privacy of EU citizens but also the establishment of a formal EU-US home affairs policy, since the cooperation has seemingly been extended from combating terrorism and Passenger Name Records to all fields of home affairs, including migration and asylum. UK-based civil liberties organisation, Statewatch, added that the report paves the way for the EU’s “unfettered powers to access and gather masses of personal data on the everyday life of everyone”

and that the “convergence principle” is equated with “EU state building”.

► eucrim ID=0801011

## Reform of the European Union

By Thomas Wahl & Leonard Ghione

### Introductory Remarks

The Lisbon Treaty was rebuffed by Irish voters in the referendum held on 12 June 2008. Since then, it has not been clear what this ‘no’ means for the Reform Treaty itself as well as for the future of the European Union.

The Lisbon Treaty was officially signed by EU heads of state and government at a summit in the Portuguese capital on 13 December 2007. The Treaty’s main objectives are the streamlining of the decision-making process in the enlarged EU, reducing the size of the Commission, and strengthening the role of national parliaments. In addition, it aims at creating the new posts of Council President and High Representative for Foreign and Security Policy (for further details, see eucrim 3-4/2007, pp. 73-75).

In order to enter into force, the Treaty must be ratified by all 27 EU Member States. By the time of the Irish referendum, 18 countries had already ratified the Treaty. The original plan was for ratification by all 27 countries to be completed by the end of 2008, in order for the Treaty to take effect before the European Parliament elections in June 2009.

After the negative referendum, it was agreed at the EU summit on 19-20 June 2008 to continue the ratification process in the remaining Member States and give the Irish government time to come up with a solution. At the EU Council summit on 15-16 October 2008, the Taoiseach (head of the Irish government), Brian Cowen, promised to present an action plan as a way out of the stalemate by December 2008.

► eucrim ID=0801012

### Background: The Irish “No”

On 12 June 2008, Irish voters rejected the Lisbon Treaty by a total of 53.4% with a voter participation of 53.1%. However, according to a survey published on 20 June 2008, the vast majority of those who voted against the Treaty (80%) want Ireland to remain within the EU. Comparison to an opinion poll published before the referendum (see eucrim 3-4 2007, p. 74) shows that the “no”-camp was able to sway almost all of the 30% of voters who indicated they were undecided at that time.

*Details of the vote:* The same survey reveals that a lot of Irish voters refused to vote on the Treaty because they “did not fully understand the issues raised” and that many of those who voted were uncertain as to whether Ireland would benefit from the Treaty (a fifth of the ‘no’ voters and a sixth of the ‘yes’ voters). According to the survey, persons under the age of 24, as well as women and the unemployed, were significant supporters of the ‘no’ vote; the Treaty was backed instead by mostly professionals, managers, and retirees – generally, across all age-groups, support was greatest among voters over the age of 55.

► eucrim ID=0801013

*Reasons for the vote:* There is an ongoing debate about what the reasons were for the negative outcome of the Irish referendum. According to the survey, a “lack of knowledge of the Treaty” (22%) and the “protection of Irish identity” (12%) were the main reasons for rejecting the Treaty. Other reasons for voting ‘no’ included the “lack of trust in politicians”, “safeguarding neutrality”, “losing the right to a permanent commissioner” and “protecting the tax system” (all 6%).

► eucrim ID=0801014

### EU Summit: Agreement on Future Steps for the Lisbon Treaty

At the meeting of the European Council on 11-12 December 2008, the Heads of State and Government agreed on a solution by which to enable the Lisbon Treaty

to come into force by the end of 2009. Ireland agreed to hold a second referendum before the end of the current term of the European Commission, that is by November 2009. According to several diplomatic sources, the most likely date for the referendum is October 2009.

In exchange, the other EU Member States made several concessions taking into account the concerns of the Irish people. Ireland will receive “legal guarantees” which will clarify that the Treaty of Lisbon will not infringe the Member State’s authority in matters of taxation, neutrality, and ethical issues (such as abortion, euthanasia, and gay marriages). In addition, the high importance of other (economic) issues, including worker’s rights, will be “confirmed”. Furthermore, the Council agreed to take those necessary legal steps for all 27 EU countries to continue to have a permanent commissioner if the treaty takes effect.

In order to avoid reopening of the ratification process, it is planned that the promises become legally binding by adding them into the protocol in Croatia’s accession treaty – this must be ratified by all EU Member States for it to enter into force. Croatia’s accession is envisaged for 2010 or 2011.

The compromise also revealed that the second referendum would not take place in Ireland prior or parallel to the elections of the European Parliament in June 2009. This was the original plan (particularly articulated by French President Nicolas Sarkozy), but it has been dropped by the Irish delegation for being unrealistic. Thus, the European Council had to agree on transitional arrangements concerning the Presidency of the European Council as well as the European Parliament:

■ The Member State holding the EU Presidency when the Lisbon Treaty enters into force (according to the current plan, Sweden will hold the Presidency in the second half of 2009) will continue to chair the meetings in the same manner as today’s presidencies till the end of the period of office. The next EU Presi-

dency (likely Spain, which takes over from January 2010) shall make changes in conformity with the Lisbon Treaty, i.e., pave the way for a permanent President of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy.

■ The European Parliament will be elected under the provisions of the Treaty of Nice, but the numbers of MEPs will increase from 736 to 754 in the course of 2010. This will continue till the end of the legislative period 2009-2014. The size of parliament will (temporarily) benefit Germany, which will then keep its 99 MEPs.

► eucrim ID=0801015

### Scenarios

Ireland’s position at the December summit was largely influenced by a report of a sub-committee of the Irish Parliament in which all parties assessed Ireland’s future in the EU. The report confirmed that a second referendum on the same issue is legally possible and that Ireland would lose its weight in the EU if the other EU countries proceed with the Lisbon Treaty without Ireland.

► eucrim ID=0801016

Besides the said report, a wide range of scenarios was conceived in the pre-run of the December summit. The idea of a second referendum combined with an opt-out for Ireland on sensitive issues was put forward early on, inter alia, by Irish politicians. Although politically rejected by the Irish parliament, legal scholars took the view that the ratification of the Lisbon Treaty could also be passed on its own by the Irish parliament. Other suggestions ranged from giving up the reform package and continuing under the Treaty of Nice, negotiating a new Treaty, or excluding Ireland from the EU, and even to using a kind of differentiated integration under the existing “enhanced cooperation”. The following ID contains a selection of analyses as to the way forward after the Irish “no-vote”.

► eucrim ID=0801017



In case of failure of the ratification of the Lisbon Treaty, other ways to implement “Lisbon projects” on the current legal basis become interesting. As to Justice and Home Affairs policies, the “passerelle-clause” again becomes relevant in the discussion (see eucrim 1-2/2006, pp. 4-5, see also the analysis of Prof. Steve Peers as indicated in the following link). Additionally, other projects, such as the EU’s diplomacy service (EEAS), could be made possible without ratification of the Lisbon Treaty.

► eucrim ID=0801018

No matter what happens with the Lisbon Treaty, some predict that it was the last attempt by the EU to adopt a “big, comprehensive” treaty instead of several treaties in specific areas. A more sectoral approach to European Integration might be the way of the future.

► eucrim ID=0801019

### Ratification Process in other Member States

As mentioned above, the Council decided after the Irish “no vote” that the other Member States should continue the ratification process. Most of them have meanwhile done so. The 23rd Member State to recently complete the ratification of the Reform Treaty was Sweden. The Swedish parliament adopted the treaty in November 2008 by a vast majority in a late-night session.

► eucrim ID=0801020

However, independent of Ireland, it is still a bumpy road to the Lisbon Treaty. Main obstacles still exist in three EU countries:

The ratification process of the Lisbon Treaty has been suspended in the *Czech Republic*. After a positive vote in the Lower House of Parliament, senators of the Upper House and party members of eurosceptic President Václav Klaus decided to forward the Lisbon Treaty to the Constitutional Court. Mr. Klaus has made no bones about his hostile attitude towards the Reform Treaty. He described the Irish vote as a “victory of freedom and reason”. Nevertheless, on

26 November 2008, the Czech Constitutional Court gave its go-ahead to the Lisbon Treaty. The judge argues that the new treaty neither changes the fundamental direction of the EU, nor harms the sovereignty of the Member States. Observers commented that the verdict opened the way for the completion of the ratification process, likely during the EU Presidency of the Czech Republic, which will be taken over from France on 1 January 2009.

► eucrim ID=0801021

The fate of the Lisbon Treaty in *Poland* is similarly unclear. Though both chambers of the Polish parliament voted in favour of the Treaty, President Lech Kaczyński is pertinaciously refusing to sign off the instrument of ratification unless Ireland overturns its ‘no’. However, it seems legally ambiguous whether the President is obliged to ratify the Treaty. Legal doctrine in Poland seems to affirm such an obligation; however, there is no ruling by the Constitutional Court in this matter.

In *Germany*, President Köhler is waiting for the decision of the Federal Constitutional Court on the constitutionality of the Lisbon Treaty before ratifying it (see eucrim 3-4/2007, p. 74). The judgment of the Federal Constitutional Court is expected in spring 2009. Both chambers of the German parliament have already voted in favour of the Treaty.

► eucrim ID=0801022

Additional complications might arise in *Finland*: the Åland Islands – an autonomous province of Finland – demand concessions from Helsinki in return for ratifying the Lisbon Treaty. Finland has ratified the Treaty without the consent of the Åland parliament. Though its consent is not a prerequisite for ratification by Finland, a negative vote could jeopardise the Treaty’s application in the province of Åland.

► eucrim ID=0801023

### “Wise Group” Formed

As reported in eucrim 3-4/2007, p. 75, the EU leaders agreed in December 2007

to set up an independent reflection group of the “wise” to help shape Europe’s long-term future. At the meeting of the European Council in October 2008, the EU leaders approved the composition of the group. It comprises 12 persons and will be headed by former Spanish Prime Minister Felipe González. Besides himself and the two vice-chairs – Latvia’s former president, Vaira Vīle-Freiberga, and Nokia chief, Jorma Ollila from Finland – the group includes well-known politicians, such as former Polish president Lech Walesa or former competition commissioner, Mario Monti (Italy). The group is set to start work from January 2009 on. The General Secretariat of the Council will provide the group with material and logistical support. It is planned that the group present its report to the EU leaders at their summit in June 2010.

► eucrim ID=0801024

### The Enlargement of the Schengen Area

#### Schengen Area Becomes Reality for Switzerland

After the Council confirmed that the Swiss Confederation had fulfilled the necessary conditions for the country’s admission to the Schengen area in November 2008, passport controls at the land borders between Switzerland and its EU neighbours were lifted as of 12 December 2008. Air border controls will be lifted as of 29 March 2009 with the switch to summertime and the new flight schedule. Switzerland will use this time to complete the remaining physical adjustments at its airports (affected are, in particular, the airports of Basel, Geneva, and Zurich).

The lifting of border controls will mean that persons can travel to/from Switzerland without passport controls. However, Switzerland will maintain customs controls at the border since the country is not a member of the EU’s customs union. Thus, there will be no

changes for goods entering the country. Although systematic passport controls at the border crossings have been lifted, Swiss authorities will carry out random checks within border regions and in international trains. This is not new because Swiss border guards have been carrying out mobile border controls for some time.

The major change for the police will be the use of the Schengen Information System, which allows for the exchange of data on specific individuals or stolen/lost goods.

Switzerland is the 25th Schengen State. For more information on the Schengen area, its enlargement, and SIS, see eucrim 3-4/2007, pp. 66-73.

►eucrim ID=0801025

### Second Generation of the SIS – State of Play

As reported in eucrim 3-4/2007, p. 70, the Schengen States are currently using an “extended version” of the Schengen Information System (SIS+), as introduced by the 1990 Implementing Convention (CISA). This system will be replaced by the second-generation Schengen Information System, in short SIS II. The establishment, operation, and use of SIS II is regulated by Regulation (EC) No. 1987/2006 and Decision 2007/533/JHA. SIS II shall be developed by the Commission and the Member States as a single integrated system and shall be prepared for operations.

In October 2008, the Council adopted the necessary legislative instruments to ensure the transition from SIS+ to SIS II. Accordingly, the Member States participating in SIS 1+ shall switch from N.SIS to N.SIS II using the interim migration architecture, with the support of France and the Commission, by 30 September 2009 at the latest. If necessary, this date may be changed in accordance with a committee procedure.

►eucrim ID=0801026

SIS II is currently in the testing phase. However, the Commission informed the Council that some tests with the new

system had to be interrupted so that the introduction of SIS II by September 2009 was not feasible.

►eucrim ID=0801027

## Legislation

### First Meetings of Justice Forum

The Justice Forum, which was reported on in eucrim 3-4/2007, pp. 79-80, has been institutionalised. On 30 May 2008, the first meeting was held and the official launch of the forum proclaimed. The forum convenes practitioners and civil stakeholders, giving them the opportunity to discuss the implementation, evaluation, and consequences of Justice and Home Affairs instruments of the EU together with EU authorities. It is the first time that legal professionals can discuss the EU’s policy in the area of freedom, security and justice in a sustainable and multidisciplinary way. The forum will meet four times per year in Brussels. Subgroups were built to discuss specific issues in a more in-depth manner. Special experts may be invited ad hoc by the Commission.

The focus of further meetings of the Forum in 2008 was on mutual recognition (July), e-justice (September), and victims (December). The Commission was particularly interested in what issues legal professionals wish to focus on in 2009. The following link refers to the website of the Justice Forum that was established by the Commission’s Directorate-General of Freedom, Security and Justice.

►eucrim ID=0801028

### Council Creates Network on Legislative Cooperation

On 28 November 2008, the Council adopted a Resolution on the establishment of a network for legislative cooperation between the Ministries of Justice of the Member States of the European Union. The network will enable Ministries of Justice to exchange informa-

tion on their legislation, judicial and legal systems and ongoing reforms in a swift, reliable and flexible way by means of correspondents and the creation of a common database. The effect of this network should be to increase the understanding of the legislation of other Member States and to improve mutual trust, which is seen as the major condition for the application of the mutual recognition principle.

The Resolution formulates the specific tasks as follows:

- Providing members of the network on request with coherent and up-to-date information on legislation and with case-law on selected subjects

- Providing access to the results of comparative law research carried out by or for the Ministries of Justice of each State in fields of law generally falling within the sphere of competence of those Ministries, including in the context of reforms carried out by the Member States or of transposition of law of the European Union

- Being aware of major legal reform projects, while complying with the obligation of confidentiality by which States’ bodies are bound.

The Resolution further clarifies that the Member States will not have translation obligations.

►eucrim ID=0801029

### Access to Documents: Fundamental Considerations of ECJ

The European Court of Justice (ECJ) strengthened the rights of individuals regarding access to documents of European institutions. The Court of Justice overruled a decision of the Court of First Instance and stressed that, in principal, opinions of the Council’s legal service relating to a legislative process must be disclosed. In the case at hand, Mr. Turco requested access to said opinions concerning a proposal for a directive laying down minimum standards for the reception of applicants for asylum in Member States. He referred to Regulation EC No. 1049/2001 regarding public access

to documents which, as a general rule, provides that any citizen of the Union and any person residing in a Member State have the right of access to documents of the institutions. However, the regulation provides for exceptions, inter alia, where disclosure of a document would undermine the protection of court proceedings and legal advice if there is an overriding public interest in disclosure. The Court of First Instance followed the argumentation of the Council in applying the exception and argued that disclosure of legal opinions, such as the one in question, could give rise to lingering doubts as to the lawfulness of legislative acts to which such advice is related and could also compromise the independence of the opinions of the Council's legal service.

On appeal, the ECJ held that this position is not in line with the idea of transparency of the legislative process. Therefore, disclosure should only be denied in cases of a sensitive nature. The ECJ highlights that any examination in view of the disclosure of Council documents should be carried out in three stages: (1) The Council must satisfy itself that the document in question does indeed concern legal advice and, if so, it must decide which parts of it are actually concerned; (2) the Council must verify whether disclosure of the parts of the document in question would undermine the protection of legal advice; here, the Court clarifies that this condition can only be affirmed if a risk of undermining the protection is foreseeable and not purely hypothetical; (3) if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined, the Council must ascertain whether there is any overriding public interest in justifying disclosure.

Although the ruling refers to documents concerning asylum policy, it will have a widespread impact on other policy areas of Justice and Home affairs and Community policies alike.

►eucrim ID=0801030

### Commission Proposal on Access to Documents of EU Institutions

In the context of access to official documents, it is worth mentioning that the EU is currently preparing an amendment to the above-mentioned Regulation 1049/2001. The Regulation itself implements Art. 255 TEC, as introduced by the Amsterdam Treaty. Art. 255 TEC confers the right of access to European Parliament, Council, and Commission documents to any citizen of the Union and any natural or legal person residing or having his registered office in a Member State.

The time for the amendment was considered mature by the Commission after the said Regulation had been applied for six years and several voices were raised for changes, including a Resolution of the European Parliament of 4 April 2006. The proposal codifies the existing texts and aligns them with the so-called Aarhus Convention containing rules on access to information in environmental matters and with Court of Justice case law. It also defines the concept of a "document".

►eucrim ID=0801031

The present draft for a Regulation regarding public access to European Parliament, Council, and Commission documents was submitted by the Commission in April 2008. It is, inter alia, based on a public consultation via a Green Paper entitled "Public Access to Documents held by institutions of the European Community – A review" of 2007.

►eucrim ID=0801032

### Statements on New Commission Proposal on Access to Documents

Opinions on the new Commission proposal are still divided. EU officials as well as stakeholders of civil society took the occasion to present their views at a public hearing relating to the revision in the European Parliament on 2 June 2008. Whereas Commissioner Margot Wallström, who is responsible for communication strategy and Council repre-

sentatives, stressed that the new framework would be a clear improvement of citizens' access to documents, others remained sceptical. The EU Ombudsman, P. Nikiforos Diamandouros, for instance, held that the planned amendments would not open access to more but to fewer documents and that the definition of "documents" is too restrictive. Background information on and contributions to the public hearing can be downloaded via the following link:

►eucrim ID=0801033

An overview of the development of freedom of information in the European Union is provided by the following website of Statewatch:

►eucrim ID=0801034

### EDPS: Opinion on Draft on Access to Documents

Following the aforementioned public hearing of 2 June 2008, the European Data Protection Supervisor (EDPS), Peter Hustinx, on 30 June 2008, submitted an opinion on the draft Commission proposal on the revision of the right to access to documents of the EP, the Council, and the Commission. The opinion focuses on a better balancing of the tensions between the two fundamental rights: public access to documents, on the one hand, and protection of personal data, on the other hand. The EDPS puts forward three main issues that he is not satisfied with: (1) the failure to reflect recent European case law on access to documents and data protection (esp. Bavarian Lager case); (2) the insufficient balance of the fundamental rights at stake; and (3) the lack of practical viability. As a result, the EDPS proposes a different provision on how to grant public access to documents containing personal data.

►eucrim ID=0801035

### CoE: Draft Convention on Access to Official Documents

It is worth mentioning that, besides the European Union, the Council of Europe is also taking action to improve human rights with regard to the freedom of in-

### Literature: Criminal Procedure in Europe

The recently published book entitled “Criminal Procedure in Europe”, edited by Prof. Richard Vogler and Dr. Barbara Huber represents a valuable contribution on European criminal justice systems. The book gives an updated insight in English into six important national criminal procedure systems, i.e., England and Wales, France, Germany, Netherlands, Slovenia, and Spain. It is a helpful tool for the practitioner and judge as well as for the academic who strives towards a better understanding of the criminal justice processes of these different European countries. The following provides a summary of the book by the editors:

Substantial and far-reaching changes have occurred since the publication of the first edition of this volume in 1996, and there is little doubt that we are currently witnessing the most profound transformation in criminal justice across Europe since the French revolution. In the midst of the most rapid and concerted period of criminal justice reform in the recent history of the continent of Europe, this book is an attempt to take stock of the process across a wide range of different jurisdictions, encompassing more than 200 million inhabitants. It spans a broad range of traditions and provides a comparative account of European criminal justice, compiled by a group of distinguished authors, to a common format. What are the criminal justice norms which are arising from this process? Is it really possible to speak of an emerging European culture of criminal justice or is the continent drifting into a post-modern diversity of styles and forms of justice?

The editors firmly believe that a new consensus on many of these issues is beginning to emerge across the continent, not based upon the domination of any single model of procedure or on forced harmonisation but on the growth of shared understanding about the appropriate balance between the interest of the state, the community, and the individual in the crucial area of criminal justice. The editors hope that the essays will make a significant contribution to the pan-European effort to evolve criminal justice procedures which are both efficient and respectful of human rights.

The book is published in the book series of the Max Planck Institute for Foreign and International Criminal Law.

► eucrim ID=0801037

formation. Council of Europe states are currently preparing a treaty intended to guarantee public access to information. It would be the first binding international treaty in this regard. Drafting the Council of Europe Convention on Access to Official Documents took place from January 2006 to February 2008. Negotiations turned out to be difficult and controversial, with many information commissioners and NGOs raising concerns several times during the process. On 3 October 2008, the Parliamentary Assembly of the Council of Europe identified a series of problems with the draft Convention and called for its re-drafting. The Committee of Ministers dealt with the Convention at its meeting on 27 November 2008.

► eucrim ID=0801036

## Institutions

### Council

#### 18-Month Programme of the French, Czech, and Swedish Presidencies

On 30 June 2008, France, the Czech Republic, and Sweden published an 18-month programme presenting important issues to be covered during their EU presidencies in the period from July 2008 to December 2009. The main steps that need to be taken are:

- Designing a new multi-annual strategic work programme for 2010-2014 (see above)
- Proposing the adoption of a European Pact on Immigration and Asylum
- Continuing to counter all forms of terrorism, focusing on the misuse of the Internet for terrorist purposes, the implementation of the Action Plan on Enhancing Security Explosives and on the development of concrete tools for an early detection of terrorist activities
- Enhancing operational cooperation and the exchange of information between law enforcement authorities

- Pursuing further implementation of the principle of mutual recognition of judicial decisions, especially with regard to proposals relating to judgements in absentia and a European Supervision Order.

The programme follows the new approach by trio-Presidencies of presenting a common and more consistent plan for the EU’s Justice and Home Affairs Policy.

The approach began with the start of the trio-presidencies of Germany, Portugal, and Slovenia. With the beginning of Germany’s EU Presidency in 2007, the countries presented their common programme lasting one and a half years (see eucrim 3-4/2007, p. 49).

► eucrim ID=0801038

## European Court of Justice (ECJ)

### First Judgments Expedited by Urgent Preliminary Proceedings

In eucrim 3-4/2007, p. 78, it was reported that, from 1 March 2008 onwards, national courts or tribunals have the possibility to request an urgent preliminary procedure for references which relate to the area of freedom, security and justice, i.e., areas covered by Title VI TEU and Title IV TEC (cf. new Art. 104b of the Rules of Procedure of the ECJ). The references are coded “PPU” in the registry of the Court. Meanwhile, the ECJ has delivered its first judgments according to these proceedings. The first “urgent preliminary ruling” concerned civil matters and dealt with a reference of the Supreme Court of Lithuania requesting clarification on Community rules relating to the return of a child wrongfully retained in another Member State (Case C-195/08 PPU, “Rinau”). The Lithuanian court decided on 30 April 2008 to refer the case to the ECJ. The ECJ delivered its judgment on 11 July 2008.

► eucrim ID=0801039

The first case that was finally ruled on regarding criminal matters dealt with a reference of the Cour d’appel

de Montpellier (France). The subject matter concerned the interpretation of the European Arrest Warrant system (Case C-296/08 PPU, “Santesteban Goicoechea”; see below under “Cooperation – European Arrest Warrant”). The French court applied for the urgent preliminary ruling procedure on 3 July 2008; the ECJ delivered its judgment on 12 August 2008.

► eucrim ID=0801040

## OLAF

### New OLAF-Eurojust Agreement

The relationship between OLAF and Eurojust was put on a new footing. On 24 September 2008, Director General of OLAF, Mr. Franz-Hermann Brüner, and the President of Eurojust, Mr. José Luís Lopes da Mota, signed a “practical agreement on arrangements of cooperation between Eurojust and OLAF”. In the last instance, the Council approved the agreement. It details modalities for closer and increased cooperation between the two bodies, particularly rules on operational cooperation, including the exchange of case summaries, exchange of case-related information, and exchange of strategic information, operational and strategic meetings, participation in Joint Investigation Teams, etc. An additional part contains data protection rules, since not only general but also personal data will be exchanged. The new agreement replaces the Memorandum of Understanding between Eurojust and OLAF of 2003 which governed their cooperation up till now.

► eucrim ID=0801041

### Court of First Instance Delivers Far-Reaching Judgment for OLAF Work

The Court of First Instance (CFI) delivered an additional important ruling on the procedural rights of defendants in the course of OLAF’s (internal) investigations and information policy to the public by the Commission. The case

concerns OLAF investigations in the so-called “Eurostat-affair”. After information on irregularities and maladministration had been whistle-blown, OLAF opened investigations relating to the contractual practice of Eurostat (the European Communities’ statistical office) concerning several companies. Investigations also concentrated particularly on the former Director-General, Mr. Yves Franchet, and former Director of Eurostat, Mr. Daniel Byk, alleging them to be liable for the irregularities. OLAF sent files to the Luxembourg and French judicial authorities containing information on facts that could trigger criminal proceedings against the two persons. In return, Mr. Franchet and Mr. Byk brought action before the CFI, claiming that OLAF and the Commission acted wrongfully in the course of the investigations and demanding compensation for material and immoral damages (Case T-48/05).

The Court found that OLAF should have informed the plaintiffs about passing the files to the judicial authorities in Luxembourg and France and that the conditions of the exception for cases requiring absolute secrecy for the purpose of the investigation were not satisfied. Accordingly, OLAF infringed the rights of defence. Furthermore, the Court held that OLAF committed wrongful acts when it referred to the plaintiffs publicly – including leaks to the press – as being guilty of criminal offences. According to the CFI, this infringes the principle of the presumption of innocence, the principle of the obligation of confidentiality in investigations, and the principle of sound administration.

The CFI next examined the conduct of the Commission in the case and also found that the Commission acted wrongfully in disclosing various pieces of information in the context of the investigations. The CFI remarked: “While noting that the [EU] institutions cannot be prevented from informing the public about ongoing investigations, the Court finds that, in the present case, it cannot

be considered that the Commission did so with all the required discretion and reserve and maintaining a fair balance between the interests of Mr Franchet and Mr Byk and those of the institutions.” The CFI assessed this behaviour as serious breaches of the principle of presumption of innocence, too.

All in all, the wrongful acts of OLAF and the Commission satisfy the conditions for the non-contractual liability of the Community in the sense of Art. 288 (2) TEC. The CFI jointly awarded €56,000 to the two officials for damages to their honour and reputation (i.e., non-material damages). Both had sought damages for €1 million.

Director General of OLAF Franz-Hermann Brüner and the Commission reacted to the judgment with disappointment. Mr. Brüner said that the judgment paralyzes the investigative work of OLAF and may have consequences on the types of OLAF reports in future. A Commission spokesman noted that it is difficult for the Commission and OLAF to do their jobs because of the ruling. The Commission, however, did not appeal the verdict before the European Court of Justice, which would have been legally possible.

In 2006, the CFI already ruled on the complaint of Mr. Franchet and Mr. Byk concerning access to documents of the OLAF investigations against them. The complaint was partly successful (Joined Cases T-391/03 and T-70/04). Interestingly, the French and Luxembourg judicial authorities have not initiated criminal proceedings against the two men, as newspapers reported after the recent judgment, although OLAF transmitted its files in 2003 already. The “judicial winding-up” of the “Eurostat affair” is one of the most politically delicate issues encountered in OLAF investigations so far. The affair also prompted the row between OLAF and German journalist Tillack (for the “Tillack case”, see eucrim 3-4/2007, p. 82 and eucrim 3-4/2006 p. 49).

► eucrim ID=0801042

## European Parliament Amends OLAF Reform Proposal

The European Parliament heralded the next round of discussions on the reform of the current Regulation No. 1073/99 concerning OLAF investigations. The vast majority of MEPs (450 to 8 votes, with 11 abstentions) favoured a report by German MEP Ingeborg Grässle (Committee of Budgetary Control) containing a series of amendments to the initial Commission proposal of 2006 (see eucrim 1-2/2006, pp. 6-7).

The MEPs pointed out the great importance of the work of OLAF and reiterated the responsibility of national authorities to assist in investigations against Community fraud. The amendment proposals added by the European Parliament aim at strengthening the cooperation between OLAF and its Supervisory Committee as well as the procedural safeguards of persons subjected to OLAF investigations. Furthermore, they aim at an increased control of investigations and the improved exchange of information. The main amendments are as follows

*As regards relations with other EU institutions:*

- A more systematic exchange of information between OLAF and Eurojust on (serious) fraud and corruption cases
- Possibility for OLAF to conclude cooperation agreements between Eurojust and Europol and other international organisations
- Obligation of EU institutions, bodies, and agencies to rapidly forward to OLAF accurate information in cases involving internal investigations
- Right of the Director General of OLAF to intervene before the European Court of Justice (ECJ) when the exercise of his investigative function is at issue
- Right of the Supervisory Committee to bring action before the ECJ against an EU institution if measures thwart the independence of the Director General
- General obligation of the Director General to report regularly to the European Parliament, the Council, the Com-

mission, and the Court of Auditors on the results of OLAF investigations.

*Cooperation between OLAF and EU Member States:*

- Competent national authorities of EU Member States must provide OLAF with the necessary assistance in accordance with Regulation 2185/96, such that OLAF can perform its tasks if difficulties are encountered in cases of on-the-spot checks or inspections on the premises of economic operators
- OLAF employees may ask national authorities to take the necessary “precautionary or implementing measures” in order to preserve evidence.

*Procedural safeguards:*

- Clarification that people who are under investigations by OLAF enjoy equal procedural guarantees and legitimate rights, irrespective of whether the investigation is internal or external
- Regular checks on legality, particularly prior to the opening and closing of an investigation, by legal experts of the Office
- Complaints by individuals affected by OLAF investigations (including informants) must be lodged with the Supervisory Committee and are treated by the “Review Adviser”
- A “written authority” issued by the Director General, indicating the subject matter and purpose of the investigation, the legal basis for conducting the investigation, and the respective investigative powers, is necessary for interventions by OLAF investigators
- Time limits for closing investigations and reporting obligations of the Director General to the Supervisory Committee if investigations exceed a certain time limit (18 months)
- Right of the person under investigation by OLAF to comment on the final OLAF investigation report
- Adoption of a “procedural code for OLAF investigations”, including the procedural guarantees and judicial principles of OLAF investigations, such as the principle of presumption of innocence.

Against the background of the “Tillack case”, the MEPs propose the insertion of a specific clause on the protection of journalistic sources. The clause would oblige all EU bodies involved in the investigations to respect the principle of protecting journalists’ sources in accordance with national legislation (for the “Tillack case”, see eucrim 3-4/2007, p. 82 with further references).

The resolution of the European Parliament, which was adopted in first reading on 20 November 2008, forms the basis for the Council to decide on the reform of OLAF’s legal basis in the co-decision procedure. Non-binding opinions were already issued by the European Data Protection Supervisor (eucrim 1-2/2007, p. 15) and the European Court of Auditors (3-4/2006, p. 50).

► eucrim ID=0801043

## OLAF Activity Report 2007

OLAF presented its eighth Activity Report, which covers the period from 1 January 2007 to 31 December 2007. Director General Franz-Hermann Brüner pointed out in the foreword that the report confirms the principal trends of recent years, the main ones being:

- The volume and quality of information received increased, indicating greater visibility and public confidence in OLAF. In 2007, a high of 886 new items of information were received, and 543 decisions (up 15% compared to 2006) were taken on the basis of new incoming information.
- Data shows that OLAF focused more and more on its own investigations – 2007 was the first year in which the number of OLAF’s own investigations overtook the number of cases in which OLAF assisted national authorities. Furthermore, OLAF put emphasis on the investigation of the most serious and complex cases; in this context, priority also continues to be given to the assessment of information in respect of which OLAF has a clear mandate.
- There was a greater proportion of cases with significant recommendations for follow-up.

■ The level of recovery further increased compared to the previous years. In 2007, more than 200 million Euros were recovered following closed OLAF cases. This is a considerable financial benefit for the EU taxpayer.

It is further worth mentioning that OLAF was investigating a total of 408 cases at the end of 2007. A significant share of OLAF's new case records relates to a small number of countries: approximately 60% of all new case records created in 2007 originated in five member states (Belgium, Bulgaria, Germany, Italy, Romania). In proportion to population, and with the exception of Belgium and Luxemburg, the highest occurrence of cases was to be found in Bulgaria, followed by Romania and Greece. One reason for Romania and Bulgaria topping the list may be the intensification of OLAF's activities in these two new Member States since their accession to the EU on 1 January 2007.

As regards external investigations, the bulk of cases involve agricultural subsidies (which, however, decreased more than 50% in comparison with 2004), cigarette smuggling, and "external aid", i.e., projects related to development assistance and humanitarian goals; the latter item increased by 70% compared with the figures from 2005.

The report also shows a considerable increase in internal investigations, i.e., those inside the European institutions or bodies, with the European Commission being the institution most targeted. In 2007, 35 cases in internal investigations were opened, and a total of 70 internal cases were being investigated at the end of 2007.

Like the previous reports, the present report contains a number of case studies demonstrating the variety of cases in which OLAF intervened in 2007, ranging from embezzlement by an agent from an EC delegation, an alleged fraudulent pension claim by a retired official, tomato imports that evaded customs duties, plagiarism in an EU research project, etc.

OLAF's activity report was published

simultaneously with the European Commission's report on the protection of the financial interests of the Communities (see below) in July 2008. For the annual reports of OLAF for 2006 and 2005, please refer to eucrim 1-2/2007, p. 14 and eucrim 1-2/2006, p. 6, respectively.

► eucrim ID=0801044

### OLAF Posts Officer in China

OLAF placed an official of the Office in China (Beijing). It is the first time that an officer has been sent to a country outside of Europe. Thereby, OLAF reacts to the increase of counterfeiting and smuggling activities stemming from China. The aim is to strengthen the protection of the EU's financial interests and facilitate international co-working with the Chinese authorities. The OLAF representative will support the anti-contraband and anti-counterfeit activities of the Office, especially those that are related to cigarette smuggling.

► eucrim ID=0801045

## Europol

### Europol's Transformation into EU Agency Agreed

At its meeting on 18 April 2008, the Justice and Home Affairs Council took another step forward towards transforming Europol into an EU agency. The Council reached political agreement on the decision establishing Europol (for information on the reform of Europol's footing, see eucrim 3-4/2007, p. 83 with further references). The three main features of the change are:

■ The Europol Convention will be replaced by a Council Decision based on Articles 30(1)(b), 30(2) and 34(2)(c) TEU; this allows a more rapid and flexible adaption of Europol's legal framework on new trends in crime by avoiding lengthy ratification procedures

■ Europol's mandate will be extended to all serious forms of crime independent of their relation to organised crime

■ Europol will be financed by the Community budget instead of the present intergovernmental financing. As a result, the Financial Regulation and the Staff Regulations of officials and other servants of the European Communities apply to Europol servants. In addition, control by the European Parliament will increase, notably because of its capacity as a budgetary authority.

A number of transitional provisions shall ensure that the changeover will run smoothly. The new status will be effective from 1 January 2010 onwards.

► eucrim ID=0801046

### Europol Work Programme 2009

At its meeting on 18 April 2008, the JHA Council endorsed the Europol Work Programme for 2009. As with the previous Work Programme for 2008, the 2009 Programme gives a holistic view of Europol's planning through its business areas, i.e., (1) operations, (2) strategy and monitoring of overall business performance, (3) logistics, and (4) management activities. The programme is shaped by the following issues:

■ Strategy for Europol as adopted by Europol's Management Board in October 2007

■ Several policy factors, such as the entry into force of the Lisbon Treaty, the Hague Programme of 2005, the strategy of the external dimension of Justice and Home Affairs as approved by the Council in December 2005, the Organised Crime Threat Assessment (OCTA), overall developments in the area of the exchange of information and other activities of the Council and the Commission as to JHA policy and criminal phenomena

■ Input provided by Europol National Units

■ Europol's new legal framework which is currently under discussion in the Council and due to be put into effect by 2010.

Appendix A of the document of the Work Programme for 2009 contains a detailed description of the objectives that Europol intends to achieve in 2009

in the various business areas. For the Europol Work Programme for 2008, see eucrim 1-2/2007, p. 15.

➤ eucrim ID=0801047

### Europol Annual Report 2007

In July 2008, Europol published its Annual Report. It summarizes the activities of the European Police Office and the Europol Liaison Bureaux during the calendar year 2007. The fight against terrorism remains to be of top priority, just as it has been over the previous years. Here, the “Check the Web” portal – a tool which allows the sharing of information on the use of the Internet by Islamist terrorists – and the First Response Network are highlighted. They were both implemented in 2007.

The report further points out that, regarding serious and organised crime, the priorities in 2007 were drugs trafficking, smuggling and trafficking in human beings, fraud, commodity counterfeiting, intellectual property theft, money laundering and euro counterfeiting. The report recalls that Europol is the Central Office for combating euro counterfeiting, making it also the worldwide contact point. In May 2007, Europol therefore organised the First International Conference on the “Protection of the Euro against Counterfeiting” which was attended by more than 300 experts from both the international law enforcement environment and the central banks. Europol also reports on several operational actions inside and outside the Eurozone which focused on the protection of the euro.

Figures of the work of Europol also show that the body’s workload increased compared to the previous year 2006. In this context, it is worth mentioning that the content processed by the Europol Information System almost doubled in 2007.

Max-Peter Ratzel, the Director of Europol, also emphasised the important changes to the legal basis of Europol: the year 2007 marked the implementation of the three protocols amending the

Europol Convention as well as the initiation of a Council Decision which will replace the Europol Decision in the future (see previous issues of eucrim). The new legal basis will make Europol a more effective tool for the Member States, according to Mr. Ratzel.

➤ eucrim ID=0801048

### Europol Extends Cooperation over the Balkans

In September 2008, Europol signed two bilateral agreements with two countries of the Western Balkans, i.e. Montenegro and the Republic of Serbia. The agreements aim at enhancing cooperation in the fight against serious forms of international crime including, amongst others, drug trafficking, money laundering and illegal immigration. They enable the involved parties to exchange strategic and technical information. In addition, the agreements provide the legal basis for the exchange of a liaison officer. The agreements still need to undergo the ratification process in the respective countries.

Europol has continuously improved its international law enforcement cooperation by negotiating operational or strategic agreements with other states outside the EU, international organisations or other EU bodies (such as OLAF or Frontex). The main differences between operational and strategic cooperation agreements are the scope and nature of the cooperation. Operational agreements include the exchange of personal data.

➤ eucrim ID=0801049

### Strategic Agreement Europol - Frontex

Europol strengthened its cooperation with Frontex, the EU’s agency for external border security. In particular, the agreement provides for the exchange of strategic and technical information. These types of information are defined in Article 2 of the Agreement. The Agreement does not authorise the transmission of data related to an identified individual or identifiable individuals though.

Frontex was established in 2004 by Council Regulation (EC) 2007/2004. The agency started to operate in October 2005 and it was the first EU agency to be based in one of the new EU Member States, i.e. Warsaw, Poland. The main task of the agency is to coordinate the operational cooperation between Member States in the field of border security. The activities of Frontex are intelligence-driven. Frontex complements and provides particular added value to the national border management systems of the Member States.

➤ eucrim ID=0801050

## Eurojust

### Council’s General Approach on Strengthening Eurojust

At its meeting on 24-25 July 2008, the Council of the Justice and Home Affairs Ministers agreed on a general approach to the draft decision on strengthening Eurojust (see eucrim 3-4/2007, pp. 84-85). As a whole, the new decision is designed to strengthen the operational effectiveness of Eurojust. At its meetings on 18 April and 6 June 2008, the Council had already agreed on a general approach to certain provisions, notably as regards the articles on the composition of Eurojust, its tasks, and the status and powers of its National Members and Eurojust’s staff. The new draft decision now establishes clearer rules on when national law enforcement authorities must submit information when running criminal investigations with international dimensions. After the – non-binding – opinion of the European Parliament (see next news item) the draft will be further examined within the Council.

➤ eucrim ID=0801051

### European Parliament’s Opinion on New Eurojust Decision

On 2 September 2008, the majority of MEPs approved amendments by the European Parliament to the initial initiative



of the 14 Member States concerning the decision on strengthening Eurojust (see aforementioned news item). In essence, the amendments relate to strengthening data protection and the procedural safeguards of defendants, and improve the European Parliament's control rights regarding Eurojust's activities. Several amendments deal with situations where National Members of Eurojust must act in urgent cases; here the EP proposes a system of post-reporting. The proposed amendments are not binding for the Council.

►eucrim ID=0801052

### EDPS on Eurojust Initiative

Besides the European Parliament, the European Data Protection Supervisor (EDPS), Peter Hustinx, submitted a statement on the planned Council Decision on strengthening Eurojust. The EDPS first regretted that the Council had not officially asked him for advice, so that he gave his opinion on his own initiative – as he previously had as regards another Justice and Home affairs proposal, namely the proposal for integrating the “Prüm Treaty” into the EU's legal framework. Although the Council is not obliged to consult the EDPS under the decision-making provisions of the EU Treaty, consultation is by no means ruled out. The opinion of the EDPS was prompted by the fact that the initiative to adjust Eurojust's position to the current needs of law enforcement largely deal with the collection, storage, and exchange of personal data.

The EDPS further regrets that the initiative was accompanied by neither an assessment on the impacts of the new EU legislation nor an analysis of the shortcomings of the existing rules and expected effectiveness of the new provisions. In particular, the latter aspect is considered important, since Eurojust exchanges data within widely differing legal systems and will increase the exchange of personal data according to the initiative. Specific observations are made in relation to data protection, rela-

tions with external partners (third entities such as the World Customs Organisation, cooperation with Europol, and data exchange with authorities of third countries), and supervision. The EDPS ultimately puts forward several arguments in favour of holding back new legislation on Eurojust until the entry into force of the Lisbon Treaty.

►eucrim ID=0801053

### Eurojust Annual Report 2007

Eurojust presented its sixth Annual Report which provides information on Eurojust's activities in 2007. The major part focuses on Eurojust's operational activities in 2007, but information is also provided on its external relations and internal issues.

The report first gives detailed statistics on the casework of Eurojust. The historic threshold of 1000 cases which were handled by Eurojust in one single year is highlighted. In 2007, 1085 new cases were referred to Eurojust, an increase of 41% compared to 2006 (771 cases). As in 2006, drug trafficking and crime against property or public goods, including fraud, constitute the largest percentage of the cases referred, while cases dealing with trafficking in human beings and money laundering have also increased significantly. In addition, involvement of third countries outside the European Union has increased significantly. For the first time, liaison prosecutors seconded to Eurojust, such as that of Norway, registered their own cases which had been referred to them by their national authorities.

As regards external relations, the report stresses the improved cooperation with Europol, the European Judicial Network, and OLAF. The more efficient relationship with OLAF is mainly due to the establishment of regular meetings on a quarterly basis as well as the exchange of information and experience in several ad hoc meetings in 2007, such as the first joint OLAF-Eurojust conference in March 2007 on the protection of the EC's financial interests. Beyond

the results relating to the relationship of Eurojust with third countries (such as the USA, Switzerland, Croatia, Russia, etc.), the report also points out Eurojust's active participation in various EU networks, such as the genocide network, the European Judicial training network, the CARIN network, and the cybercrime network.

Finally, the report contains a preliminary assessment of the strategic objectives set out in the previous annual report of 2006 to be achieved in 2007-2008. It shows that most objectives have already been partially met or are in the process of being accomplished.

►eucrim ID=0801054

### Council Conclusions on Eurojust Annual Report 2007

At its meeting on 18 April 2008, the Justice and Home Affairs Ministers of the EU Member States endorsed the Council conclusions on the sixth Eurojust Annual Report (for the calendar year 2007). The conclusions, inter alia, note that there are still significant differences among EU Member States as regards the utilisation of Eurojust's assistance. Therefore, the Council calls on the competent authorities of the Member States to refer serious and complex cases to Eurojust by involving the unit, where possible, at an early stage of investigation.

The Council is also showing its appreciation of the wider use of Articles 6 and 7 of the Europol Decision by asking national authorities to consider undertaking investigations or prosecution on specific acts or to accept that one of the authorities would be in a better position to prosecute.

As regards external relations, the Council encourages Eurojust to continue the enhanced involvement of third countries by means of cooperation agreements which – inter alia – need to contain clear provisions on data protection. The importance of concluding working arrangements with OLAF is highlighted as well.

►eucrim ID=0801055

### Further Agreements with Third Countries

The Council approved two agreements which extend (geographically) close cooperation between Eurojust and countries outside the European Union. The first agreement is the cooperation agreement between Eurojust and Switzerland. Switzerland has been cooperating with Eurojust on a case-by-case basis for a long time; however, now, the cooperation has been formalised and institution-alised. The agreement governs the exchange of information, the processing of transferred data, and data protection rules for the data subject. A further provision details the possibility to second a liaison officer from Switzerland to Eurojust. The exchange of information is carried out via the Federal Office of Justice of the Federal Department of Justice and Police (Bundesamt für Justiz), which is the contact point for Switzerland to Eurojust.

►eucrim ID=0801056

A similar agreement was concluded between Eurojust and the Former Yugoslav Republic of Macedonia (FYROM). The agreements will enter into force once all parties have completed their internal procedures.

►eucrim ID=0801057

### European Judicial Network (EJN)

#### Council's General Approach on New Footing of EJN

Parallel to the above-mentioned decision on Eurojust, the Council of Justice and Home Affairs, at its meeting on 24-25 July 2008, also arrived at a general approach regarding the draft decision on the European Judicial Network in criminal matters. The draft is based on the initiative of 14 Member States as it was tabled in January 2008, simultaneously along with the proposal on strengthening Eurojust (see eucrim 3-4/2007, p. 85). The goal is to strengthen the European Judicial Network in order to adapt it to

the new reality of judicial cooperation in criminal matters in the EU and to re-inforce its relationship with Eurojust. The current structure and flexibility of the network, which consists of several contact points in the EU Member States that support mutual legal assistance in criminal matters, is not touched upon. The new footing will provide rules on the internal organisation of the network, such as location and frequency of contact point meetings, and the communication between the contact points via a secure telecommunication connection.

►eucrim ID=0801058

The European Parliament and the Council are currently also working on a further development of the European Judicial Network in civil and commercial matters. In June 2008, the Commission tabled a proposal which adapts and amends the founding legislative act of 2001. In parallel to the EJN in criminal matters, the network in civil and commercial matters facilitates cooperation between the EU Member States in the said areas, inter alia by means of establishing central contact points in the Member States and by seconding liaison magistrates.

►eucrim ID=0801059

#### European Parliament's Amendments to EJN Draft Decision

At its plenary session on 2 September 2008, the European Parliament adopted a number of amendments to the aforementioned initiative of the 14 Member States, with a view to adopting a Council Decision on the European Judicial Network. The proposed amendments mainly concern improved data protection rules and clarification as regards the tasks and roles of the participants in the network. Likewise, the EP aims to increase its position in controlling and monitoring the network's activities. The proposed amendments of the EP are not binding on the Council.

It is noteworthy that the European Data Protection Supervisor did not deliver an own opinion on the initiative on

the EJN, unlike he did on the Eurojust draft decision (see above). The EDPS took the view that the initiative on the EJN is less intrusive, since less personal data are transmitted within the EJN in criminal matters.

►eucrim ID=0801060

### Agency for Fundamental Rights (FRA)

#### Agreement with Council of Europe in Force

Following the approval of the Council in February 2008, the cooperation agreement between the Council of Europe (CoE) and the European Union Agency for Fundamental Rights was signed. Upon signature on 18 June 2008 by Terry Davis, the Secretary General of the Council of Europe, and, on behalf of the EU, Janez Lenarčič, the Slovenian State Secretary for European Union Affairs, the agreement entered into force. The agreement puts cooperation between the two main European entities committed to fundamental rights issues on a formal legal basis, in order to promote the coherence and effectiveness of the system of fundamental rights protection in Europe and avoid double work. The CoE clarified, that, in essence, the CoE is to ensure the respect of human rights within its 47 CoE States, including the 27 EU countries, and to develop and promote a common human rights standard. The EU Agency for Fundamental Rights has the primary task of working on the human rights aspects of EU law and its implementation by EU Member States and EU institutions. Joint activities allow for the common promotion of human rights in Europe. For further information on the agreement, see eucrim 3-4/2007, p. 87. The agreement was published in the Official Journal OJ 2008 L 186, pp. 6-11.

►eucrim ID=0801061

#### First Annual Report Published

On 24 June 2008, the European Union Agency for Fundamental Rights submit-

ted the Annual Report 2008 on its activities in 2007 to the European Parliament, Council, and Commission. The report, which provides an account of the activities and achievements of the agency during 2007, is the first to be produced on the basis of the FRA legal base and mandate. It especially summarises the findings of the Agency's ongoing data collection through its RAXEN National Focal Points in each of the 27 Member States of the EU and gives an overview on:

- Legal and institutional initiatives against racism and discrimination
- Racist violence and crime
- Racism and discrimination and preventive initiatives in employment, education, housing and health care
- Developments in EU policy and legislation relevant to combating racism and xenophobia.

► eucrim ID=0801062

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Commission Report 2007 on the Protection of Financial Interests

The provision of quick and accurate information on irregularities and suspected fraud by the Member States is essential for an effective protection of the Communities' financial interests. In his presentation of the 2007 annual report on the "Protection of the Communities' financial interests – Fight against fraud", Vice-President of the Commission, Siim Kallas, responsible for Administrative Affairs, Audit and Anti-Fraud, highlighted the responsibility of the EU Member States as regards the management of Community funds.

In particular, the report gives statistical data on all irregularities notified to the Commission by the Member States and sets out the most significant steps

taken by the Member States and the Commission in 2007 to improve the prevention and fight against fraud. Based on replies to questionnaires sent to the Member States, two parts of the report focus on (1) the existing control measures to detect irregularities and fraud, and (2) limitation periods applicable to proceedings and decisions concerning irregularities. The last part of the report deals with recoveries made in 2007 in all budget areas.

The report emphasises that the statistics must be read and used with great care, since, in most cases, a reported *irregularity* is not a possible *fraud* (which requires a deliberate act), and a reported *suspicion of fraud* is not necessarily a fraud confirmed by a court judgment. However, the report deals with all the irregularities presented that are subject to different forms of follow-up. Due to their nature, the figures set out in the report are indicative, preliminary, and non-final.

The main items of the fraud report 2007 are the following: The estimated amount affected by *irregularities* has increased across the various sectors but, as a percentage of the budget, it remains relatively stable. The estimated impact of *suspected fraud* cases remains stable with regard to expenditure and has slightly decreased cases involving own resources. As regards the Member States' obligations to notify irregularities to the Commission, the report states that most irregularities are notified within the established time-limits. However, the situation is not completely satisfactory as some Member States often notify with delay (e.g., in the field of agriculture, notifications are made after 1.2 years on average).

The report is supplemented by two annexes. The first annex provides an overview of the implementation of Art. 280 TEC by the Member States in 2007. Like the previous annual report of 2006, the 2007 report follows the tradition of first listing the legal instruments that were employed by the Member States in

2007 in order to give effect to Art. 280 TEC, i.e., measures to combat fraud and all illegal activities affecting the financial interests of the Communities in the areas of own resources, agricultural expenditure, and structural measures. Furthermore, measures of the EU Member States in two special areas are analysed. This time, the topics concern (1) the above-mentioned limitation periods for proceedings on irregularities and subsequent decisions establishing administrative penalties or measures, and (2) the management verifications under Art. 4 of Regulation No. 438/2001 in respect of the European Regional Development Fund (ERDF).

The second annex contains a detailed statistical evaluation of the irregularities reported by the Member States in accordance with different regulations in the various sectors of the budget, i.e., traditional own resources, agricultural expenditure, structural measures, pre-accession funds, and direct expenditure. Among the key figures, it appears that, in general, the number of irregularities notified for the year 2007 decreased by 9%. The total number of irregularities increased for traditional own resources and structural funds, as well as for the pre-accession funds, whereas it decreased for the cohesion fund and agriculture.

In keeping with tradition, the Commission report was presented in July 2008, alongside the OLAF Activity Report (see above). For the 2006 and 2005 annual reports of the Commission on the protection of the Communities' financial interests, please refer to eucrim 1-2/2007, pp. 19-20 and eucrim 1-2/2006, p. 10.

► eucrim ID=0801063

#### EP Resolution on Strategy to Fight Fiscal Fraud

Following the Council and the European Economic and Social Committee, the European Parliament (EP) launched its opinion on a coordinated strategy to improve the fight against fiscal fraud. On 2 September 2008, the MEPs adopted

the own initiative report from MEP Sharon Bowles (UK), which replies to the respective Commission Communication of 2006 (COM(2006) 253 (see eucrim 3-4/2006, p. 57; eucrim 1-2/2007, p. 20; eucrim 3-4/2007, pp. 91 ff.).

Bearing in mind the considerable loss to the national and EU budget, particularly as regards VAT fraud, the MEPs regret the blockading of Member States that have not yet agreed on an effective EU strategy to counter fiscal fraud. The MEPs consider outdated the current transitional VAT system, which dates back to 1993. They support the Commission's efforts to bring about a fundamental change to the current system, but believe that the introduction of the controversially debated "origin system" (i.e., taxation at the rate of the exporting Member State) can only be realised in the long-term, requiring an approximation of Member States' tax law and the establishment of a clearing system.

The EP further shares the point of view that the introduction of the so-called reverse charge mechanism (where the recipient/customer of goods or services declares the VAT in business-to-business relations instead of the supplier) is not an appropriate alternative solution. The resolution warns that the system could lead to new forms of fraud and increased tax losses at the retail level as well as to further administrative burdens. Nevertheless, the resolution notes that a pilot project may help to make apparent the inherent risks of the reverse charge system.

The MEPs consider that the best approach to tackling VAT fraud related to cross-border supplies is to introduce a system in which the VAT exemption for intra-Community supplies is replaced by taxation at the rate of 15%. Necessary rebalancing payments should be made through a clearing house which would facilitate the passing of revenue between Member States.

In addition, the resolution notes that administrative cooperation and mutual assistance in the field of VAT, excise

duties, and direct taxation between the national anti-fraud offices is very insufficiently developed. In this context, the MEPs call on Member States to take comparable measures against fraudsters, such as sanctions and criminal proceedings, regardless of where losses of revenue take place. As a result, the revenue of all Member States could be protected equally as regards the internal market.

Lastly, the EP calls on the European Union to eliminate tax havens, both by eliminating loopholes within the EU legislation as well as by countering tax havens at the international level.

► eucrim ID=0801064

#### Judgment C-420/06 – Application of the *lex mitior* Principle

On 11 March 2008, the ECJ decided on a reference for a preliminary ruling under Article 234 TEC regarding the application of the *lex mitior* principle (when there are several legal provisions applicable that refer to each other).

The reference to the ECJ was made in the context of proceedings between Mr. Jager, a farmer, and the Office for Agriculture, Bützow, Germany (Amt für Landwirtschaft Bützow) regarding the grant of suckler cow premiums for the year 2001. Mr. Jager brought judicial proceedings before the Administrative Court of Schwerin in 2002 after the Office for Agriculture had rejected his application for premiums for maintaining suckler cows based upon Article 10 c (1) of Regulation No. 3887/92. The Court decided to stay proceedings and refer to the ECJ, posing the question of whether the second sentence of Article 2(2) of the Regulation No. 2988/95 on the protection of the European Communities' financial interests is to be interpreted as meaning that provisions imposing a more favorable penalty (Articles 57 to 63 of Regulation No. 796/2004) are to be applied retroactively to an application falling within the scope *ratione temporis* of a Regulation (No. 3887/92), even if the Regulation imposing the more fa-

vourable penalties (No. 796/2004) is not applicable *ratione materiae* in the Member State concerned.

The ECJ stated that the principle of the retroactive application of the more lenient penalty is part of the constitutional traditions common to all Member States and must be considered to be one of the general principles of Community law. However, in the case under consideration, the Court points out that the system of penalties established in Articles 66 and 67 of Regulation No. 796/2004 was not designed to change the nature or severity of the penalties applicable in the context of the aid system for bovine animals established by Regulation No. 1254/1999. Therefore, the system introduced by Articles 66 and 67 of Regulation No. 796/2004 does not reflect a revised assessment by the Community legislature as to whether the penalty is commensurate with the gravity of the irregularity at issue. The system does not constitute a subsequent amendment within the meaning of the second sentence of Article 2(2) of Regulation No. 2988/95 and, hence, Regulation No. 796/2004 may not be applied retroactively for an application falling within the scope *ratione temporis* of Regulation No. 3887/92.

► eucrim ID=0801065

#### Judgment C-132/06 – Italian Tax Amnesty Not Permissible

On 17 July 2008, the ECJ ruled that the Italian Republic failed to fulfil its obligations under Articles 2 and 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes as well as its obligations under Article 10 TEC by providing for a general and indiscriminate waiver of verification of taxable transactions effected in a series of tax years. The Action under Article 226 TEC was brought on by the Commission on 7 March 2006 after having sent a letter of formal notice as well as a reasoned opinion to the Italian Republic.

Articles 8 and 9 of Law No. 289/2002 essentially allowed taxable persons to submit a supplementary VAT (Value Added Tax) return by means of a confidential procedure in order to correct returns which had already been filed in respect of tax periods falling between 1998 and 2001.

The ECJ finds that these regulations lead to providing taxable persons with a powerful incentive to declare only part of the tax debt actually due. In the end, Articles 8 and 9 allow taxable persons to escape any public controls as well as any fiscal administrative or criminal penalties by paying a lump sum in lieu of an amount proportionate to the turnover achieved. According to the ECJ, the effect of the considerable imbalance between the amounts actually due and the amounts paid by taxable persons wishing to take advantage of the tax amnesty is tantamount to a tax exemption. Since Articles 2 and 22 of the Sixth Directive as well as Article 10 TEC oblige each Member State to take all appropriate legislative and administrative measures to ensure the collection of all the VAT due on its territory and to secure the collection of the Community's own resources, the ECJ decided that Law No. 289/2002 seriously disrupts the proper functioning of the common system of VAT and is also not conducive to the Community's objective to curtail tax evasion. Therefore, the ECJ considered the action well-founded.

► eucrim ID=0801066

### Commission Decisions for Reclaiming of CAP Expenditure

This section again provides regular information about the decisions taken by the Commission to reclaim money from Member States because the countries did not adequately control procedures or did not comply with EU rules as regards expenditure under the Common Agricultural Policy (CAP). The money flows back to the EU budget. The Member States are responsible for spending and controlling expenditure within the framework of CAP.

## Criminal Law from the Perspective of the Reform of the European Treaties

Report from the Conference in Verona/Italy, 27-28 June 2008

On 27-28 June 2008, the Faculty of Law and the Department of Law of the University of Verona – supported by the co-financing of the European Anti-Fraud Office and with the participation of the Italian Group of the AIDP (Association Internationale de Droit Pénal) – organised the final symposium of the inter-university project entitled “Criminal Law and the Treaty establishing a Constitution for Europe”. The project involved the Universities of Catania, Como-Insubria, Ferrara, Modena and Reggio Emilia, and Verona. Two years after the launch of the research project, new perspectives and the need for reflection have emerged, owing to the resumption of the reform process following the Lisbon Treaty of 13 December 2007 and after the negative results of the referendum in France and the Netherlands that bought to a halt the ratification process of the constitutional text of 2004.

Top-level experts from the European institutions and bodies, national and European experts, and high-profile academics discussed the explicit attribution of competences in criminal matters to the European Union. Indeed, changes of outstanding importance concern criminal law. They are connected to overcoming the division into pillars and to the extension of the “community” method to the procedures of adopting European criminal law rules: the position of the Parliament will be equivalent to that of the Council, and national Parliaments will be involved in the “ascending” phase of the legislative process, strengthening its democratic nature and transparency as well as respect for the principles of subsidiarity and proportionality.

The Conference was divided into the following five sessions and a final round table:

- Session I on “European Union competences in criminal matters and the principle of legality”.
- Session II on “The fight against organised crime: a target of the EU. Intervention techniques and sanctions in the area of freedom, security and justice”.
- Session III on “Economic crime and European criminal law”, dealing with (a) European criminal law and economic crime from the perspective of the Treaty of Lisbon, (b) corporate liability and culpable offence from a comparative perspective,

and (c) corruption and fraud, including fraud against the EU's financial interests.

- Session IV on “Criminal law on the information technology in the perspective of the reform of the European Union treaties”, addressing, inter alia, identity-related fraud and criminal law, new interests in the criminal law on information technology in a supranational context, and copyrights.

- Session V on the “European Public Prosecutor and evidence circulation in the EU”. The final round table discussions and conclusions were dedicated to the topic of “Criminal law and the protection of the financial interests of the European Union. Perspectives of the ‘European criminal law’ in the project of the European treaties’ reform.”

The participants welcomed the Lisbon Treaty as a step in the right direction. In conclusion, the new legal framework was considered as a first important step in the effective implementation of the Union's policy in criminal matters and the protection of its interests. In this context, the new legal environment being introduced by the Lisbon was highlighted:

- Reduction of the “democratic deficit” due to new attributes of the European Parliament (and its democratic legitimisation), and the involvement of the national Parliaments in the “ascending” phase of the legislative process
- “Common” approach to the fight against all forms of transnational crime, the establishing of “minimum rules” with regard to the definition of criminal offences, sanctions and even criminal procedure norms, particularly on the matter of the collection and circulation of evidence
- Room for the Council to extend the criminal law framework of the EU (cf. Art. 83 TFEU)
- Broad possibilities to establish a proper European criminal law for the prevention of and fight against fraud affecting the Union's budget (cf. Art. 325 TFEU)
- Reinforcement of the operational aspect to enforce (European) criminal law by the European Public Prosecutor's office, and improved police and judicial cooperation in criminal matters.

*By Roberto Flor, University of Verona, Italy*

In its recent decision of 11 December 2008 (the 29th decision since the 1995 reform of the CAP system) a total of €528.5 million of EU farm money unduly spent by Member States will be reclaimed. The decision affects Cyprus, Denmark, Estonia, Finland, Spain, France, United Kingdom, Greece, Ireland, Italy, Latvia, the Netherlands, Portugal, Slovenia, and Sweden. At the top of the list is Italy with €105.5 million charged for weaknesses in key and ancillary controls in the sector of olive oil production. It is followed by the United Kingdom (€84.7 million claimed) for not heeding payment deadlines.

► eucrim ID=0801067

On July 2008, in its 28th decision since 1995, a total of €410.31 million of unduly spent CAP funds is due to be recovered from Germany, Spain, France, Great Britain, Greece, Italy, the Netherlands, Poland, and Sweden. Here, Italy and Greece lead the list with €145.2 million and €127.7 million to be recovered.

► eucrim ID=0801068

In its 27th decision since 1995, the Commission claimed back a total of €83 million of EU agricultural money. Affected this time were the Czech Republic, Denmark, Germany, Ireland, Spain, France, Italy, Luxembourg, the Netherlands, Austria, and Portugal. At the top of the list was Spain, which was charged with €54.9 million for unauthorised planting of vineyards in the years 2003 and 2004. For more background information, see eucrim 3-4/2006, pp. 56-57 and eucrim 1-2/2006, p. 10.

► eucrim ID=0801069

### Practice: Coordination in Large Tax Fraud and Money Laundering Case

By coordinating judicial and police actions involving five EU Member States, Eurojust and Europol supported investigations on tax fraud, counterfeiting, money laundering and participation in a criminal organisation. Investigations and searches were carried out in October 2008 in the Netherlands, Belgium, Germany, Italy and Spain against per-

petrators who allegedly evaded import and customs tax by distributing cooking equipment and knife sets. Furthermore, large quantities of money were laundered. It is presumed that a total amount of €5 million in tax was lost and an amount of €22 million was laundered. Max-Peter Ratzel, Director of Europol said: “This operation demonstrates the complementary role of Europol in the broader EU strategy of preventing and combating organised fiscal fraud.”

► eucrim ID=0801070

### Practice: Blows to Cigarette Smugglers

The European Anti-Fraud Office (OLAF) recently announced two important successful strikes against cigarette smuggling.

The first operation concerned an international cooperation with the Singapore authorities. In October 2008, OLAF reported that nearly 40 million cigarettes believed to be destined for the EU black market have been seized by Customs in Singapore following a close cooperation between OLAF and Singapore Customs.

► eucrim ID=0801071

On 28 November 2008, the Zollkriminalamt (German Customs Investigations Office) in Cologne, Germany, presented the final results of one of the biggest investigations of organised cigarette smuggling in German history. After more than two years of work, customs investigators from Germany, Greece and Belgium succeeded in dismantling a transnational criminal organisation which smuggled cigarettes across Europe. Over 640 million cigarettes were seized and, in Germany alone, 28 arrests were made. The damage for tax revenue is estimated at about €108 million. The operation was dubbed “Boomerang” and OLAF supported the investigations. In the context of the contraband seizures, the Zollkriminalamt also pointed out the health risks for the consumers which emanated from the counterfeit cigarettes.

► eucrim ID=0801072

## Corruption

### Contact Point Network against Corruption on Its Way

Following the initiative of Germany in 2007 (see eucrim 1-2/2007, p. 22), the Council has now approved the establishment of a network of contact points for the Member States of the European Union, designed to improve cooperation between authorities and agencies of the Member States of the European Union charged with preventing or combating corruption. The European Commission, Europol, and Eurojust will be fully associated with the network’s activities.

The main tasks of the network are:

- Constituting a forum for the exchange of information throughout the EU on effective measures and experience in the prevention and combating of corruption

- Facilitating the establishment and active maintenance of contacts between its members.

To these ends, inter alia, a list of contact points shall be kept up-to-date and a website operated. The members of the network shall meet at least once a year to accomplish their tasks.

► eucrim ID=0801073

On 5 June 2008, the European Parliament delivered its statement on the proposal. The requests of the EP were not accepted by the Council. In particular, the EP could not convince the Council of its proposal that OLAF should be a full integral part of the network and that a review mechanism on the network’s findings needs to be introduced.

► eucrim ID=0801074

### Independent Anti-Corruption Offices Eyed by Governments

It can be observed that, during the last few months, many independent offices or high commissioners mandated to fight the corruption have been confronted with setbacks in many EU countries. The decision of the new Italian government of Silvio Berlusconi to shut down the Italian Office of the High Commissioner

## Combating Corruption and Fraud in the EU: Annual Fora

3rd Forum in Trier, ERA, 19-20 February 2009

From 19-20 February 2009, the Academy of European Law (ERA) in Trier, Germany will host the third annual forum on combating corruption and fraud in the EU. The objective of the annual forum is to debate how best to ensure effective detection, investigation and prosecution of corruption, particularly affecting the EC's financial interests. It explores the work of national judicial and law enforcement organisations and promotes cooperation with agencies in other EU Member States.

The forum in 2009 will focus on different aspects of asset recovery, singled out as "a fundamental principle" of the 2003 United Nations Convention against Corruption (UNCAC). The following topics will be addressed:

- Major international, European and national initiatives in asset recovery
- Best practice for more effective asset recovery in Member States
- Practitioners' perspective on what makes asset recovery so difficult and the role of Eurojust.

As in previous fora the role and contribution of OLAF will be outlined and concrete international and European cases presented in discussion groups.

► [eucrim ID=0801212](#)

The 2009 forum follows on from "Combating corruption in the EU – first and second annual fora", projects sponsored by OLAF (Hercule Programme) and implemented by ERA in February 2007 and April 2008. The second annual forum of April 2008 aimed

mainly at discussing the recent European and international initiatives to combat corruption and fraud and at sharing experiences in Member States (especially those of judges and prosecutors) in dealing with these matters. Working groups, where OLAF's concrete cases were illustrated and analysed in detail, played a vital role. The seminar brought together approximately seventy legal practitioners and experts, some of whom were from the national "Associations for protection of the financial interests of the European Communities". The programme developed by the Academy of European Law attracted the interest of applicants from many EU countries as well as candidate countries and some third states. Participants came, for example, from Moldova, Turkey, and Switzerland.

A large number of countries and therefore legal jurisdictions were represented in the end, fulfilling the goal of a forum that would facilitate an EU-wide exchange of experiences and offer the prospect of improving cooperation between the Member States. The presence of OLAF representatives at the policy and investigation levels ensured adequate coverage of the protection of EU funds against corruption; the OLAF investigators and magistrates brought with them some case studies which illustrated the need for improved cooperation both between the competent authorities of the Member States inter se and between the national and EU agencies.

► [eucrim ID=0801076](#)

*Laviero Buono, ERA*

against Corruption with effect of 25 August 2008 triggered a public outcry. The office of the High Commissioner had been created in 2004. Drago Kos, the President of the Council of Europe's anti-corruption monitoring body GRECO (see below), and Transparency International protested vehemently against the decision of Italy's government.

However, Italy is not the only country where anti-corruption offices – which all EU countries are obliged to establish under the 2003 UN Convention against

corruption (once fully ratified) – face difficulties. Offices, for example in Romania, Latvia, Austria, and Slovenia are engaged in similar struggles with the respective country's government. An OLAF spokesman pointed out that the existence of these specialised agencies in the Member States is very useful for the work of OLAF. OLAF was in the process of negotiating a memorandum of understanding with the Italian High Commissioner prior to his dismissal.

► [eucrim ID=0801075](#)

## Money Laundering

### 3rd Anti-Money Laundering Directive: Commission Takes Member States to Court

In November 2008, the Commission decided to refer four EU Member States – Belgium, Ireland, Spain, and Sweden – to the European Court of Justice for not having implemented the EC's third Anti-Money Laundering Directive in time (for the Directive, see [eucrim 1-2/2006](#), p. 11). The deadline for transposition of the Directive expired on 15 December 2007. However, in June 2008, the Commission pursued infringement procedures against 15 Member States for non-timely implementation of the Directive. Germany was also among the States that narrowly escaped infringement procedures before the Court. The German law transposing the Directive entered into force on 21 August 2008 ([BGBl. I S. 1690](#)).

The Third Anti-Money Laundering Directive adopted in October 2005 tightens existing EU legislation and incorporates into EU law the June 2003 revision of the 40 Recommendations of the Financial Action Task Force (FATF), the international standard-setter in the fight against money laundering and terrorist financing. The Directive is applicable to the financial sector as well as to lawyers, notaries, accountants, real estate agents, casinos, trusts, and company service providers. All providers of goods, when payments are made in cash in excess of €15,000, must also comply with the standards. Those subjected to the Directive are required to:

- Identify and verify the identity of their respective customer and of its beneficial owner, and to monitor their business relationship with the customer
- Report suspicions of money laundering or terrorist financing to the public authorities – usually, the national financial intelligence unit
- Implement supporting measures, such as ensuring proper training of personnel and the establishment of appro-

appropriate internal preventive policies and procedures.

► eucrim ID=0801077

## Non-Cash Means of Payment

### Implementation of the EU Action Plan on Payment Fraud

On 28 April 2008, the Commission released a report on fraud regarding non-cash means of payment in the EU, presenting the implementation of the second EU 2004-2007 Action Plan. The report describes the main actions undertaken in the field of payment fraud in the context of the EU Action Plan and provides an overview of the prevention of and fight against fraud. The intention of the EU Action Plan was to strengthen consumer confidence in non-cash means of payment and to foster a more coherent approach to fraud prevention, especially by intensifying the cooperation among stakeholders through the Fraud Prevention Expert Group (FPEG). The FPEG, an independent expert group of representatives from different parties involved in fraud prevention, not only provided a platform for information exchange during 2004-2007 but also prepared reports on the harmonisation of security evaluation criteria for card payments and ATM security, including card skimming. Further information on the work of the FPEG, including the reports is available at the following FPEG website.

► eucrim ID=0801078

As far as the legislative aspect of the Action Plan is concerned, the report refers to the third Directive on the prevention of money laundering (2005/60/EC) and the Directive on payment services in the internal market (2007/64/EC) as part of a substantial progress towards the creation of a “more robust” legal environment at the EU level in the financial services area. It also contains further information on the Single Euro Payments Area (SEPA), which aims at simplifying

the process of making payments throughout the Eurozone. To achieve this goal, the European Payments Council (EPC) is developing standard specifications for cards, terminals, and networks. The Common Approval Scheme (CAS) project, one of the developed initiatives, was created to work on proposals regarding:

- Minimum security requirements for cards and terminals (“points of interaction”)
- A common and neutral security evaluation methodology
- A framework for mutual recognition and type approval across SEPA.

Besides the presentation of the implemented and intended measures, the report also gives attention to difficulties regarding the prosecution of fraud, such as the problem of finding enough evidence to prove criminal conduct or the various problems related to cross-border attacks. It ends by pointing out the remaining challenges in the fight against fraud, which include protection from new threats, such as identity theft and cybercrime, as well as the need to increase public awareness of the risks involved in using non-cash means of payment.

► eucrim ID=0801079

## Counterfeiting & Piracy

### Impact of Counterfeiting on International Trade – Motion for EP Resolution

On 26 June 2008, the EP’s committee on international trade published a draft report on the impact of counterfeiting on international trade. The report by Rapporteur Gianluca Susta highly recommends making the fight against counterfeiting one of the EU’s priorities, since counterfeiting causes economic damage as well as the loss of many jobs (the report mentions a loss of about 200,000 jobs). It may also endanger consumer health, fund criminal and terrorist organ-

isations, and cause serious damage to the environment. The rapporteur particularly supports the establishment of a single European authority responsible for the coordination of the Member States’ efforts in the fight against counterfeiting, the creation of a system of effective criminal laws for combating counterfeiting and piracy, and the harmonisation of customs procedures within the EU. The report has developed a motion for a European Parliament Resolution on the impact of counterfeiting on international trade. Both the committee on the internal market and consumer protection as well as the committee on legal affairs have already overwhelmingly adopted the report. The plenary is to vote on 18 December 2008.

► eucrim ID=0801080

### Customs Seizures Statistics 2007

The customs statistics published by the Commission on 19 May 2008 show that counterfeiting and piracy remain an alarming threat to the Community. Due to improved cooperation between customs authorities and the industry, customs authorities registered over 43,000 cases of fake goods seized at the EU’s external border, compared to 37,000 in 2006. Although the overall number of articles seized decreased from 128 million articles in 2006 to 79 million articles in 2007, there is a significant increase in the number of articles in sectors that are potentially dangerous to consumers, such as medicines, cosmetics, and electrical equipment. Regarding the main sources of counterfeit goods, China continues to top the list with almost 60 % of all articles seized coming from there.

► eucrim ID=0801081

## Organised Crime

### Framework Decision on Organised Crime Finally Adopted

At its meeting on 24 October 2008, the Council formally adopted the Frame-



work Decision “on the fight against organised crime”. The Framework Decision aims at harmonising the substantive criminal law of the Member States by defining offences relating to the participation of a criminal organisation. The FD also takes up the common scheme of laying down “minimum maximum penalties” for individuals, defining criminal liability and penalties for legal persons as well as the jurisdiction and coordination of proceedings (see eucrim 1-2/2006, p. 14).

The establishment of the Framework Decision on organised crime was a lengthy process. The initial proposal from the Commission stems from 19 January 2005. The European Parliament delivered its opinion on 26 October 2005 while the Council agreed on a general approach to the proposal on 26 April 2006. The procedure was delayed because of parliamentary scrutiny reservations by several Member States. The following link leads to the publication of the FD in the Official Journal.

➤eucrim ID=0801082

### Commission Proposes Strategy to Target Resources of Organised Crime

The Commission proposed ten strategic priorities to be followed for the confiscation and recovery of the proceeds of crime. The Communication (COM(2008) 766) intends to strengthen efforts to hit criminals where it hurts most, i.e., depriving them of the assets they acquired through crime. The Communication notes that the vast majority of organised crime activities have a financial motivation and that, even in the absence of reliable statistics, the amounts recovered from organised crime today remain modest compared to the profits of organised crime.

The Commission’s proposals highlight the importance of the national Asset Recovery Offices which should operate effectively in each of the 27 EU Member States as a matter of priority. These Offices facilitate the tracing of criminal assets, participate in confiscation proce-

dures, and ensure the proper management of seized assets (also see in this context the establishment of the CARIN network, eucrim 3-4/2007, p. 109).

Furthermore, EU Member States should ensure that the cross-border exchange of information runs smoothly and remove other existing obstacles to confiscation procedures. The Communication also suggests increasingly involving Eurojust in facilitating cooperation at the judicial level and promoting mutual recognition in confiscation matters, as well as facilitating the interaction between Asset Recovery Offices and judicial authorities. A common EU training programme for financial investigators will be implemented. Improving the sharing of information with Asset Recovery Offices in non-EU countries is another priority. These actions can be complemented by a future streamlining and updating of the existing EU legislation.

➤eucrim ID=0801083

### 2008 Organised Crime Threat Assessment

Organised criminal groups are making increasing use of legal business structures to facilitate criminal activities and launder criminal proceeds but also to get established in legal business. This is one of the main findings in Europol’s Organised Crime Threat Assessment (OCTA), which refers to 2008.

The press release by Europol states: “In general, the main organised crime groups are transnational, multi-ethnic and engaged in diverse criminal activities. This wider dimension gives them the possibility to run the production and distribution processes of entire criminal markets, optimising their profits and cutting out local and minor organised crime groups. A trend for more sophisticated criminals is that they find it more profitable to make money from citizens instead of robbing them by offering the citizens what is forbidden, rare or otherwise very expensive at a lower cost. The criminal groups get access to

these items and can sell them cheaper than legal businesses because of their control over or impact on international smuggling routes, the establishment of strategic alliances between powerful organised crime groups in source and transit countries, the misuse of the transport sector and their control over black markets.”

Another important issue of the OCTA is the identification of so-called *criminal hubs*. The OCTA defined criminal hubs as “a conceptual entity that is generated by a combination of factors such as proximity to major destination markets, geographic location, infrastructure, types of OC groups and migration processes concerning key criminals or OC groups in general.” A criminal hub receives flows from a number of sources and spreads their effects in the EU, thereby forging criminal markets and creating opportunities for the growth of OC groups that are able to profit from these dynamics. The OCTA identifies five hubs: North-West, North-East, South-West, South-East, and Southern. The analysis of these hubs is considered important for optimal support of a Member State’s law enforcement authorities in rooting out this phenomenon.

The OCTA annually presents identification and assessment of current and expected trends in organised crime across the EU. It is a product of existing knowledge and expertise and is mainly based on contributions from the EU Member States following Europol’s intelligence requirements. For the 2007 OCTA report, see eucrim 1-2/2007, pp. 28-29.

➤eucrim ID=0801084

### Russian Organised Crime Threat Assessment – Council Gives Parameters

Organised crime often stems from regions outside the bloc; nevertheless its threat to the security of the European Union and its Member States can be enormous. One of the most influential regions is Russia. Therefore, the Council mandated that Europol produce an

Organised Crime Threat Assessment which takes special account of the organised crime threats emanating from the geographical area of Russia. In this Assessment, in short ROCTA, Europol is to collate all relevant information on Russian organised crime and identify specific threats against the EU and its Member States so that better use of intelligence-based law enforcement operations can be made. ROCTA should follow the methodology of the “standard” Organised Crime Threat Assessment (OCTA, see above). ROCTA should be based on information provided by liaison officers of the Member States stationed in the Russian Federation, Russian Federation law enforcement authorities, and other EU and third-country bodies competent in the fight against Russian organised crime. The plan is to draft ROCTA every two years.

► [eucrim ID=0801085](#)

## Cybercrime

### Opaque Implementation of EU’s “Cybercrime” Law

The Commission published its first evaluation report on how the EU Member States have (formally) complied with the Council Framework Decision of 24 February 2005 on attacks against information systems. The Framework Decision aims at improving judicial and other law enforcement cooperation through the approximation of laws in the EU Member States in the area of attacks against information systems. In essence, the FD obliges Member States to punish certain computer-related offences with “effective, proportional and dissuasive *criminal* penalties”. Punishable offences are:

- Illegal access to information systems
- Illegal system interference
- Illegal data interference.

The FD had to be implemented by 16 March 2007. However, the Commission

states in its report that, till this date, only one Member State notified (incompletely) the text of its national implementation law. By 1 June 2008, seven out of the 27 EU Member States were still lacking in implementation of the provisions of the FD. Since information transmitted by the Member States is partly incomplete, the report makes evident that a proper picture of the implementation could not be drawn.

As a result of the assessment, the Commission acknowledges that “the level of implementation has been found to be relatively good”. However, the Member States implemented the provisions in a very different way. The Commission also pointed out that, in its view, provisions have not been implemented correctly by all Member States. Measures against illegal access to information systems, for instance, were only implemented correctly by 16 out of the 20 assessed States in the view of the Commission.

► [eucrim ID=0801086](#)

### French Council Presidency Seeks Strategy against Cybercrime

One of the French Presidency’s priorities in the field of justice and home affairs is the stepping up of the fight against cybercrime. The French Presidency came up with the idea of drawing up a comprehensive action plan to combat cybercrime in the EU. It is in pursuit of making it possible to cope even more effectively with the multiple crimes committed by means of electronic networks, notably child pornography, sexual violence, and terrorism. Furthermore, the EU should be beefed up for reacting against large-scale attacks on information systems.

In conclusions on a “concerted work strategy and practical measures against cyber crime”, the Council identifies three main areas where action of the EU is needed:

(1) Strengthening the partnership between public authorities and the private sector

(2) Improving the knowledge and training of stakeholders involved in the fight against cybercrime in Europe

(3) Reinforcing technical and international cooperation with third countries.

In this context, the Council proposes operational measures to be taken in the short and medium terms. *Short-term* measures include:

- Establishing a European platform with the objective of reporting on offences committed on the Internet
- Drafting a European agreement model for partnerships between law enforcement authorities and private operators
- Exchanging best practices on cyberpatrols.

Measures in the *midterm* encompass, inter alia:

- Exchanging information on the mechanisms for blocking and/or closing down child pornography sites in Member States
- Making statistical data more comparable in order to gain more information about the various forms of crimes on the Internet.

► [eucrim ID=0801087](#)

*Background:* The European Union has not been inactive as regards measures against cybercrime. The main tool is Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (see above). On the institutional side, the EU established the European Network and Information Security Agency (ENISA) in 2004, located in Heraklion/Greece. In May 2008, the Commission tabled a Communication entitled “Towards a general policy on the fight against cyber crime” (see [eucrim 1-2/2007](#), p. 29). The fight against cybercrime is also likely to play a major role in the next long-term programme (2010-2014) of the Commission in the field of Liberty, Security and Justice (see above under “Foundations – The Hague Programme Review”). Therefore, the Council refrained from recommending long-term actions.

► [eucrim ID=0801088](#)

## JHA Council Calls for Alert Platform on Internet Crimes

At its meeting on 24 October 2008, the Justice and Home Affairs Council adopted conclusions on setting up alert platforms which shall be designed for reporting offences noticed on the Internet. The addressees of the conclusions are twofold: First – based on the idea of a common model – Member States are encouraged to establish a national alert platform or central national point, “to be managed by public and/or private bodies”, for the purpose of centralising information on the illicit Internet content. In addition, the possibility for the public to report illicit content on the Internet to a national platform, as well as public-private partnerships to combat cybercrime, is explicitly mentioned. Second, – for the purpose of improving the circulation of information and enabling the assessment of the European extent of the collected information – Europol is to establish and host a European platform. This communication network shall improve the fight against Internet crime – in particular child pornography – more effectively by closer cooperation between the Member States’ law enforcement authorities.

➤ [eucrim ID=0801089](#)

The initiative was taken by the French Presidency. The measure is one of the main operational issues in the envisaged strategy against cybercrime. France, like other Member States, already has a central national alert platform for reporting illicit content on the Internet and would like to set up common structures on the EU level. In the pre-run of the above-mentioned conclusions, a workshop took place in June 2008 in Reims/France. The participants –not only EU Member States, but also third countries and international and European organisations (Europol, Interpol, OLAF, and the Council of Europe) – took stock of the systems available for combating sites regarded as illicit and developed ideas for the above-mentioned EU-wide platforms.

➤ [eucrim ID=0801090](#)

## Environmental Crime

### Directive on the Protection of the Environment through Criminal Law Finally Adopted

At the Justice and Home Affairs meeting on 24 October 2008, the Council adopted the directive on the protection of the environment through criminal law (COM(2007) 51; see [eucrim 1-2-2007](#), p. 8) at first reading. The adopted proposal results from a compromise between the Parliament and the Council. Compared to the initial Commission’s text, an article regarding the duration and extension of the proposed sanctions has been deleted in order to limit the impact of the initial proposal. This corresponds to the decision by the European Court of Justice (ECJ) of 23 October 2007 (C-440/05, see [eucrim 1-2/2007](#), p.7). The adopted directive now obliges the Member States to incorporate *criminal* sanctions for serious violations of Community environmental protection law *without specifying type or level* of the criminal sanctions. Member States retain the power to apply effective, proportionate and dissuasive (but criminal!) sanctions to one of the acts listed in the catalogue of offences. The listed offences include:

- Illegal discharge, emission or introduction of radioactive substance into air, soil or water
- Illegal waste management as well as illegal disposal of waste
- Illegal operation of plants pursuing hazardous activities.

In all these cases the activities have to cause or have to be likely to cause death or serious injuries of people or considerable deterioration in the condition of air, soil or water, or a detriment of animals or plants.

Further punishable offences are:

- Illegal killing, destruction, possession and taking of protected wild fauna or flora species
- Illegal trading in protected animals and plants or parts thereof, except for cases when the conduct concerns the

negligible quantity of such specimens and has a negligible impact on the conservation status of the specie

- Any illegal action resulting in a deterioration of a habitat within protected districts

- Illegal production, importation, exportation or use of substances that deplete the ozone layer.

➤ [eucrim ID=0801091](#)

The legislative history, including the latest opinions of the European Parliament and the Council can be observed by the following link:

➤ [eucrim ID=0801092](#)

### EESC Delivers Opinion on Ship-Source Pollution

On 17 September 2008, the European Economic and Social Committee (EESC) adopted an opinion on the proposal for a directive amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (COM (2008) 134 final; see [eucrim 3-4 2007](#), p. 77).

First of all, the EESC discusses the scope of Community powers in criminal matters, pointing out that no competence has been conferred on the Community by the treaties with regard to criminal matters. However, the proposal on ship-source pollution only calls upon the Member States to provide for and introduce effective, proportionate and dissuasive penalties in their criminal legislations and, insofar, the EESC considers the proposal to be in full compliance with Community (case) law. As for the proposal’s content, the EESC supports the proposed means of identifying and monitoring ships overall and believes that they will ensure the effective and systematic penalising of illegal practices.

➤ [eucrim ID=0801093](#)

### Intertanko Case Decided by ECJ

On 3 June 2008, the Grand Chamber of the European Court of Justice (ECJ) delivered a judgment on the validity of Articles 4 and 5 of Directive 2005/35/EC on ship-source pollution and on the

introduction of penalties for infringements. The London High Court had referred the case to the ECJ for a preliminary ruling in the course of proceedings by several organisations representing the interests of the maritime shipping industry (Case C-308/06, “Intertanko and others”, see eucrim 1-2/2007, p. 8).

With regard to the question of whether the validity of Articles 4 and 5 is affected by provisions deriving from the International Convention for the Prevention of Pollution from Ships (“Marpol” 73/78; Marpol is short for maritime pollution) or by the United Nations Convention on the Law of the Sea (UNCLOS), the Court decided that the validity of Directive 2005/35 can be assessed neither in the light of “Marpol” nor in the light of “UNCLOS” since “Marpol” does not bind the Community and “UNCLOS” is not applicable in the present case.

As to the question of whether using the term “serious negligence”, as in Article 4 of the Directive, without defining the concept infringes the principle of legal certainty, the Court finds that the concept of “serious negligence”, which refers to an unintentional act or omission by which the person breaches his duty of care, is fully integrated in the Member States’ respective legal systems. By transposing the Directive into national law, the actual definition of the infringements and the applicable penalties are those which result from the rules laid down by the Member States. Therefore, according to the ECJ, the validity of the Directive is not affected by the missing definition of “serious negligence” in the context of the general principle of legal certainty.

➤ eucrim ID=0801094

### Illegal Fishing – New Sanctions for Infringements Proposed

On 14 November 2008, the Commission launched a proposal for a Council regulation establishing a community control system for ensuring compliance with the rules of the common fisheries policy (COM(2008) 721). The common

fisheries policy (CFP) was created to limit and control catch volumes by setting total allowable catches and national quotas coupled with technical rules and effort schemes. The Commission now proposes a substantial reform of the current system since it is considered to be inefficient and expensive.

Along with other major alterations, the draft proposal implements new “measures to ensure compliance with the rules of the CFP”. As to sanctions for serious infringements, the draft proposal determines fines ranging from at least €5,000 to a maximum of at least €300,000 for each serious infringement. In cases of repeated serious infringements, the fine may even increase to a maximum of at least €600,000. Furthermore, the draft proposal introduces a penalty point system in which the holder of a fishing authorisation receives penalty points as a result of infringements against the rules of the CFP. Depending on the total number of penalty points, the sanctions vary from a suspension of the fishing authorisation to its permanent withdrawal.

➤ eucrim ID=0801095

## Illegal Employment

### Council Debate on Sanctions Directive

The EU governments remain divided over the Commission’s draft Directive of 16 May 2007 providing for a minimum harmonisation of sanctions against employers of illegally staying third-country nationals (see eucrim 1-2/2007, pp. 29-30).

The proposal was particularly high on the agenda of the JHA Council meeting on 24 July 2008. The first controversial issue was whether it is possible and/or desirable to include criminal sanctions in the Directive. While a group of Member States, including Germany, Finland, Hungary, Latvia, Poland, the Netherlands, and Sweden, considered criminal measures unjustified, other Member States called for effective sanctions,

including criminal ones. In particular, states which are under high pressure of clandestine migration – such as Italy or Spain – are very much in favour of also taking criminal law action against firms hiring illegal immigrants. Second, discussions revolved around the obligation to carry out inspections of companies. The majority of Member States seem to back the targeted high-quality inspections in the sectors of activity identified by each Member States as most open to abuse. The Commission’s original idea of making a certain quantity of checks every year was broadly rejected. A compromise proposal on the different provisions of the Directive is currently under discussion in the Council working groups.

➤ eucrim ID=0801096

### EP: Non-Legislative Resolution on Fight against Undeclared Work

In reply to the Commission’s communication on “stepping up the fight against undeclared work” of October 2007 (see eucrim 3-4/2007, p. 100), the European Parliament adopted in October 2008 a resolution on the topic. The MEPs welcome the approach taken by the Commission and call for a renewed fight against undeclared work and the underground economy, both of which damage the economy. In essence, the EP calls for an “all-out offensive against undeclared work”, i.e., a comprehensive approach that covers matters relating to monitoring and control, the economic and institutional framework and involves concerted action at several levels as well as the participation of all stakeholders (public authorities, social partners, undertakings, and workers).

As regards the criminal law field, the EP takes a “two-step approach”. In a first stage, incentives for regular work should be strengthened. If employers do not seize these opportunities, the EP favours the introduction of severe penalties in the Member States. In this context, the MEPs consider the Council Framework Decision 2005/214/JHA on

the application of the principle of mutual recognition to financial penalties a very important instrument to better police undeclared work.

► eucrim ID=0801097

## Racism and Xenophobia

### FD on Combating Racism and Xenophobia

The Council formally adopted the Framework Decision (FD) on combating certain forms and expressions of racism and xenophobia by means of criminal law. The FD lays down that the following intentional acts will be punishable in all EU Member States:

- Publicly inciting violence or hatred 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, even by the dissemination or distribution of tracts, pictures or other material
- Publicly condoning, denying or grossly trivialising
  - crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, 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;
  - crimes defined by the Nuremberg Tribunal (Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 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.

The Member States will make these acts punishable by a maximum sentence of at least one to three years' imprisonment.

The Member States will have two years to comply with the FD by 28 November 2010. A review is scheduled for 2013. The Framework Decision was sub-

ject of a lengthy and controversial negotiation process (see eucrim 3-4/2006, p. 61; 1-2/2007, p. 30; 3-4/2007, p. 100).

► eucrim ID=0801098

### FRA Statement on New FD

In a first statement on 28 November 2008, the EU Agency for Fundamental Rights (FRA) welcomed the new FD. The FRA considers the FD an important tool for an EU-wide condemnation of racist and xenophobic crimes. The FRA and its predecessor, the European Monitoring Centre for Racism and Xenophobia (EUMC) have highlighted the pressing need for the instrument several times since the original proposal was tabled in 2001.

► eucrim ID=0801099

## Procedural Criminal Law

### Procedural Safeguards

#### Agreement on Essence of Framework Decision on Trials in absentia

The JHA Council of 18 April 2008 affirmed that the Framework Decision on trials in absentia should be adopted as soon as possible. The framework decision, which was proposed by seven EU Member States in January 2008, aims at determining common rules for non-recognition of decisions rendered following a trial at which the person concerned did not appear and thus amending the existing instruments on mutual recognition, such as the Framework Decisions on the European Arrest Warrant, on financial penalties, on confiscation orders, etc. (for details on the proposal, see eucrim 3-4/2007, p. 100).

After amendments to the text in the working groups, 24 Member States expressed their firm support for the current draft. However, three Member States remain reluctant, requesting further modifications/refinements. Seven Member

States, i.e., Denmark, Ireland, Italy, the Netherlands, Sweden, and the UK, are maintaining a Parliamentary scrutiny reservation on the text.

In comparison to the initial proposal, the Member States agreed on the following:

- Delete the definition of “decisions rendered in absentia” since the term has a special meaning in national law and therefore varies considerably
- Insert a new provision that makes possible the recognition and execution of a decision where the person concerned has been defended at the trial by a legal counsellor
- Delete specific references to national law as regards timeframes, etc.

► eucrim ID=0801100

### EP Gives View on FD on Trials in absentia

On 2 September 2008, the European Parliament (EP) submitted its legislative resolution on the Framework Decision on trials in absentia. By 609 votes to 60, with 14 abstentions, the MEPs adopted a report by MEP Armando França (Portugal). The EP principally supports the initiative of several Member States whose aim is the improvement of the application of the mutual recognition principle. However, the EP stresses that adequate procedural guarantees must be established to ensure the recognition of judgments in criminal matters. In this context, it reiterates that a FD on procedural rights in criminal proceedings is essential.

As to the defence rights of persons judged in absentia, the EP would like to ensure that (1) the person concerned has the right to be present at the retrial, (2) the merits of the case, including fresh evidence, are re-examined, (3) the retrial results in the original decision being quashed, and (4) the defendant may appeal against the new decision.

Other amendments concern, inter alia, situations for which the recognition and execution of decisions should be allowed as well as technical amendments

– notably as regards the FD on the European Arrest Warrant.

It remains to be seen whether the Council will take up (some) points of the EP’s legislative resolution since the resolution is not binding on the Council.

► eucrim ID=0801101

## Data Protection

### FD on the Protection of Personal Data Finally Adopted

On 27 November 2008, the proposal for a framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters has finally been adopted. This text is the third version on the subject, based upon a political agreement reached by the Council in December 2007 after deadlock of the first two versions.

#### “Data Privacy Laws versus Surveillance”

“Legal advocacy on the side of freedom”, the motto of the 59th annual German Bar Association’s conference in Berlin from 1 to 3 May 2008, set the framework for a symposium on data privacy laws held by the information technology and the criminal law working groups of the German Bar Association. On 1 May 2008, data protection experts and legal practitioners discussed recent developments in telecommunications surveillance, electronic surveillance and telecommunications data retention. In particular, the German Federal Constitutional Court’s decision of 11 March 2008 on telecommunications data retention (1 BvR 256/08 – Use of data collected by telecommunications data retention valid only in case of the prosecution of severe criminal offences; see supra) met the approval of the participants whereas the proposed framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes within the EU was criticized and rejected overall.

► eucrim ID=0801102

For the first time, data protection standards in the framework of police and judicial cooperation were set in order to ensure a harmonised level of individuals’ privacy and to guarantee public safety when exchanging personal data. The FD defines, inter alia, the right of access to data, the right to have personal data erased or rectified, and the right to seek judicial remedies.

Member States will have two years from the date of adoption to implement the FD’s provisions. For further details on the discussion about the FD, see eucrim 3-4/2007, p. 101 with further references.

► eucrim ID=0801103

#### Opinion of EDPS on the Adopted FD

On 28 November 2008, the European Data Protection Supervisor, Peter Hustinx, published a press release on the adoption of the aforementioned framework decision. Although he welcomes the adoption overall, he regrets that the FD does not include domestic data. He furthermore stresses that there is still work to be done, especially with regard to ensuring a high level of protection for exchanges with third countries and the need for distinguishing between different categories of data subjects (suspects, criminals, witnesses, and victims) in order to enable their data to be processed with appropriate safeguards.

► eucrim ID=0801104

#### Background: The EP’s Legislative Resolution on the FD

The European Parliament, at its meeting on 23 September 2008, adopted a legislative resolution on the renewed consultation regarding the abovementioned proposal. The Parliament voted overwhelmingly: 600 in favour to 21 against and 9 abstentions. The main amendments by the EP were:

■ *The scope of the proposed framework:* The exclusion of national data processing has been deleted in order to avoid differing levels of data protection throughout the EU.

■ *Individual’s rights:* The Parliament included the right of the data subject to be informed about personal data being transmitted to third countries or private entities compared to the Council’s text that only granted this right to the data subject in case of the data being transmitted to another Member State.

■ *Prohibited processing:* The Parliament furthermore amended that, in principle, the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade-union membership as well as the processing of data concerning health or sex shall be *prohibited*. Nevertheless, this data may also be processed if domestic law provides “appropriate safeguards”.

■ *Transmission to private parties and access to data received by third parties:* A new clause was inserted, stating that national authorities may have access to and process data controlled by private persons only on a case-by-case basis, in specific circumstances, for specified purposes, and subject to judicial scrutiny. In cases in which private persons receive and process data, the national legislation is called on to set requirements that are at least equivalent to those imposed on the respective competent authorities.

■ *Transmission to third countries:* If a Member State transfers personal data to third countries or international bodies, an adequate level of protection for the intended data processing, which is equivalent to the one provided by the Additional Protocol to Convention No. 108 of the Council of Europe and Article 8 of the European Convention on Human Rights, has to be guaranteed.

■ *Establishment of a Working Party on the Protection of Individuals with regard to the Processing of Personal Data:* A new independent “Working Party on the Protection of Individuals with regard to the Processing of Personal Data for the purpose of the Prevention, Investigation, Detection, and Prosecution of Criminal Offences” is to be established. It shall give its opinion on national measures

### Privacy Conference 2008

The 30th international conference on data protection and privacy commissioners was held in Strasbourg from 15-17 October 2008. The event was jointly organised by the French and German Data Protection Authorities and attracted more than 600 participants. The motto "protecting privacy in a borderless world" set the framework for panel discussions about the relation between privacy and economic growth, new instruments of regulation for the future of privacy, or the balance between privacy and security. However, the conference mainly focused on social networking on the Internet, with special attention being paid to the protection of minors and their privacy. Participants agreed that the youths should be taught how to surf the Internet in a privacy-friendly way while also respecting the rights of others. The entire public part of the conference is available in the form of archived videos on the conference website.

► eucrim ID=0801105

and monitor the standard of data protection achieved in national data processing as well as on the level of protection between the Member States and third countries and international bodies.

► eucrim ID=0801106

### EU PNR Scheme – Redraft by the Council

In early 2008, the Council had virtually abandoned the Commission's proposal for a Framework Decision on the use of Passenger Name Record (PNR) data by Member States' law enforcement authorities (COM(2007) 654; see eucrim 3-4/2007, p. 101). The Council started to draw up its own proposal, taking into account that some Member States had expressed their wish for the framework decision to go much further than the Commission's proposal.

On 17 April 2008, the Council presented a redrafted version of the proposal, calling upon the Member States' delegations within the Council's Multidisciplinary Group on Organised Crime

to participate in discussing the draft over the next months. The draft proposal contains inter alia:

- *Scope of the framework decision*: The redrafted proposal covers only the collection and processing of data from international flights; data deriving from intra-EU flights are explicitly exempted.

- *Setting up Passenger Information Units (PIUs)*: PIUs are to be set up in each Member State. The PIUs are to be responsible for collecting and analyzing the PNR data as well as for carrying out a risk assessment in order to identify those persons requiring further examination. The national PIUs are also in charge of the PNR data transmission to other Member States' PIUs requesting the information.

- *Transmission to third countries*: Under certain circumstances that still need to be specified, the PNR data may be transmitted to third countries as well.

- *Period of data retention*: The data shall be stored at the PIUs for a period of five years after their transfer to the respective PIU. After this period, the data may be retained for an additional eight years in a "dormant" database.

► eucrim ID=0801107

At the Justice and Home Affairs meeting from 24 to 25 July 2008, the Council discussed the working method and several other issues regarding the redrafted proposal for the framework decision on the use of passenger name records (PNR). The Council expressed its wish for the upcoming discussions to give priority to the legal basis of the future instrument, the operational use of the data, the examination of privacy protection and the practical examination of technical arrangements for data collection, the treatment of transit flights, the respective role of the PIUs as well as the content of exchanges of information between the PIUs.

► eucrim ID=0801108

On 21 October 2008, the Council published a note sent to the Multidisciplinary Group on Organised Crime concerning the proposal for a framework de-

cision on the use of PNR data. The note contains general discussions of matters relating to the analysis and transmission of PNR data and data-protection.

► eucrim ID=0801109

### EU PNR Proposal: Assessment by European Parliament

On 20 November 2008, the European Parliament (EP) adopted – by 512 in favour, 5 against, and 19 abstentions – a resolution on the proposal for a framework decision on the use of PNR data for law enforcement purposes. The resolution, developed by Rapporteur MEP Sophia in 't Veld, acknowledges the need for stronger cooperation at the European and international levels in the fight against terrorism and crime.

However, the EP stresses that the formulation and justification of the proposal left legal uncertainties regarding compatibility with the ECHR and the Charter of Fundamental Rights. It also requires the Council to undertake a substantial review of the possible scope and impact of a future EU initiative in this domain and to incorporate additional information, particularly information on the legal basis of the initiative and the role of the EP.

The EP points out that there are strong reservations amongst the parliamentarians regarding the necessity and added value of the proposal and that many questions raised, e.g., by the Parliament, the Article 29 Working Party, the Working Party on Police and Justice, and the EDPS have not been satisfactorily answered. Furthermore, the EP stresses that access to PNR data exchanged between Member States should be strictly limited to those authorities that deal with counter-terrorism and organised crime.

Overall, the EP's questions the need for an EU PNR System and recommends examining the existing measures first. The MEPs say that the information provided by the US in the framework of the EU-US PNR agreement so far is "anecdotal" and that the US has never proven the necessity of the use of PNR

in the fight against terrorism and serious crime. The EP also stresses that an adequate data protection framework under the third pillar is a precondition for any EU PNR scheme and requests the Council to specify which data protection rules are to apply to Passenger Information Units (PIUs).

► eucrim ID=0801110

### The Council of Europe's Pompidou Group Favours Extended Scope

“Statewatch” (a British organisation that monitors the state and civil liberties in Europe) published on its website a confidential note by the Chair of the Airports Group of the Council of Europe's Pompidou Group to the Multidisciplinary Group on Organised Crime (MDG) concerning the proposed framework decision on the use of PNR data for law enforcement purposes. The note informs the MDG about the last annual meeting of the airport group in May 2008 and its suggestions for the EU PNR scheme:

- The airport group would like to see intra-EU flights included in the framework decision in order to better combat illegal drug trafficking.
- Since the Member State's definitions of organised crime differ, the framework decision should also cover (certain forms of) serious crime.
- Customs services should be included in the list of agencies authorised to access PNR data.

► eucrim ID=0801111

*Background information on the Pompidou Group:*

The Council of Europe's Pompidou Group (Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs) is an intergovernmental body formed in 1971 at the suggestion of the late French President Georges Pompidou. At present, 35 Member States make up the Pompidou Group, seeking to contribute to the development of multidisciplinary, innovative, effective, and evidence-based drug policies. However, their fields of activity also include airports and aviation, comprising customs

and law enforcement officers aiming at harmonising procedures to improve the efficiency of controls in European airports.

### Statement by Lobby Group

The British organisation “Statewatch” published a letter by the European Travel Agents' and Tour Operators' Associations (ECTAA), dated 1 August 2008, addressed to the Council regarding the proposed framework decision on the use of PNR data. The ECTAA first of all states that the proposal for a framework decision should in no case be extended to intra-EU flights. Regarding the scope of the proposed framework decision, the ECTAA stresses that data should only be used for border purposes, held securely and for a limited period of time. They also point out that the extra costs connected to PNR data collection and processing would have to be passed on to the passengers. Regarding the actual proceedings, the ECTAA adds that the transmission of data 24 hours in advance and again immediately after flight closure would be an unnecessary duplication. The ECTAA recommends only one data transmission immediately after flight closure because putting in place an advance system for charter carriers would be costly (more costs to be passed on to the passengers!) and require considerable time.

► eucrim ID=0801112

### PNR Exchange with Third Countries: EU-Australia Scheme

The EU and Australia concluded an agreement on the processing and transfer of European Union-sourced Passenger Name Record (PNR) data by air carriers to the Australian Customs Service. The agreement, signed on 30 June 2008, consists of the following:

- *Processing* of EU-sourced PNR data for the purpose of preventing and combating terrorism and serious crime: Australian customs shall require data only for passengers flying to, through, or from Australia. The data collected

and transferred includes, inter alia, data about date of reservation, date of intended travel, name, all available contact information, all available payment/billing information, travel agency, travel status of passenger, ticketing information, and baggage information: Australian customs must request the data 72 hours before scheduled departure. They may request data ad hoc when it is necessary to respond to specific threats to a flight, a set of flights, the route, or under other dangerous circumstances.

- *Retention* of the PNR data: Customs shall retain the data for no more than three-and-a-half years after the date of receipt of the PNR data at customs; after this time, the data may be archived for two further years. Data that relates to ongoing judicial proceedings or a criminal investigation may be retained until the proceedings or investigations have been concluded.

- *Protection* of personal data: Australia has to provide a system accessible by individuals, regardless of their nationality or country of residence, for seeking access to, and correction of, their own personal information. The Australian Privacy Act will apply to EU citizens.

The EU-Australia PNR agreement is the third PNR agreement (Australia, USA and Canada) that the EU has concluded so far.

► eucrim ID=0801113

### PNR Exchange with Third Countries: EU-Australia Scheme Assessed by EP

On 22 October 2008, the European Parliament (EP) made some recommendations to the Council regarding the above-mentioned agreement. The EP considers the agreement to lack democratic legitimacy since the Parliament was not involved in any stage of the procedure. The EP furthermore reserves its right to intervene at the ECJ since the approval of only ten national parliaments out of 27 is required and, therefore, the procedure is inadequate (especially since the agreement is purely focused on the internal security needs of a third state



and, according to the EP, has no added value for the security of the EU). As for the agreement itself, the EP welcomes overall the data protection standard chosen. Nevertheless, the EP notes that a retention period of 5,5 years shall not be established as long as the purposes for which the data are being stored have been insufficiently specified.

► eucrim ID=0801114

### PNR Exchange with Third Countries: Latest Developments as to EU-US

Regarding the agreement between the United States of America and the EU on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS), the Council has published a document, presenting the declarations made in accordance with Art. 24 (5) TEU. Art. 24 (5) TEU gives the Member States the right to state that, in order to bind the declaring state, the respective agreement has to comply with the requirements of its own constitutional procedure. The documents, dated 23 July 2008, show that, till then, only Germany, Latvia, Finland, and Lithuania have finalised their constitutional procedures regarding the EU-US agreement. For the EU-US “PNR deal”, see eucrim 1-2/2007, pp. 9-10.

► eucrim ID=0801115

### EU-US High-Level Contact Group: Final Report

On 28 May 2008, the Presidency of the Council of the EU announced to the COREPER, from the perspective of the EU summit of 12 June 2008, that the EU-US high-level contact group on information sharing and privacy and personal data protection had finalised its report. During their work period from February 2008 to May 2008, they identified and defined fundamental principles of privacy and personal data protection when processing personal data for law enforcement purposes. These principles include, e.g., maintaining proportionality, guaranteeing information security,

and restricting onward transfers to third countries. Unfortunately, the negotiators did not agree upon the question of whether EU citizens can file a lawsuit against the US government if they think their personal data have been misused. For the future, the group recommends an international agreement binding both the EU and the US to apply the agreed common principles in transatlantic data transfers in order to provide a high level of legal security and certainty.

► eucrim ID=0801116

*Background information on the high-level contact group:*

Within the framework of the EU-US Ministerial Troika on 6 November 2006, it was decided to establish an informal high-level advisory group to start discussions on privacy and personal data protection regarding the exchange of information for law enforcement purposes between the EU and the US. The group consists of senior officials from the Commission, the Council Presidency, and the U.S. Departments of Justice, Homeland Security and State. The goal of the high-level contact group was to explore ways that would enable the EU and the US to work together more closely and efficiently in the exchange of law enforcement information while ensuring that the protection of personal data and privacy are guaranteed. The establishment of the group was motivated by several international agreements between the US and the EU, e.g., the extradition and mutual legal assistance agreement (2003), the aforementioned PNR agreement (2007), as well as agreements governing personal data exchange between the US and Europol (2002) and Eurojust (2006). See also eucrim 3-4/2007, p. 101.

### EU-US High Level Contact Group: Opinion of EDPS

On 11 November 2008, the European Data Protection Supervisor (EDPS), Peter Hustinx, adopted an opinion regarding the final report of the above-mentioned high-level contact group. The EDPS states that, although some

progress has been made towards the definition of common standards on information sharing and privacy and personal data protection, many problems have not been solved yet, especially regarding the scope and nature of an instrument on information sharing, on the one hand, and the essential question of redress, on the other hand. After analyzing the elaborated principles, the EDPS ends by recommending the involvement of all stakeholders, including the European Parliament, in the upcoming process of elaborating further data protection principles between the EU and the US.

► eucrim ID=0801117

### Ne bis in idem

#### “Bourquain” Case: Court Rules on Extension of ne bis in idem

In its judgment of 11 December 2008 (case C-297/07), the European Court of Justice (ECJ) ruled that the bar that a person may not be tried twice for the same act (Art. 54 CISA) should also be applied to a conviction which could never, on account of specific features of procedure, have been directly enforced. The judgment is based on rather unusual facts:

In the present case a German (Mr. Bourquain) was tried for murder before a French military tribunal in Algeria. The tribunal found him guilty in absentia and sentenced him to death in a judgment of 1961. According to the Military Code applicable in 1961, the sentence would not have been enforced if the sentenced person had reappeared. Instead, a new trial would have had to be held at which he appeared and the imposition of any penalty would have depended solely on the outcome of that trial. After the judgment of the military tribunal, no other criminal proceedings were brought against Mr. Bourquain, neither in France nor in Algeria. Mr Bourquain took refuge in the German Democratic Republic. In 2002, the prosecutor’s of-

ficie in Regensburg, Germany opened proceedings against Mr. Bourquain in order to try him in Germany for the crime committed in Algeria. When the new trial opened in Germany, the sentence imposed in 1961 was not enforceable in France: first, it was time-barred; second, France had abolished the death penalty and had, even earlier, passed a law proclaiming an amnesty in respect of the events in Algeria.

The Landgericht (court of first instance) in Regensburg made reference to the European Court of Justice (Art. 35 TEU) asking whether protection from being sentenced twice for the same act, as laid down in Art. 54 CISA, applies if the penalty imposed on the defendant could never be enforced under the laws of the sentencing contracting party (see also eucrim 3-4/2007, p. 104).

The Court explains first that Art. 54 CISA applies in the present case both *ratione temporis* as well as regarding the territorial scope.

As to the *res materiae*, the ECJ states that, in principle, a conviction rendered in absentia falls within the scope of Art. 54 CISA. It further holds that the sentence pronounced in 1961, in Mr. Bourquain's absence, is a final judgment, even though the penalty could not be directly enforced given the procedural obligation to open new proceedings if he were to reappear.

In line with the opinion of Advocate General (AG) Dámaso Ruiz-Jarabo Colomer from 8 April 2008, the Court ruled that the *ne bis in idem* principle does not require that the penalty must have been enforceable at some time in the past; it is decisive that the judgment is no longer enforceable at the time the second set of proceedings is initiated (here in 2002). The Court mainly argues by means of the objective of the Schengen *acquis*, which is to ensure that no one is prosecuted for the same acts in several Member States on account of his having exercised his rights to freedom of movement. The Court concludes for the present case, that Mr.

Bourquain could be sure that, once he has been convicted and when the penalty imposed on him can no longer be enforced under the laws of the sentencing Contracting State (here: France), he may travel with in the Schengen area without fear of prosecution in another Contracting State.

► eucrim ID=0801118

## Victim Protection

### ECJ Clarifies Standing of Victims in Criminal Proceedings

After the fundamental rulings in “Pupino” and “Dell’Orto”, the European Court of Justice (ECJ) again had the opportunity to pass judgment on the interpretation of the 2001 Framework Decision (FD) “on the standing of victims in criminal proceedings.” The European Court of Justice decided that Art. 2 and Art. 3 of the FD are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution. The ECJ further clarifies that the FD explicitly obliges Member States to guarantee that the victim is permitted to give testimony which can be taken into account as evidence (Case C-404/07, “Katz/Sós”).

The judgment is based on the case of a Hungarian plaintiff (Mr. Katz) who became victim of a criminal offence (committed by Mr. Sós) and who requested to be summoned and heard as witness in the framework of a so-called substitute private prosecution. Under Hungarian law, substitute private prosecution is a means of instituting criminal proceedings, permitting victims of a crime to take action, *inter alia*, where the public prosecutor terminates proceedings that he has instituted. The Fővárosi Bíróság (Budapest Metropolitan Court), which referred the case to the ECJ, actually denied Mr. Katz' request by arguing that, for this type of action, the Hungarian law does not provide for a derogation of the

prohibition to be a witness if somebody acts in the capacity of public prosecutor. The question was now whether the Hungarian law is in line with the FD.

The ECJ decided in the affirmative and clarified the scope of Member States' obligation stemming from Art. 2 (respect and recognition of victims) and Art. 3 (hearings and provision on evidence) of the FD. The main argument of the Court reads as follows:

“[i]t must therefore be concluded that the Framework Decision, while requiring Member States, first, to ensure that victims enjoy a high level of protection and have a real and appropriate role in their criminal legal system and, second, to recognise victims' rights and legitimate interests and ensure that they can be heard and supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement those objectives. However, in order not to deprive the first paragraph of Article 3 of the Framework Decision of much of its practical effect or to infringe the obligations stated in Article 2(1) of the Framework Decision, those provisions imply, in any event, that the victim is to be able to give testimony in the course of the criminal proceedings which can be taken into account as evidence.”

The judgment of the ECJ implies the conformity of other national laws with the FD, which provide for similar paths of private prosecution (such as the German law).

The case is also interesting against the background of questions on admissibility. The ECJ continued its case law of “Dell’Orto” that the provisions of Art. 234 TEC apply to the provisions of the preliminary ruling procedure under Art. 35 TEU. This time, the ECJ transferred its case law regarding objections against the inadmissibility of hypothetical questions (see also eucrim 1-2/2007, pp. 34-35 and refer to the “Goicoechea” case below under “Cooperation – European Arrest Warrant”).

► eucrim ID=0801119

### CFI Dismissal of Action Based on FD on Standing of Victims

The Court of First Instance dismissed the action of a German resident seeking intervention by the Commission in a row between him and German civil servants/judges who he claimed had treated him unfairly. His argumentation was, *inter alia*, based on the claim that German authorities denied his rights as set out in Art. 9 of the FD on the standing of victims in criminal proceedings, i.e., his right to compensation. The Court dismissed the action as partly inadmissible and partly unfounded (Case T-412/07 “Ammayappan Ayyanarsamy”).

► eucrim ID=0801120

### Freezing of Assets

This section follows up the presentation in eucrim 3-4/2007, pp. 105 ff. of the recent cases brought before European Community courts addressing legal problems in relation to terrorist blacklists maintained by the EU. The lists concern EC Regulations adopted and updated by the Council that enforce Resolutions of the UN Security Council obliging all Member States of the UN to freeze the funds and other financial resources of certain persons or entities suspected to be or support terrorists. The European Court of Justice and the Court of First Instance now further strengthened the right of due process for persons affected by the list.

### Kadi & Al Barakaat Cases – Landmark Ruling by ECJ

Ruling on appeal of Mr. Kadi and Al Barakaat International Foundation against their blacklisting as terrorist suspects, the European Court of Justice (ECJ) overturned the European courts case law. The arguments of the appellants were rejected by the Court of First Instance (CFI), which mainly argued that the Community courts had, in principle, no jurisdiction to review the valid-

ity of the Regulation at issue listing the appellants (for this judgment, see *Frank Meyer*, eucrim 3-4/2006, p. 66). The ECJ now overruled the CFI’s verdict and largely followed the perspective of Advocate General Maduro, whose opinions were discussed by *Frank Meyer* in eucrim 3-4/2007, p. 106-107. In a rather fundamental way, the ECJ addressed the following main issues:

■ First, the ECJ confirms the competence of the Council to adopt the Regulation on the basis of the EC Treaty (Articles 60 and 301, jointly with Art. 308 TEC).

■ In contrary to the CFI, the ECJ decided that the Community courts can review the lawfulness of Community acts, even though they give effect to UN Resolutions. The ECJ emphasised first that Community acts have to be examined in order to be conform to higher-ranking Community law, particularly fundamental rights, and, second, that this review of lawfulness by the Community courts does not entail any challenge to the primacy of the UN Security Council Resolution. In order to underpin its view, the ECJ refers to a classical argument of EC law, namely the autonomy of the Community legal order. The Court states: “[t]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”

■ On this basis, the ECJ examined a breach of fundamental rights by the Community act. The Court mainly rebukes the EU for not providing an adequate administrative mechanism communicating evidence or grounds justifying the inclusion of the names of the persons or entities in the list. Indeed, the Council had never informed Mr. Kadi or Al Barakaat about evidence of their proscription. As a consequence, the Court found that the Regulation

breached the rights of defence and the right to a legal remedy.

■ Furthermore, the lack of any guarantee for the persons to put their case to the competent authorities further does not satisfy the respect for their rights to property, according to the ECJ.

■ In consequence, the ECJ annuls the Council Regulation in so far as it freezes the funds of the appellants. However, the ECJ moderates the effects of its judgment by maintaining the effects of the Regulation at issue for three months until the implementation of a new Regulation to remedy the infringements found. The Court reasoned this measure, that, “in the period before the regulation is replaced, the person and entity concerned might take steps to prevent measures freezing funds from being applied to them again. Furthermore, [...] it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.”

The judgment of the ECJ facilitates actions of other listed persons or entities against the proscription system of the Council and the UN alike. The Court’s view of the relationship between Community law, notably its human rights review, and the UN Charter will likely spark the most controversial discussions in literature. The Commission announced that it would work on a mechanism that satisfies the Court’s demands for implementation of the persons’ right to be heard and for effective judicial review. For a detailed analysis of the judgment in the cases Kadi and Al Barakaat (C-402/05 P and C-415/05 P), please consult the article of *Frank Meyer* in this eucrim issue.

► eucrim ID=0801121

### OMPI Case – CFI Rules Again on Inclusion in List

For the second time, the Court of First Instance (CFI) decided on the annulment of Council decisions maintaining the Iranian opposition group OMPI (Organisation des Modjahedines du peuple

d'Iran, in English abbreviated "PMOI") on the EU terror list. In the first judgment of 2006, the CFI annulled Council decisions of 2005 ordering the freezing of OMPI's funds on the grounds that it did not contain a sufficient statement of reasons, that it had been adopted in the course of a procedure during which the applicant's right to a fair hearing had not been observed, and that the Court itself was not in a position to review the lawfulness of that decision (Case T-228/02; see eucrim 3-4/2006, p. 67). The Council remedied the requirements of the Court by supplying a sufficient statement of reasons but refused to take OMPI from the list. The Council replaced the annulled decision by subsequent decisions (for more background information, see eucrim 3-4/2007, p. 105). Now, OMPI attacked two Council decisions of 2007 that keep the group on the list (Case T-256/07).

Prior to its Decision 2007/445/EC of 28 June 2007, the Council informed OMPI that its inclusion on the list is justified since an order by the Home Secretary of the United Kingdom of March 2001 prescribing OMPI as an organisation concerned in terrorism is still valid.

The Council also kept OMPI on the list when it updated the EU terror list with its Decision 2007/868/EC of 20 December 2007. However, in the meantime, a judicial review of the Home Secretary's order was successful in the United Kingdom. The so-called Proscribed Organisations Appeal Commission ("the POAC") – a superior court of record in the UK – which is competent for appeals in cases where the Home Secretary refuses to de-proscribe organisations believed to be involved in terrorism – found that the view of the Home Secretary that OMPI is still a terrorist organisation is "perverse" and "unreasonable". As a result, the POAC ordered the Home Secretary to remove OMPI from the UK list of proscribed organisations. Furthermore, the POAC refused permission for the Home Secretary to lodge an

appeal against its decision before the Court of Appeal.

By examining the annulment request, the CFI largely draws a link between the decisions of the national authority and the Council Decisions on the EU level. As regards the first Decision of 2007 (2007/445/EC), the CFI does not contest the Council's *modus operandi* and upholds the Decision. The CFI accepts the new procedure of supplying a sufficient statement of reasons. It further stresses that the Council – when assessing evidence – was not wrong when it relied on the still valid order of the Home Secretary.

However, as regards the second Decision (2007/868/EC), the CFI found that the Council was obliged to take sufficiently into account the subsequent decisions of national authorities in the UK, i.e., new evidence coming from the judicial verdict of the POAC. Against the background of the fact-finding by the POAC and its particularly disapproving legal conclusions on the Home Secretary's order ("perverse", "unreasonable"), the CFI considers clearly insufficient the Council's argumentation *via-à-vis* OMPI that the Home Secretary intends to lodge an appeal and therefore OMPI should remain on the list. As a consequence, the CFI annuls Decision 2007/868/EC in so far as it concerns OMPI.

► eucrim ID=0801122

### OMPI Case (II): CFI Stops Council Anew

The aforementioned CFI's verdict (T-256/07) was only a Pyrrhic victory for OMPI. The Council outpaced the Court with a fresh decision of 15 July 2008, still keeping OMPI on the terror list. OMPI also brought action against this Decision (2008/583/EC); the case was numbered T-284/08. This time, the Council mainly argued that judicial inquiries against the group were opened before the Tribunal de grande instance of Paris and that two supplementary charges were brought in March and November 2007 against persons presumed to be members of the OMPI by

the Paris prosecution's office. According to the Council, these acts constituted a decision of a competent national judicial authority in accordance with applicable basic Community legislation.

However, the Council did not comply with the CFI's verdict in the initial OMPI case (see eucrim 3-4/2006, p. 67) because it did not inform the applicant of the new information or new material in the file prior to its Decision on maintaining the group on the list; the Council also did not enable the applicant to effectively make known his view of the matter prior to the contested Decision. This is a clear breach of the applicant's defence rights, according to the CFI. The advancement of the Council would, if need be, only have been justified if urgency could be assumed. In this context, the CFI could not find any grounds that the Council could not uphold the standard procedure (as explained in the first OMPI verdict), which would have respected the group's rights of the defence. The CFI even considers the omission of the Council to comply with the defined procedure to be an abuse or misuse of powers or procedures. This reasoning led to the annulment of the said Decision, insofar as it concerns OMPI.

In a second part of the judgment, the Court discusses the additional arguments of the applicant, even though there was no need for the Court to do so. The CFI particularly examines (1) whether the conditions laid down in the basic Community legislation relating to the freezing of funds were respected, most notably that a decision was taken against the person or organisation concerned by a competent national judicial authority (cf. Art. 1 para. 4 of Common Position 2001/931); (2) the burden of proof in this regard; and (3) the fundamental right to effective judicial protection. Here, the Court largely refers to the fundamental findings in the first-mentioned OMPI judgment of 12 December 2006. In this regard, the CFI found, first, that the Council did not comply with the

procedure established in Art. 1 para. 4 of Common Position 2001/931 (in conjunction with Art. 2 para. 3 Regulation No. 2580/2001). The main line of reasoning of the CFI is that the Council was unable to explain that it had “serious and credible evidence or ‘clues’ that justify the freezing of the group’s funds. In particular, the Council failed to explain the specific reasons as to why the acts ascribed to the persons alleged to be members of OMPI should be attributed to OMPI itself.” As a legal result, the requirement that the decision had been taken by a competent national judicial authority was not fulfilled.

Second, the Court states that the French authorities refused to communicate to the Court an important document containing justifications for keeping OMPI on the EU terror list. In this context, the CFI “considers that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.” As already found in the first OMPI judgment, there is a breach of the fundamental right to an effective judicial review if the CFI is unable to review the lawfulness of the contested decision. This was the case here because the French authorities and the Council did not communicate, even to the CFI alone, essential information.

*Background of the case:* At the request of the applicant, the CFI applied an expedited procedure (Art. 76a of the Rules of Procedure of the Court of First Instance). This judgment of the CFI, delivered on 4 December 2008, will go down in the Court’s history because it was delivered one day after the oral procedure on the case had taken place before the Court. This is the quickest judgment ever following a hearing. It is also the first time that the European Court ruled on the list while it is actually in force.

The Council’s legal service is cur-

rently analysing whether the effects of the judgment mean striking OMPI from the list immediately or whether a follow-up EU common position amending the list is needed to enact the judgment.

► [eucrim ID=0801123](#)

*General background:* The “OMPI case” becomes more and more a political issue. Meanwhile, also parliamentarians intervene (in June French deputies and lastly, in November 2008, a number of German parliamentarians) who request the removal of the Iranian opposition group from the anti-terror list. OMPI was a militant Iranian group which participated in the overthrow of the Shah regime in Iran; then it fought against the mullahs in the 1980s and 1990s. The Paris-based group affirmed that it has meanwhile turned democratic and renounced violence in 2001. Supporters of the group think that governments of EU Member States keep OMPI on the list in order to avoid jeopardising diplomacy with Iran whereas intelligence services are of the opinion that the group remains a threat for European security.

## Cooperation

### Police Cooperation

#### Transfer of Prüm Treaty Finalised

The Council Decision, which transfers the Treaty of Prüm into the framework of the EU, was finally adopted and published in the Official Journal (L 210 of 6 August 2008). The Decision (2008/615/JHA) relates to the provisions of the Prüm Treaty, which are covered by Title VI of the EU Treaty, i.e., the third pillar of the EU. The Decision contains, inter alia, provisions on the conditions and procedure for:

- Automated transfer of DNA profiles, dactyloscopic data, and certain national vehicle registration data
- Supply of data in connection with ma-

major events having a cross-border dimension

- Supply of information in order to prevent terrorist offences
- Stepping up cross-border police cooperation.

The EU Member States have principally one year’s time to comply with the implementation of the provision. Necessary measures relating to provisions on data exchange (chapter 2 of the Decision) must take effect within 3 years. The Commission is requested to submit a report to the Council by 28 July 2012 on the implementation of this Decision, accompanied by such proposals as it deems appropriate for any further development.

The Treaty of Prüm was initially concluded outside the framework of the EU by 7 Member States in 2005. However, a short time afterwards, initiatives were taken to let the provisions become EU norms which apply to all EU Member States. This approach follows the model of the Schengen Convention. Following the model of Schengen, the integrated Prüm Treaty is to be applied by non-EU Member States as well. Negotiations between the EU and Iceland and Norway are underway.

With respect to subject matters that fall under the first pillar of the EU, the transfer would require an initiative by the European Commission, which enjoys the monopoly on legislative initiatives in this pillar. The Commission has not yet taken an initiative with regard to this content of the Prüm Treaty.

For the development of the Prüm Treaty and its integration into the EU legal framework, please refer also to eucrim 1-2/2007, pp. 37-38; and 3-4/2006, pp. 72-73.

► [eucrim ID=0801124](#)

#### Prüm Implementing Decision Finalised

The above-mentioned “Prüm Decision” 2008/615/JHA is accompanied by a Council Decision (2008/616/JHA), which establishes administrative and technical measures necessary for the im-

plementation of the Prüm Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The proposal for implementation measures originates from an initiative by Germany (see eucrim, 3-4/2007, p. 109).

► eucrim ID=0801125

### Guidelines on Best Practices for Police and Customs Cooperation Centres

The Council approved European best practice guidelines dealing with the establishment, operation, and evaluation of Police and Customs Cooperation Centres (PCCCs). PCCCs stem from joint border stations and involve police and customs officers from two neighbouring EU Member States. They are located in positions of strategic importance for observing cross-border crime. They are a valuable tool, especially for information exchange, and they are able to deliver quick replies in cross-border cooperation. PCCCs are one of the compensatory measures for the abolishment of internal border controls within the EU after the Schengen Convention. Germany currently maintains three centres at the borders with France, the Czech Republic, and Poland. With the adoption of best practice guidelines, the Council, inter alia, aims at encouraging Member States to increase the setting up of these centres.

► eucrim ID=0801127

### Treaty on Police Cooperation between Germany, Belgium, France, and Luxembourg

On 24 October 2008, the Ministers for Justice and Home Affairs from Germany, Belgium, France, and Luxembourg signed a treaty that is designed to intensify the cross-border cooperation of the countries' police and customs authorities. The treaty will also form the legal basis for building up a common cooperation centre where the competent authorities of the four States will work together under one roof. Experience already exists with centres established bilaterally, such as the centre for France

and Germany in Kehl, Germany, but it would be the first time that a centre comprises Member States on a multilateral basis. The common cooperation centre, which is to be located in Luxembourg, will be tasked with:

- Gathering, analysing, and exchanging information relevant for police and customs cooperation, including police situation reports on the border region
- Supporting and facilitating the coordination of certain investigations
- Facilitating and fulfilling operational tasks of the police and customs authorities.

► eucrim ID=0801126

## Judicial Cooperation

### Training of Judicial Staff: Council Adopts New Guidelines

At its meeting on 24 October 2004, the Justice and Home Affairs Council agreed on several guidelines which particularly aim at establishing a sense of common European judicial culture among the judicial staff of the EU Member States. The EU Member States are invited to take several common steps, most notably in order to (1) improve the knowledge and application of European law, (2) foster knowledge of the different legal systems and laws of the other Member States, and (3) enhance language skills. On the central level, an important role in this regard is attributed to the European Judicial Training Network (EJTN) – a Brussels-based organisation supported by the institutions in charge of the training of judges and prosecutors in the MS and designed for further training of judicial staff (for more information on the EJTN see eucrim 3-4/2007, p. 84).

► eucrim ID=0801128

The importance of practical training measures for judges, prosecutors, and other judicial staff of the EU Member States have been reiterated time and again. It is considered one of the essential tools for developing mutual trust as

the underlying principle of mutual recognition of judicial decisions in the EU. On 29 June 2006, the Commission launched a Communication on judicial training in the EU (see eucrim 3-4/2006, p. 73).

On 9 July 2008, the European Parliament adopted a non-legislative resolution addressing the role of the national judge in the European judicial system. The EP proposed a more structured framework for judicial training in the EU. It is considered absolutely necessary that the enhancement of language skills of the judiciary in the EU Member States take place. The resolution also pointed out that – due to a lack of adequate training – a large number of judges and prosecutors have insufficient knowledge of European (criminal and civil) law.

► eucrim ID=0801129

## European Arrest Warrant

In recent months, the European Court of Justice (ECJ) decided on the first references for a preliminary ruling submitted by national courts on the interpretation of the 2002 Framework Decision on the European arrest warrant and the surrender procedures between Member States (hereinafter: FD EAW). The Court seized the opportunity to make the application of the FD throughout the EU more coherent. The judgments of the ECJ are summarised in the following.

### “Kozłowski” Case: Germany Must Interpret its Law in Conformity with FD

Upon reference of the Oberlandesgericht (Higher Regional Court) Stuttgart, Germany, the ECJ was asked to decide on two questions relating to the interpretation and implementation of Art. 4 No. 6 of the FD EAW. It allows the executing Member State to refuse the execution of an EAW issued for the purposes of execution of a custodial sentence or detention order, “where the requested person is staying in, or is a national or a resident of the executing Member State and that

State undertakes to execute the sentence or detention order in accordance with its domestic law.”

Whereas Art. 4 No. 6 of the FD refers only to persons who are “staying” in the executing Member State or have a “residence” there, the German legislator implemented this provision in such a way that extradition may be refused to foreign nationals whose “usual place of residence” is in Germany. This discrepancy in wording led to the first question of the Oberlandesgericht since, in the present case, it was doubtful whether the person concerned “is staying” in the sense of Art. 4 No. 6 of the FD.

In its judgment of 17 July 2008, the ECJ confirmed that the terms “staying” and “resident” are autonomous concepts of Union law. Therefore, the national law must take into account a uniform interpretation of the terms. As regards interpretation of the term “staying”, the ECJ required certain connections with the executing state, which are of a similar degree to those resulting from residence, and held that the connections must be determined by an overall assessment. Criteria that cover the term “staying” shall be of an *objective* nature and include the length, nature, and conditions of the person’s presence as well as the family and economic connections he has with the executing Member State.

In the present case, the ECJ denied assuming a “stay” of the person in Germany whose stay did not comply with the national legislation on the residence of foreign nationals and who had no family ties as well as weak economic connections with Germany. Nevertheless, the consequence of the ECJ’s judgment is that German domestic law – without requiring amendment – must be interpreted in conformity with the framework decision and that the executing authority must determine, as a first step, whether the person in question is “residing” or “staying” in Germany.

The second issue of the reference had a more political connotation. Since

German law differentiates between the extradition of German nationals, whose extradition for the purpose of execution of a sentence against their will is automatically impermissible, and nationals of other Member States, whose extradition against their will can be authorised at the discretion of the authorities, the Oberlandesgericht wanted to know whether this violates the principle of non-discrimination under Art. 18 in connection with Art. 12 TEC and Art. 6 TEU.

The ECJ did not need to decide on this question, since it had already denied the stay of the foreigner in Germany (inapplicability of Art. 4 No. 6 of the FD in the present case). However, the ECJ indirectly provided hints for a solution. The starting point is the fact that discrimination can be justified by a reason of substance. The ECJ concluded in its judgment that the main reason for Art. 4 No. 6 of the FD is to increase the prosecuted person’s chances of being reintegrated into society when the sentence imposed on him expires. As a consequence, a different treatment of nationals and foreigners can be justified if reintegration is prone to failure in Germany, e.g., because the person must leave the country after serving the sentence. Otherwise, German law must be interpreted in line with EC law, and foreigners should enjoy the same protection as nationals.

For the history of the case (C-66/08, “Szymon Kozłowski”, see eucrim 3-4/2007, p. 110).

►eucrim ID=0801130

#### **Pending Case „Wolzenburg“: Further Interpretation of Art. 4 No. 6 FD**

Following the above-mentioned case “Kozłowski”, it is worth mentioning that the Rechtbank Amsterdam has also referred a case for preliminary ruling to the ECJ requesting interpretation of the terms “staying and resident in the executing Member State” pursuant to the optional grounds for refusal of Art. 4 No. 6 of the FD EAW. In essence, the Dutch court seeks clarification on to

which extent requirements of the lawfulness of residence must be met (Case C-123/08, “D. Wolzenburg”).

►eucrim ID=0801131

#### **“Goicoechea” Case: Relationship Between EAW and 1996 Extradition Convention**

After reference from the Chambre de l’instruction of the Cour d’appel de Montpellier (France), the ECJ had to decide on the relationship between the Framework Decision on the European arrest warrant and the 1996 Convention relating to extradition between the Member States of the European Union (also known as the “Dublin Convention”). In particular, the reference asked for interpretation of Articles 31 and 32 of the FD.

Art. 31 of the FD (“Relation to other legal instruments”) principally states that the FD EAW replaces, from 1 January 2004 on, other extradition conventions that are applicable between the EU Member States. Among these conventions is the 1996 Extradition Convention. However, Art. 31 para. 2 provides that Member States may continue to apply bilateral or multilateral agreements or arrangements in force when the FD is adopted in so far as such agreements or arrangements allow the objectives of the FD EAW to be extended or enlarged and help to simplify or facilitate further the procedures for the surrender of persons who are the subject of European Arrest Warrants.

According to Art. 32 of the FD (“Transitional Provision”): “Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts com-

mitted before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.”

France submitted such a statement, indicating that it will continue the extradition system in place before 1 January 2004 as far as requests that relate to acts committed before 1 November 1993 (the date of entry into force of the “Maasticht Treaty”) are concerned.

A particularity of law was that the 1996 Extradition Convention became applicable between France and Spain from 1 July 2005 onwards because France ratified the Convention together with the implementation of the FD EAW.

In the case at issue, the Spanish authorities requested the extradition of Mr. Santesteban Goicoechea from France several times for offences relating to terrorism, which had allegedly been committed on Spanish territory in 1992:

A first extradition request of 2000 had been rejected by a French court with the argument that the offences in question were statute-barred under French law, such that the ground for refusal of Art. 10 (lapse of time) of the 1957 Council of Europe Convention on Extradition (only applicable at that time) was given.

In March 2004, the Spanish authorities made a new attempt by issuing a European Arrest Warrant for the same acts as those in the extradition request of 2000. However, the French authorities pointed to their statement in the context of Art. 32 FD EAW and reminded the Spanish authorities that, for this case, the traditional extradition system applied. Furthermore, they denied extradition since Mr. Goicoechea was serving a sentence of imprisonment in France until 6 June 2008.

On 2 June 2008, the Spanish authorities undertook their third attempt and requested the extradition of Mr Goicoechea, this time under the 1996 Con-

vention. The advantage for the Spanish authorities was that France could no longer deny extradition with the argument of lapse in time because Art. 8 of the 1996 Convention excludes this ground for refusal if the act in question is statute-barred according to the law of the requested Member State. Naturally, Mr Goicoechea disagreed with this solution, arguing that the application of the 1996 Convention would infringe the general principles of law applicable within the Union, in particular the principles of legal certainty, legality, and non-retroactivity of the more severe criminal law.

The first question was, in essence, whether Art. 31 FD blocks the application of the traditional extradition agreements in force on 1 January 2004 between the EU Member States. The ECJ points out that one must clearly distinguish between Art. 31 and Art. 32 of the FD, which are mutually exclusive. The ECJ further states that, although the extradition conventions listed in Art. 31 para. 1 of the FD EAW had been replaced by the FD since 1 January 2004, they can still be applied in the (few) cases where the European Arrest Warrant is not applicable. One of these cases rests on the premise that the scope of the EAW is limited in time due to the statement made by a Member State pursuant to Art. 32 FD. In view of the above-mentioned statement of France to apply the traditional extradition conventions to acts allegedly committed before 1 November 1993 (which was the case here), the European Arrest Warrant system was inapplicable and hence the 1996 Convention could be used.

However, the second question was then whether Art. 32 FD EAW must be interpreted as precluding the application by an executing Member State (France) of the 1996 Convention where that Convention became applicable in that Member State only after 1 January 2004. The ECJ negates this view and concludes that Art. 32 FD does not preclude the possibility for a Member State to make

the 1996 Convention applicable after 1 January 2004 in order to cover, inter alia, situations in which the European Arrest Warrant system does not apply. The ECJ mainly argues that any efforts of the Member States to facilitate the extradition system in the EU are welcome as long as they are not contrary to the objectives of the FD.

All in all, the ECJ favours the application of the 1996 Convention on extradition in relation to the EU Member States, with the consequence that Mr. Goicoechea cannot sidestep his extradition from France to Spain.

The case (C-296/08) is also interesting as to aspects of “European” procedural law. First, the case was treated under the newly introduced urgent procedure (Art. 104b of the Rules of Procedure of the ECJ; see also eucrim 3-4/2007, pp. 78-79). It was the first judgment of the ECJ which was delivered under this procedure in a criminal law case (see also above under “Institutions – European Court of Justice”)

Moreover, the ECJ held again that the reference for preliminary ruling on framework decisions is admissible even when it does not mention Art. 35 TEU, but refers only to Art. 234 TEC (see judgment in the case “Dell’Orto, eucrim 1-2/2007, pp. 34-35). Last but not least, the ECJ transferred its settled case law on whether a body making a reference is a “court or tribunal” in the sense of Art. 234 TEC to the reference of Art. 35 TEU.

➤ eucrim ID=0801132

### “Leymann and Pustovarov” Case: The Scope of the Speciality Rule

On 1 December 2008, the ECJ delivered its third judgment under the urgent preliminary reference procedure (see above). Within less than three months, the ECJ replied to several questions from the Supreme Court in Helsinki, Finland (Korkein oikeus) relating to the interpretation of the speciality rule in the Framework Decision on the European Arrest Warrant (FD EAW).



## The European Arrest Warrant and Joint Investigation Teams in Practice

Report from the ERA Conference in Trier, 24–25 April 2008

The seminar at the Academy of European Law (ERA) focused on the practical application of two important instruments of police and judicial cooperation in the European Union, namely the regime of the European Arrest Warrant and Joint Investigation Teams (JITs). The participants, mainly legal practitioners from various EU Member States, seized the opportunity to share their experiences and best practices with these two instruments which exemplify the leading principles of justice and home affairs cooperation, i.e., mutual recognition and mutual trust.

The first day was dedicated to the European Arrest Warrant (EAW), with emphasis placed on practical concerns. In the first part of the session, the implementation and practical application of the EAW was discussed from the perspective of the European institutions, i.e., the Commission and the Council. The officials shared their experience – based not only on the Commission's implementation reports of 2005 and 2007, but also on the current round of mutual evaluations on a Member-State-by-Member-State basis. Although it was reiterated that the EAW is a success story, several shortcomings were pointed out. Implementation of the EAW still differs, leading to a lack of consistency in the application of the instrument among the Member States.

Some Member States, for instance, inserted reservations into their national legislation with regard to aspects of surrender of own nationals, thus indicating residual mistrust of other EU criminal justice systems. It is additionally problematic that some Member States transposed an optional ground for refusal into a mandatory one or included grounds for refusal not provided for in the Framework Decision. Problems experienced by executing states with in absentia judgements led to the overall question of how the guarantees with regard to the fundamental rights of the requested person are ensured in the course of EAW proceedings. Another major current problem which was highlighted during the conference is the issuing of EAWs for apparently minor offences or offences for which little punishment is expected, causing these EAWs to clash with the principle of proportionality.

A more consistent and homogenous application is therefore expected from the handbook on the EAW which is being drafted by the Council Secretariat. The state of play of the handbook as well as its contents was presented in detail. The handbook will address problems in practice and aims at assisting legal practitioners by providing uniform guidelines on how to fill in the EAW form. It will be the first time that all relevant practical information on the EAW is contained in one document. The participants welcomed this project designed to facilitate the handling of EAWs. In particular, the fact that the handbook will be translated into all EU languages was considered an important step towards ensuring a more consistent and transparent application of the instrument.

In the second part of the session on the EAW, experts discussed experiences in national practice with the application of

EAWs, including the United Kingdom, Sweden, Portugal, the Czech Republic, and Italy. All in all, the speeches showed that each national legal system still retains certain typicalities concerning surrender under the EAW. Interestingly, the speeches also revealed that common law and continental law systems are faced with similar problems regarding mutual recognition and mutual trust, but provide different solutions. In this context, participants discussed best practices which could also apply in each other's – principally different – legal orders. Issues which were addressed in this context were, for example, how to protect nationals from extradition, how to prevent surrender if draconic or inappropriate punishment is likely, or how to take into account possible procedural rights infringements.

The session on the EAW ended with the presentation of views from Eurojust and liaison magistrates. The lessons learnt by these two actors confirmed the conclusion drawn after the first day that the EAW instrument is being successfully used in practice, especially in comparison to the circumstances and difficulties prior to its existence. However, administrative and practical problems still need to be resolved, the currently most important problem being how to take into account the principle of proportionality.

In the course of the second day, the tool of Joint Investigation Teams (commonly abbreviated JITs), created by a Council Framework Decision of 2002, was examined. So far, little experience exists as all JITs have been carried out on a bilateral basis up until now. The experts addressed three aspects of JITs:

- (1) Emphasis was put on concerns regarding the gathering of evidence within the teams and the use of foreign evidence in national criminal law proceedings.
- (2) Concrete insight into the practical work of JITs was given by presenting experiences between Belgium and the Netherlands in the Rhine-Maas region as well as between Finland and Estonia in the Baltic Sea region.
- (3) Representatives from Europol and Eurojust explored their role in implementing JITs and possibilities for their participation in JITs.

All in all, legal practitioners who had experience with JITs highly appreciated this tool. However, during the discussion, participants still doubted whether JITs would also run well if three or more states were involved, since experience has gained so far only in smaller JITs on a bilateral basis. A major obstacle in this context was seen in the somewhat cumbersome and lengthy procedure used to conclude agreements on the setting up of JITs. With regard to a potential future strategy, participants agreed that the added value of JITs must be examined on a case-by-case basis and that it is essential to gain further practical experience with JITs so that other Member States which may still be rather sceptical will more readily accept and implement this instrument.

► eucrim ID=0801133

*By Thomas Wahl*

As to the legal background, Art. 27 para. 2 of the FD provides for the “principle of speciality”, a classic limitation of extradition. It reads that “a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.” Art. 27 para. 3 provides for several exceptions to this rule. They are mainly divided into two categories: Art. 27 para. 3 lit. b) to d) envisage the expected punishment (in essence, deprivation of liberty or not), whereas the exceptions in Art. 27 para. 3 lit e) to g) are motivated by consent.

The facts of the case (Case C-83/08) were as follows: Mr Leymann and Mr Pustovarov were wanted by the Finnish authorities for illegally importing drugs into Finland. The Finnish authorities sent a European Arrest Warrant to the Polish authorities for Mr Leymann and the Spanish authorities for Mr Pustovarov. The warrants stated that the persons were suspected of committing a serious drug trafficking offence, between 1 January 2005 and 31 March 2006 in the case of Mr Leymann and between 19 and 25 February 2006 in the case of Mr Pustovarov. According to the arrest warrants, the offence related to a large quantity of amphetamines. The arrest warrant for Mr Pustovarov also mentioned two separate offences of drug trafficking allegedly committed in September/October 2005 and November 2005 respectively.

Mr Leymann and Mr Pustovarov were surrendered to Finland on the basis of these arrest warrants and remanded in custody. Some time later, the indictment against the two stated that the serious drug trafficking offence concerned not amphetamines but hashish and had been committed between 15 and 26 February 2006. A new arrest warrant with these changes was sent to the Spanish authorities, but the latter did not consent to the arrest until much later. Leymann and Pustovarov had meanwhile both been

convicted in the first instance and sentenced to imprisonment for this offence and, in the case of Mr Pustovarov, also for the said two separate offences.

On appeal, the defendants argued that they had been convicted for an offence other than that for which they had been surrendered, contrary to the ‘specialty rule’ in Art. 27 para. 2 of the FD EAW. The Finnish court, in particular, requested criteria on how to interpret the legal notion of “other offence” in Art. 27 of the FD.

In its judgment, the ECJ mainly argues using the objective, efficiency, and purpose of the EAW system to speed up and facilitate judicial cooperation, hence that the demand for consent of the executing state on every amendment of the description of the facts would be counterproductive. In determining whether it is “another offence” or not, the ECJ suggests verifying whether the constitutive elements of the offence that were described by the issuing State according to its law are the same for which the person had been surrendered and whether the piece of information contained in the arrest warrant and the one mentioned in the later proceedings in the issuing Member State correspond sufficiently. Therefore, the Court does not see a breach of the speciality rule if alterations in the description of the circumstances of the act (e.g., place, time) are made in the course of later proceedings as long as they do not change the nature of the offence or lead to another assessment of the grounds for refusal in Art. 3 and 4 of the FD.

Applied to the case, the ECJ found that the alterations as to time and class of narcotics concerned are not in themselves capable of characterising a new offence since they still belong to the category of “illegal trafficking in narcotic drugs” and the level of punishment also remains the same.

In addition, the Finnish court asked whether the exception to the speciality rule where the criminal proceedings do not give rise to the application of a

measure restricting personal liberty (Art. 27 para. 3 lit. c) of the FD EAW applies in the case of a person such as Mr Pustovarov who was in custody for the two separate offences of which he was accused. In this context, the ECJ explains that the two categories in Art. 27 para. 3 as mentioned above are independent; the Court suggests examining the exceptions in two steps. The Court concludes that “the Framework Decision does not, however, prevent the person surrendered from being subjected to a measure restricting personal liberty before consent is obtained, where that restriction is justified in law by other charges mentioned in the European arrest warrant.”

► eucrim ID=0801134

### Statistics for 2007 – Latest Figures

The Council published updated figures on the practical operation of the European Arrest Warrant in the year 2007. The figures were provided by the EU Member States based on a common questionnaire. Annex I gives an overview of replies to the question of which grounds for refusal of the surrender were applied in the different cases reported. Annex II contains additional information by some Member States on the operation of the EAW (see also eucrim 3-4/2007, p. 110 for the year 2006).

► eucrim ID=0801135

## European Evidence Warrant

### European Evidence Warrant in Force

On 18 December 2008, the Council formally adopted the Framework Decision 2008/978/JHA on the European Evidence Warrant for the purpose of obtaining objects, documents, and data for use in proceedings in criminal matters (hereinafter: FD EEW). The instrument is another milestone in the EU’s efforts to effect the principle of mutual recognition in the area of judicial cooperation.

The FD EEW will supplement the Framework Decision of 22 July 2003

on the execution in the EU of orders freezing property and evidence, and, as a consequence, it facilitates the transfer of evidence. The EEW is a means of obtaining any objects, documents, or data for use in proceedings in criminal matters for which it may be issued. This may include objects, documents, or data from a search of the suspect's premises, historical statements from witnesses, or records as to the results of special investigation techniques.

Excluded from the scope of the EEW are (a) the taking of evidence from interviews, statements, or hearings, (b) the taking of evidence from a person's body (in particular DNA samples), (c) real-time evidence, such as interceptions of communications or monitoring of bank accounts, (d) evidence requiring analysis of existing objects, documents, or data, and (e) evidence related to data retention (cf. Art. 4 para. 2).

Following the example of other instruments on mutual recognition, such as the European Arrest Warrant, the possibilities of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, have been considerably limited in comparison with traditional agreements on mutual legal assistance in criminal matters. The main features in this regard are as follows:

- Refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) is not possible for certain categories of offences. The list of offences in Art. 14 para. 2 FD EEW is modeled on Art. 2 para. 2 of the Framework Decision of the European Arrest Warrant. One condition is that the offences must be punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State. No verification of dual criminality is performed unless it is necessary to carry out a search or seizure (cf. Art. 14 of the FD). The latter aspect corresponds to the existing standard

of judicial cooperation under the regime of the Council of Europe Conventions on mutual legal assistance in criminal matters.

- In respect of the categories of offences for which double criminality should no longer be verified, Germany reserved a special optout clause: The clause allows Germany to issue a declaration (annexed to the FD) making the execution of an EEW subject to verification of double criminality in cases relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling, if it is necessary for carrying out a search or seizure for the execution of the warrant, except where the issuing authority has declared that the offence concerned under the law of the issuing State falls within the scope of criteria indicated in the declaration (see also eucrim 1-2/2006, p. 20). It should be mentioned that Germany is obliged to inform the Council and the Commission, at the beginning of every calendar year, of the number of cases in which the clause was applied in the previous year.

- The particularly controversially discussed "territoriality clause" has been maintained. The clause allows a Member State not to recognise or not to execute an EEW if it relates to criminal offences that, under the law of the executing State, are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory (cf. Art. 13 para. 1 (f)(i) of the FD). Interestingly, the FD EEW limits this ground for refusal in two ways: First, Art. 13 para. 3 contains instructions on how to apply the territoriality clause by the executing authority, indicating that the clause should only be used in exceptional cases. Second, the competent executing authority must consult Eurojust if it intends to make use of the territoriality clause (Art. 13 para. 4).

- Other grounds for refusal include immunities or privileges under the law of the executing State (e.g., for medi-

cal or legal professions). Furthermore, an EEW may not be executed if its execution would harm essential national security interests, jeopardise the source of the information, or involve the use of classified information relating to specific intelligence activities.

- There is no possibility for the executing authority to refuse an EEW depending on the issue of whether the issuing of the EEW was proportionate for the purpose of the proceedings. It is only up to the issuing authority to assess the conditions of proportionality in each case (cf. Art. 7).

Other important items contained in the FD EEW are as follows:

- Art. 5 d) explicitly states that the EEW may also be issued for proceedings in relation to the criminal liability of legal persons.

- Art. 11 underscores the principle of mutual recognition by stating that the executing authority shall recognise an EEW without any further formality and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents, or data.

- Art. 12 provides that the executing authority should comply with the formalities and procedures expressly indicated by the issuing authority, in order to assist in making the evidence sought admissible in the issuing State. These formalities or procedures concern legal or administrative processes, e.g., the official stamping of a document or the presence of a representative from the issuing State. They do not encompass coercive measures.

- As all instruments based on the mutual recognition principle, the FD EEW provides for deadlines for the recognition, execution, and transfer of the objects, documents, or data (cf. Art. 15).

- Art. 18 recognises the right to legal remedies, but includes one important restriction: Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures.

■ The FD EEW also establishes a mechanism “to assess the effectiveness” of the FD: A Member State that has experienced repeated problems in the execution of EEWs on the part of another Member State can involve the Council. The Council will conduct a review (details in Art. 20).

■ Attached to the FD is a form that must be completed by the issuing authority and transferred to the executing one.

Ultimately, some aspects are worth mentioning concerning the relationship between the EEW and other legal instruments, transitional arrangements, and implementation. Bearing in mind the limited scope of the EEW (see above), the FD EEW applies in coexistence with other (traditional) legal instruments for mutual assistance regarding evidence in use among the EU Member States. However, the issuing authorities shall rely on the EEW when all of the objects, documents, or data required from the executing State fall within the scope of the FD EEW.

The FD EEW is further only applicable to mutual assistance requests after 19 January 2011. Till this date, Member States have time to implement the provisions of the FD in their national legal orders. By 19 January 2012, the Commission shall present an implementation report, accompanied, if necessary, with legislative proposals. After 19 January 2014, the Council is called on to decide whether the grounds for refusal of Art. 13 para. 1 and 3 of the FD and Germany’s optout in relation to double criminality should be repealed or modified.

► [eucrim ID=0801213](#)

### European Parliament Makes Statement for Second Time

After the Council had agreed on a compromise on the Framework Decision on the European Evidence Warrant (EEW), the European Parliament (EP) was again called on to look into the dossier. On 21 October 2008, the EP adopted a number of amendments to the Council document, backing the report by Belgian MEP Gérard Deprez. In essence, the EP calls

off the main changes that were the subject of the Council compromise. However, the EP was unable to put through hardly any of its suggestions, since it is only consulted in the legislative process:

■ The EP suggested returning to the original Commission proposal that the authority competent for issuing an EEW be narrowed down to judges, investigating magistrates, or public prosecutors. The Council, by contrast, broadened the definition of issuing authority to include “any other judicial authority as defined in the issuing state and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in crossborder cases in accordance with national law” (Art. 2c) FD EEW).

■ The EP deleted the so-called “territoriality clause”, which had been inserted by the Council. The clause allowed a Member State to refuse an EEW for offences committed wholly or, for the main part, within its territory.

■ The EP further disagreed with the introduction of a threshold that conditions the nonverification of double criminality when carrying out a search or seizure. The Council had introduced the condition that the offence must be punishable in the issuing State by a custodial sentence or detention order of a maximum of at least 3 years. By deleting this part, the EP signalled that it favours the gradual abolition of the verification of double criminality in the instruments based on mutual recognition.

■ The EP proposed elimination of the optout clause inserted in favour of Germany (see aforementioned news item).

■ The EP backed the original Commission proposal that contained safeguards for execution. They were deleted by the Council. The EP inserted a new clause that foresees minimum conditions that must be ensured in the execution of an EEW. Certain minimum safeguards shall further apply when it comes to a search or seizure in order to obtain objects, documents, or data.

The EP deleted a clause stating that Member States may limit the legal remedies provided for in cases in which the EEW is executed using coercive measures.

Further important amendments by the EP were made as follows:

A new clause states that the EEW is an instrument available to both the defence and the prosecution. Consequently, the defence may also ask the competent judicial authority to issue an EEW.

■ The EP deleted the Council’s text, stating that the EEW may, if requested by the issuing authority, also cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW (Art. 4 para. 6 FD EEW).

■ The EP inserted a data protection clause, clarifying that anyone affected by an exchange of data carried out in accordance with the FD may claim the right to data protection.

■ The EP added that EEWs concerning offences that fall under amnesty or affect minors, who cannot be held criminally liable, should not be recognised.

■ The EP favoured maximum deadlines for the transfer of the objects, documents, or data obtained by means of an EEW.

► [eucrim ID=0801136](#)

*Background:* The European Evidence Warrant is one of the instruments on mutual recognition of judicial decisions in criminal matters that is subject to lengthy proceedings. The original proposal from the Commission dates from 2003. The EP delivered its first opinion on the text in 2004. On 12 June 2007, the Council agreed on a general approach to the proposal (see also [eucrim 1-2/2006](#), 20 and [1-2/2007](#), p. 39).

Rapporteur MEP Deprez criticised the work of the Council, stating that the negotiations by the EU governments diluted the original proposal and led to inconsistent arrangements. He considers the requirement of unanimously adopting the FD in the Council to be the main reason for the exacerbated situation. All

in all, he is sceptical as regards the added value of the instrument in its present form.

It should also be borne in mind that the EEW is limited in its scope – only affecting existing and already available evidence. In this context, the present legislative resolution of the EP calls on a comprehensive mutual recognition regime for all types of evidence. Furthermore, the EP encourages the Commission to make efforts to harmonise the system of obtaining evidence in the Member States.

► eucrim ID=0801137

## European Supervision Order / Transfer of Sentenced Persons

### Framework Decision on Supervision of Suspended Sentences

The Council formally adopted the Framework Decision (FD) 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (see also eucrim 3-4/2007, p. 111). The FD is another jigsaw piece in the EU's efforts to replace the old Council of Europe mutual legal assistance scheme in the area of enforcement of judgments. It will particularly supplement the FD on the mutual recognition of judgments imposing custodial sentences or measures involving deprivation of liberty (see below), also keeping in mind a facilitated social rehabilitation of the sentenced person. It can also be regarded as the counterpart to the planned framework decision on the supervision of measures. The FD on custodial sentences was designed as an alternative to provisional detention in the pretrial phase of criminal proceedings (see next news item).

The present FD lays down rules under which a Member State, other than the Member State in which the person con-

cerned has been sentenced, recognises judgments and, where applicable, probation decisions and supervises probation measures imposed on the basis of a judgment, or alternative sanctions contained in such a judgment, and takes – unless otherwise provided in the Framework Decision – all other decisions relating to that judgment.

The EU Member States are obliged to supervise several types of probation measures and alternative sanctions that are considered common among the Member States. These types include, inter alia, orders relating to behaviour (such as an obligation to stop the consumption of alcohol), residence (such as an obligation to change residence for reasons of domestic violence), education and training (such as an obligation to follow a safe-driving course), and limitations on or modalities of carrying out a professional activity (such as an obligation to seek a professional activity in a different working environment). Member States may declare that, in addition, they are willing to supervise other types of probation measures and/or other types of alternative sanctions (Art. 4).

The requested authority can be the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing (details in Art. 5). As a principle, the requested (executing) state is solely competent concerning supervision of the probation measure/alternative sanction after recognition (Art. 7). In particular, it has the competence to take all subsequent decisions, notably (1) modification of obligations or instructions contained in the probation measure/alternative sanction or the modification of the duration of the probation period, (2) the revocation of the supervision of the execution of the judgment or the revocation of the decision on conditional release, and (3) the imposition of a custodial sentence or measure involving deprivation of liberty in case of an alternative sanction or conditional sentence (Art. 14(1)). However, each Member State is

allowed to declare that, as an executing State, it will not assume responsibility for subsequent decisions in the above-mentioned cases (2) and (3) under circumstances to be specified (Art. 14 (3)-(6); see also recital 15).

Following the model of other instruments on mutual recognition, the FD contains several grounds for refusing recognition and supervision (cf. Art. 11). The grounds include inter alia:

- Judgments which were issued against a person who, owing to his/her age cannot be held criminally liable under the law of the executing state
- Judgments or probation decisions which provide for medical/therapeutic treatment which the executing state is unable to supervise in view of its legal or healthcare system
- Judgments rendered in absentia
- Probation measures or alternative sanctions of less than six months' duration (i.e., concerning predominantly community services).

One peculiarity exists in view of the abolishment of double criminality checks as a ground for possible refusal of requests. The FD reiterates the commonly used formula that, for a category of 32 criminal offences (punishable in the issuing State with a maximum period of at least three years), double criminality is no longer verified and cannot give rise to a refusal of the recognition (Art. 10 (1)). However, Art. 10 (4) of the FD concedes an interesting "optout" from this principle, since each Member State may declare that it will not apply paragraph 1. This is the same in the FD on the mutual recognition of custodial sentences (see below).

The Member States must implement the FD on the supervision of probation measures and alternative sanctions by 6 December 2011. From this date, the FD will replace the 1964 Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders among the EU Member States.

► eucrim ID=0801214

### Council Paves Way for Supervision of Pre-Trial Procedures

After revision of the initial Commission proposal and further negotiations the Council agreed on a general approach relating to the Framework Decision on the European supervision order in pre-trial procedures between EU Member States. The agreement was reached at the JHA Council meeting on 27-28 November 2008. The draft lays down rules according to which one Member State recognised a decision on supervision measures issued in another Member State as an alternative to provisional detention. This Member State must also monitor the supervision measures imposed on a natural person and surrender the person concerned to the issuing State in case of breach of those measures. For further information on the instrument, see eucrim 3-4/2007, p. 110.

► eucrim ID=0801138

### FD Allows Mutual Recognition of Judgments in Criminal Matters

The Council finally adopted the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty. This new legislative act will enable sentenced persons to be transferred to another Member State for enforcement of their sentences, bearing in mind the possibility of their social rehabilitation.

The new FD is an important step in the field of assistance in the enforcement of foreign judgments. It replaces, within the EU, the relevant Council of Europe conventions, the relevant provisions of the Convention on the Implementation of the Schengen Agreement as well as a 1991 Convention between the Member States of the European Communities.

The Member States have time till 5 December 2011 to implement the provisions of the FD. An assessment by the Council is planned for December 2012. For the FD see also eucrim 3-4/2006, p. 75.

► eucrim ID=0801139

### Taking Account of Convictions

#### Framework Decision in Force on Taking Account of Convictions

The Council finally adopted the Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (for the preliminary stage of the FD, see eucrim 3-4/2006, pp. 65-66). The underlying principle of the FD is that Member States attach to a previous conviction handed down in another Member State effects equivalent to those attached to national convictions. Furthermore, the FD does not seek a harmonisation of the consequences attached by the different national legislations to the existence of foreign convictions. The FD also does not tackle the *ne bis in idem* principle since it applies only to convictions against the same person for different facts.

According to the FD, each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States – in respect of which information was obtained under applicable instruments on mutual legal assistance or the exchange of information extracted from criminal records – are taken into account to the extent previous national convictions are taken into consideration, and equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

This shall apply to the pretrial stage, at the trial stage itself, and at the time of execution of the conviction, particularly with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.

The taking into account of previous convictions handed down in other Member States shall not have the effect of

interfering with, revoking, or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings.

Measures are also laid down in the case where the offence (for which the new proceedings are being conducted) was committed before the previous conviction had been handed down or fully executed.

The EU Member States must implement the FD by 15 December 2010. The Commission is requested, by 15 August 2011, to present a report to the European Parliament and the Council on the application of the FD, accompanied if necessary by legislative proposals. The adoption of the FD took more than 3 years; the original Commission proposal dates from March 2005.

► eucrim ID=0801140

### Criminal Records

#### European Criminal Records Information System (ECRIS)

On 27 May 2008, the Commission submitted a proposal (COM(2008) 332) for a Council Decision on the establishment of the European Criminal Records System (ECRIS). The proposed Decision is a follow-up to the draft Framework Decision on the exchange of information extracted from criminal records between Member States of the EU, on which the JHA Council principally agreed in June 2007 (see eucrim 1-2 2007, p. 40). The proposal on ECRIS is to implement Article 11 of the Framework Decision and it aims at improving the quality of information exchanged on convictions, which is currently exchanged according to the Convention on Mutual Assistance in Criminal Matters of 1959.

The proposal provides for setting up a computerised conviction-information exchange system between the Member States, defining basic features for a standardized format for the electronic exchange of information extracted from

criminal records. The information that is to be exchanged in the future particularly concerns information on the offence giving rise to the conviction and information on the content of the conviction.

► eucrim ID=0801141

### The Council's Reactions to ECRIS

At its Justice and Home Affairs meeting in July 2008, the Council took note of the Commission's presentation of ECRIS, stating that the proposal will be essential when the Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States is implemented. At the JHA meeting in October 2008, the Council agreed on a Decision providing for the establishment of ECRIS.

► eucrim ID=0801142

The Council also refers to the "pilot project" for ECRIS, the Network of Judicial Registers, which is currently being conducted by 14 Member States and will provide a basis for further work on ECRIS (see eucrim 3-4/2006, p. 76).

► eucrim ID=0801143

### Opinion of the European Parliament on ECRIS

On 9 October 2008, the European Parliament (EP) adopted a legislative resolution amending the proposal for a Council decision on the establishment of ECRIS. The main amendments are:

- The Commission shall provide general support and monitoring services; the EP wants the Commission to play a coordinating and supervisory role in the implementation of ECRIS.
- The EP included short descriptions of the constitutive elements of the offences in the information on national convictions, sanctions, and measures.
- A clause was inserted stating that, where necessary, and in accordance with Article 34 (2) (c) and Article 39 TEU, the Commission shall propose to the Council to adopt all measures needed to ensure an optimum functioning of EC-

RIS and its interoperability with national systems.

► eucrim ID=0801144

### Opinion of the Council Working Party on Cooperation in Criminal Matters

On 1 August 2008, the Working Party on Cooperation in Criminal Matters published its opinion on the above-mentioned proposal of the Commission on ECRIS. The Working Party expressed general support for the proposal. The Working Party welcomed the decentralized architecture of the system (based on national criminal records databases and an interconnection software, both operated under the responsibility of the Member State concerned) and stated that the expected increase in the volume of information exchange as a result of the implementation of the Framework Decision would be a strong argument in favour of the commitment and rapid conclusion of work on this decision.

► eucrim ID=0801145

### EDPS's Opinion on ECRIS

On 16 September 2008, the European Data Protection Supervisor, Peter Hustinx, adopted an opinion on ECRIS. In general, the EDPS supports the present proposal. Nevertheless, he points out that a peer-to-peer network, as ECRIS is set up to be, contains certain risks. On the one hand, the division of responsibilities between the central authorities of the Member States requires additional measures in order to ensure that the information is kept up to date and uniform. On the other hand, the proposal distinguishes between the operational management of ECRIS (technical infrastructure; Commission's responsibility) and the interconnection software, for which the Member States are responsible. According to the EDPS, the Commission should be in control of the technical infrastructure as well as the interconnection software. Overall, the EDPS welcomes ECRIS, and his recommendations only relate to the actual design of ECRIS.

► eucrim ID=0801146

## Law Enforcement Cooperation

### Prosecution of Traffic Offences: Electronic Data Exchange Network Proposed

On 19 March 2008, the European Commission adopted a proposal for a Directive on facilitating cross-border prosecution of traffic offences (COM(2008) 151 final). Currently, a driver committing a traffic offence in a Member State where the vehicle is not registered often cannot be prosecuted due to difficulties with the identification of the driver or the verification of the address where the car is registered. In the end, this not only leads to inadequate road safety, but also to unequal treatment between non-resident and resident drivers, who, in similar cases, are subjected to penalties.

Against this background, the intention of the proposed directive is to facilitate the identification of non-resident drivers through technical measures and legal instruments and to therefore enable law enforcement agencies to prosecute the non-resident drivers in the same way as resident drivers. For this purpose, the Commission intends to establish a European network for electronic data exchange operated by national authorities in charge of vehicle registration documents. The information exchange shall cover information in four cases: (1) speeding, (2) driving under the influence of alcohol, (3) non-use of a seat belt, and (4) failing to stop at a red traffic light. According to the impact assessment study completed in 2007 these four offences are the leading causes of accidents and road deaths.

Thus, the proposal aims at putting in place an efficient system of cross-border enforcement of traffic offences; it deals neither with the harmonisation of road traffic rules nor with harmonising penalties for road traffic offences.

The Council and the European Parliament are expected to deal with the proposal intensively in December 2008.

► eucrim ID=0801147

## Commission's Report on Maritime Surveillance

On 3 November 2008, the Commission published a Working Document on establishing a comprehensive strategy for integrated maritime surveillance for Europe. The report illustrates the current status of offshore surveillance regarding surveillance, monitoring, identification,

tracking, and reporting systems across the EU. It has also an impact to the fight against criminal offences and law enforcement cooperation. In the long run, the intention is to create an integrated European maritime surveillance network to support national authorities in the fight against organised crime.

► eucrim ID=0801148

the protection of human rights, not only within the boundaries of the European Union but also Europe-wide. As the parliamentarians further emphasised, accession will also confirm the European Union's essence as a "community based on law" and strengthen the principle of legal certainty, to the extent that the European Union institutions will be subject to the same external review of the conformity of their acts and decisions as are Member States.

The Parliamentary Assembly therefore urges the governments of the European Union Member States, the European Parliament, and the CoE Committee of Ministers to immediately open negotiations on the accession of the European Union to the European Convention on Human Rights.

► eucrim ID=0801149



## Council of Europe

Reported by Julia Macke, Thomas Wahl, Leonard Ghione, and Johannes Schäuble

### Foundations

#### Relations between the Council of Europe and the European Union

##### Accession of the European Union to the European Convention on Human Rights

At the spring session of the Parliamentary Assembly of the Council of Europe (CoE) from 14 to 18 April 2008, both Resolution 1610 (2008) and Recommendation 1834 (2008) on the accession of the European Union/European Community to the European Convention on Human Rights were adopted. The parliamentarians welcomed therein that today there is a broad consensus on the question of the accession of the European Union to the European Convention on Human Rights and therefore stressed that accession must be the priority in the ongoing dialogue between the CoE and the European Union.

As long as the European Union has not acceded to the European Convention on Human Rights, this non-accession has adverse effects on the proper functioning of European justice as it imperils

the coherence of the system of human rights safeguards in Europe:

- Firstly, there are divergences in human rights standards both at the European level (among European institutions) and between the European Union and its Member States.

- The European Union institutions also do not come under external judicial supervision where respect for human rights and fundamental freedoms are concerned.

- The coherence of European legal protection is not fully assured, since the case law of the European Court of Human Rights and the Court of Justice of the European Communities might not be appropriately harmonised.

- European citizens do not have direct access to the European Court of Human Rights when they consider that their fundamental rights have been violated by the European Union's institutions.

- Finally, execution of the judgments of the European Court of Human Rights remains a difficult undertaking in cases involving European Union law.

In contrast, accession will convey a strong measure of clear commitment to

#### First Success with the Memorandum of Understanding

As stressed by the CoE Committee of Ministers at its 118th Session on 7 May 2008 in Strasbourg, France, the effects of the Memorandum of Understanding between the CoE and the European Union signed a year ago are already visible. It was reported that consultations between the two institutions have increased at all levels and that working relations have been strengthened in areas of common interest. Additionally, ministers called for a continued intensification of effective cooperation in priority areas as foreseen by the Memorandum. The cooperation agreement between the CoE and the European Union Agency for Fundamental Rights is specifically mentioned in this context. Besides, there is an increasing tendency to consult the CoE on draft European Union legislation as well as to make reference to CoE standards in European Union policies and legislation. That notwithstanding, other mechanisms of cooperation mentioned in the Memorandum may be further explored in the nearest future. This applies, for instance, both to the cooperation mechanisms aimed at the reinforcement of political



dialogue on issues of mutual interest and to the question of people-to-people contacts between Europeans throughout the continent.

The Ministers also turned their attention to the follow-up to the Juncker-report on the relations between the CoE and the European Union. They stressed that several recommendations have already been taken into consideration, such as the reform of the ministerial sessions and the enhanced cooperation between the CoE Human Rights Commissioner and the European Union institutions.

Further information about the Memorandum of Understanding and the Juncker-report can be found in eucrim 1-2/2007, pp. 41-42, and eucrim 3-4/2006, pp. 81-82.

➤ eucrim ID=0801150

At a meeting on 27 November 2008, the Committee of Ministers adopted the Priorities for future action in cooperation with the European Union. The document anticipates an overall assessment of relations between the two organisations that was to be presented at the 119th ministerial session in Madrid on 12 May 2009. It identifies focal areas of cooperation within the context of the implementation of the MoU.

➤ eucrim ID=0801151

## Relations between the Council of Europe and the United Nations

### Closer Cooperation between the CoE and the UN

On 3 November 2008, the UN General Assembly unanimously adopted a resolution (document A/63/L.12) on strengthened cooperation with the CoE. The General Assembly thereby expressed its support for the development of cooperation between the two institutions.

The need for cooperation between the UN Peacebuilding Commission and the CoE is highlighted as regards post-conflict reconstruction, including matters of human rights and the rule of law.

Furthermore, cooperation between the Office of the UN High Commissioner for Refugees and the CoE in the areas of nationality, democracy, and good governance should be fostered. The Resolution further encourages cooperation between both organisations in the fight against money laundering and corruption. Finally, the Secretaries-General of the UN and the CoE are asked to combine efforts in their pursuit of answers to global challenges. A report on the implementation of the resolution shall be delivered by the 65th session of the General Assembly.

In his speech on the occasion of the adoption of the Resolution, CoE Secretary General Terry Davis underlined that, especially in a world facing economic turmoil and terrorism, the need to respect the values of humanity is even more important.

➤ eucrim ID=0801152

## Reform of the European Court of Human Rights

### New Hope for Protocol No. 14?

Protocol No. 14 has still not entered into force because the last ratification needed for the Protocol's entry into force is still missing. Up to now, Russia refused to ratify the Protocol. However, new developments in Russia raise new hope: The Russian Minister of Justice requested the State Duma to reconsider the non-ratification of Protocol No. 14 to the European Convention on Human Rights.

In addition, the highest Russian judicial authorities confirmed that the existing Russian legal framework would exclude the application of the death penalty and expect the Russian authorities to rapidly translate this position into a constitutional principle which would enable the country to ratify Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty.

➤ eucrim ID=0801153

## Leading Politicians Back Court's Reform Plans

Meanwhile, leading European politicians strongly support the efforts of the Council of Europe and the European Court of Human Rights to solve the present lack of reform and to secure Russia's ratification of Protocol No. 14. For instance, Dr. Angela Merkel, the Federal Chancellor of Germany, herself expressed that she had discussed the sensitive issue of Protocol No. 14 several times with the former President Putin on the occasion of a visit to the European Court of Human Rights on 15 April 2008 and that she would continue to raise this question with his successor Mr. Medvedev.

➤ eucrim ID=0801154

Furthermore, Mr Bernard Kouchner, the French Minister for Foreign and European Affairs, and President Ivan Gašparovic of Slovakia, raised the issue of Protocol No. 14 within the framework of visits to the Court in April 2008.

➤ eucrim ID=0801155

At the 118th Session of the CoE Committee of Ministers on 7 May 2008, the Committee of Ministers also reiterated the regret that, four years after its adoption, Protocol No. 14 has still not entered into force. The Ministers stressed the significant increase of efficiency and capacity that the Protocol would introduce to the benefit of European citizens and therefore underlined that the measures contained in Protocol No. 14 should be implemented in the nearest future. The Ministers added that this would also make it possible to follow up on the recommendations of the Wise Persons in a comprehensive and meaningful way.

➤ eucrim ID=0801156

For further information about Protocol No. 14 and the recommendations of the Wise Persons see eucrim 3-4/2006, pp. 82-83, eucrim 1-2/2007, pp. 42-43, and eucrim 3-4/2007, p. 112.

## Ten Years of the "New" Court

Protocol No. 11 to the European Convention on Human Rights establishing the present single system of the Court

entered into force on 1 November 1998. On the occasion of its 10th anniversary, a seminar was held at the Court on 13 October 2008. The focus lay on the topics of the development of the right of individual petition and European human rights case law. The President of the Court, Jean-Paul Costa, highlighted the introduction of the single system as a landmark in the development of international human rights protection, giving 800 million Europeans the possibility to apply directly to an international court. To mark this occasion, a new monolingual (French or English) web portal ([www.echr.coe.int](http://www.echr.coe.int)) was launched to offer improved information on the activities of the “new” Court.

► [eucrim ID=0801157](#)

### ECtHR Delivers its 10 000th Judgment

On 18 September 2008, the European Court of Human Rights (ECtHR) announced that it has delivered its 10,000th judgment since its establishment in 1959. The judgment concerned the applicants’ complaint that their relative disappeared after being abducted from their village in Chechnya by Russian servicemen (*Takhayeva and Others v. Russia*, no. 23286/04). The first judgment dates from 1961 and dealt with the case “*Lawless v. Ireland*”. Around 95,000 applications are currently pending before the ECtHR. In 2007, the ECtHR delivered over 1500 judgments on the merits, while it declared over 27,000 applications inadmissible.

► [eucrim ID=0801158](#)

### Execution of Judgments of the European Court of Human Rights

#### First Annual Report Published

On 26 March 2008, the CoE Committee of Ministers published its first annual report on its supervision of the execution of the judgments of the European Court of Human Rights. The report is designed to underline the importance of the Com-

mittee of Ministers’ work in this field. Henceforth, such a report shall appear annually.

The 264-page report covers the period from January to December 2007 and gives an overview of issues and statistical information in the execution of the main cases before the Committee of Ministers. More precisely, the report contains an introduction by the 2007 Chairs of the Human Rights meetings, some remarks by the Director General of Human Rights and Legal Affairs, an overview of the procedure before the Committee of Ministers, and a thematic overview of the main issues examined by the Committee in 2007. It also contains a number of statistics and information on different types of resolutions adopted as well as information on memoranda and other relevant public documents prepared.

► [eucrim ID=0801159](#)

As already presented in [eucrim 3-4/2007](#), pp. 113-115, the CoE Committee of Ministers is responsible for the execution of judgments of the European Court of Human Rights according to Article 46 § 2 of the European Convention on Human Rights. Information about the two last meetings of the Committee of Ministers in September and December 2008 can be retrieved via the following link:

► [eucrim ID=0801160](#)

#### Rapid Execution of Judgments of the European Court of Human Rights Recommended

On 6 February 2008 already, the Committee of Ministers adopted Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. The Committee of Ministers, which is convinced that rapid and effective execution of the Court’s judgments contributes to enhancing the protection of human rights in Member States and to the long-term effectiveness of the European human rights protection system, recommends therein that Member States:

- Designate a co-ordinator – individual or body – for the execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process
- Ensure, whether through their permanent representation or otherwise, the existence of appropriate mechanisms for effective dialogue and the transmission of relevant information between the co-ordinator and the Committee of Ministers
- Take the necessary steps to ensure that all judgments to be executed, as well as all relevant decisions and resolutions of the Committee of Ministers related to these judgments, are duly and rapidly disseminated – if necessary, in translation – to relevant actors in the execution process
- Identify, as early as possible, the measures which may be required in order to ensure rapid execution
- Facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level, either generally or in response to a specific judgment, and to identify their respective competences
- Rapidly prepare, where appropriate, action plans on the measures envisaged to execute judgments, including an indicative timetable if possible
- Take the necessary steps to ensure that relevant actors in the execution process are sufficiently acquainted with the Court’s case law as well as the relevant Committee of Ministers’ recommendations and practices
- Disseminate the *vademecum* prepared by the CoE on the execution process to relevant actors and encourage its use, as well as that of the database of the CoE with information on the state of execution in all cases pending before the Committee of Ministers
- Keep their parliamentarians informed, as appropriate, of the situation concerning execution of judgments and measures being taken in this regard
- Ensure where required by a significant persistent problem in the execution

### New Book on the Execution of Judgments Published

In March 2008, the 2nd edition of the study conducted by Elisabeth Lambert-Abdelgawad was published, entitled "The execution of judgments of the European Court of Human Rights". In this study, the author examines both individual measures and general measures taken by States in accordance with the Court's judgment and the supervisory proceedings of the Committee of Ministers.

► eucrim ID=0801161

process, that all necessary remedial action be taken at a high level, political if need be.

► eucrim ID=0801162

### Colloquy on Implementation of the ECHR at National Level

In this context, it is also interesting that a colloquy, entitled "Towards stronger implementation of the European Convention on Human Rights at national level", took place in Stockholm, Sweden, from 9 to 10 June 2008. Around 150 representatives of governments, the European Court of Human Rights and other CoE bodies, as well as representatives of international governmental and non-governmental organisations, discussed how the CoE's 47 Member States can improve national remedies, strengthen the effect of the Court's case-law and assist Member States in implementing the European Convention on Human Rights (ECHR).

► eucrim ID=0801163

### Other Human Rights Issues

#### Common CoE and EU Training Programme for National Human Rights Structures Started

On 3 April 2008, the CoE Commissioner for Human Rights, Thomas Hammarberg, and the European Union mutually launched a joint training programme

for national human rights structures. This two-year programme, entitled "Peer-to-Peer Project", aims at empowering national human rights structures (such as ombudsmen and national institutions) to help prevent and find solutions to human rights violations more effectively and set up an active network of independent non-judicial bodies in CoE Member States. It will strengthen the human rights competences of specialised staff members belonging to national structures through a series of training programmes, peer review activities, and exchanges of good practices. Furthermore, the programme foresees the possibility of providing technical assistance to establish new, independent, and effective human rights structures at the domestic level. The project, the funding of which amounts to €900,000 will have a special focus on non-EU countries.

At the core of this project is the awareness that human rights protection could often be better ensured at the national level while it is becoming increasingly difficult for international control bodies to deal with violations in a timely manner.

► eucrim ID=0801164

#### Improved Protection of Human Rights Defenders Recommended

On 6 February 2008, the CoE Committee of Ministers adopted a declaration of CoE action to improve the protection of human rights defenders and promote their activities.

Therein, the Committee of Ministers deplores the fact that human rights defenders, including journalists, are all too often victims of violations of their rights, threats and attacks, despite efforts at both the national and international levels. It believes that human rights defenders merit special attention, as such violations may indicate the general situation of human rights in the state concerned or deterioration thereof. It pays tribute to their invaluable contribution towards promoting and protecting human rights and fundamental freedoms, and it condemns all attacks on and violations of

the rights of human rights defenders in CoE Member States or elsewhere, whether carried out by state agents or non-state actors.

Therefore, the Committee of Ministers, inter alia, calls on Member States to

- create an environment conducive to the work of human rights defenders, enabling individuals, groups, and associations to freely carry out activities, on a legal basis, that are consistent with international standards, in order to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights;

- strengthen their judicial systems and ensure the existence of effective remedies for those whose rights and freedoms are violated;

- take effective measures to prevent attacks on or harassment of human rights defenders, ensure independent and effective investigation of such acts, and hold those responsible accountable through administrative measures and/or criminal proceedings;

- consider giving or, where appropriate, strengthening the competencies and capacities of independent commissions, ombudspersons, or national human rights institutions to receive, consider, and make recommendations for the resolution of complaints by human rights defenders about violations of their rights;

- ensure that their legislation – in particular on freedom of association, peaceful assembly, and expression – is in conformity with internationally recognised human rights standards and, where appropriate, seek advice from the CoE in this respect;

- ensure the effective access of human rights defenders to the European Court of Human Rights, the European Committee of Social Rights, and other human rights standards;

- cooperate with the CoE human rights mechanisms and in particular with the European Court of Human Rights and the Commissioner for Human Rights, and

■ provide measures for the swift assistance and protection of endangered human rights defenders in third countries.

The Committee of Ministers further calls on all CoE bodies and institutions to pay special attention to issues concerning human rights defenders in their respective work. This shall include providing information and documentation, including that on relevant case law and other European standards, as well as encouraging cooperation and awareness-raising activities with civilian organisations and encouraging human rights defenders' participation in CoE activities. Finally, the Committee of Ministers invites the Commissioner of Human Rights to strengthen the role and capacity of his Office in order to provide strong and effective protection for human rights defenders with several measures, such as continuing to meet with a broad range of defenders during his country visits and to report publicly on the situation of human rights defenders.

► [eucrim ID=0801165](#)

### **New Website "Human Rights and Legal Affairs" Launched**

On 30 April 2008, a new website of the CoE Directorate General of Human Rights and Legal Affairs was launched which contains complete information on standard-setting and monitoring activities in this field, news by country and field of activity, as well as the work of the Venice Commission for Democracy and cooperation with Member States.

► [eucrim ID=0801166](#)

## **Specific Areas of Crime**

### **Corruption**

#### **GRECO: Eighth General Activity Report (2007) Published**

On 8 April 2008, the CoE Group of States against Corruption, GRECO, published

its Eighth General Activity report (2007) which provides details on GRECO's operation during 2007 and its cooperation with other international players. The report particularly contains information on GRECO's First and Second Evaluation Rounds, the first visits carried out, and the reports adopted in connection with the Third Evaluation Round which was launched in January 2007. A special chapter is devoted to the issue of "revolving doors", based on GRECO's Second Round Evaluations and a *tour de table* held on this topic in October 2007, which dealt with the challenging issue of how to best regulate the movement of public officials to the private sector.

► [eucrim ID=0801167](#)

#### **GRECO Third Round Evaluation Reports – General Remarks**

GRECO is the Council of Europe's anti-corruption monitoring body which looks into CoE Member States' compliance with the organisation's anti-corruption standards. As reported in *eucrim* 3-4/2006, p. 84, GRECO launched three evaluation rounds (the third one in January 2007), in which experts assess the compliance of the CoE Member States with the anti-corruption framework of the CoE. Each cycle of the evaluation round focuses on specific themes. GRECO's first evaluation round (2000–2002) dealt with the independence, specialisation, and means of national bodies engaged in the prevention of 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 (launched in January 2007) addresses (1) the incriminations provided for in the Criminal Law Convention on Corruption and (2) the transparency of party funding.

GRECO draws up a number of recommendations for the States in order to improve their level of compliance with the provisions under consideration. In a separate procedure, the implementation of the recommendations is observed 18 months after the adoption of the evaluation report (compliance procedure). More information on how GRECO works can be retrieved via the following website:

► [eucrim ID=0801168](#)

Since spring 2008, GRECO has published a number of country reports from the third evaluation round. These reports all consist of two parts because GRECO's Third Round deals with two distinct topics. The following gives an overview, first, of the reports on the specific countries in the third evaluation round and, second, recent reports concerning the first and second evaluation rounds. As regards the latest compliance reports or addenda to compliance reports, reference is made to the following website:

► [eucrim ID=0801169](#)

#### **GRECO: Third Round Evaluation Report on Latvia**

The Third Round Evaluation Report on Latvia was published on 23 October 2008. Regarding the criminalisation of corruption, several inconsistencies and deficiencies regarding the requirements established by the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) were criticised by GRECO. Given the significant differences in the understanding of the terminology of the provisions on bribery, a clarification was called for. Furthermore a broader criminalisation of bribery was demanded, including, inter alia, active bribery of "ordinary" employees in the private sector and bribery of arbitrators and foreign jurors in line with the standards of the Convention and the Additional Protocol.

As for the transparency of party funding, GRECO considers the existing legal and institutional framework as be-

ing well-developed. Notwithstanding, the experts expressed their concerns on the involvement of entities outside the party structure in election campaigns in the 2006 parliamentary elections. They additionally recommended strengthening the independence of the supervision body of party funding.

►eucrim ID=0801170

### GRECO: Third Round Evaluation Report on the Netherlands

On 10 September 2008, the Third Round Evaluation Report on the Netherlands was presented to the public. Though the criminalisation of corruption was considered to be in compliance with the CoE Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191), GRECO gave advice, ranging from increasing the sanctions for private sector bribery to reviewing the reservations made regarding the Convention.

As for the matter of transparency of party funding, the Dutch legal framework does not comply with the requirements of Recommendation Rec (2003)4 of the Committee of Ministers of the CoE. Therefore, GRECO stressed the necessity that all entities represented in the Parliament annually report their financial situation in appropriate detail and that these reports be public. The Netherlands were asked to establish an independent monitoring of political financing rules.

In this regard, GRECO welcomes a draft law on the Financing of Political Parties prepared by the Ministry of the Interior that is considered to address a number of the concerns raised in this context.

►eucrim ID=0801171

### GRECO: Third Round Evaluation Report on Luxemburg

On 25 August 2008, GRECO published the Third Round Evaluation Report on Luxemburg, stating that the legal framework on the criminalisation in this country observes the standards set by the

CoE to a large extent. It only mentioned several shortcomings caused by apparent oversights by parliament or a lack of consistency between neighbouring provisions concerning the criminalisation of corruption. Furthermore, the report criticises the low number of convictions for corruption that are seemingly due to the authorities' lack of resources.

Concerning the transparency of party funding, GRECO welcomes the adoption of the law on political party funding, introducing public funding of routine party activities and rules on transparency and monitoring, and leaving only some gaps, for example, in the financing of election campaigns. Because this law breaks such new ground, the improvements still need to be determined.

►eucrim ID=0801172

### GRECO: Third Round Evaluation Report on Slovenia

On 13 June 2008, GRECO published its Third Round Evaluation Report on Slovenia. Regarding the criminalisation of corruption, it stated that further steps are required to align Slovenian legislation with the CoE Criminal Law Convention on Corruption and its Additional Protocol. Problematic is, for instance, that bribery for acts not falling strictly within an official's statutory duties are still not covered and that Slovenian courts do not have national jurisdiction over bribery and trading in influence offences committed outside Slovenia by Slovenian citizens.

As to the transparency of party funding, GRECO comes to the conclusion that, although the Slovenian legislation has a good standard on paper, the picture is less convincing in practice. It seems to be easy for political parties and other election campaign organisers to circumvent existing legal provisions. GRECO therefore urges the Slovenian authorities to ensure that effective independent supervision is in place and that party and campaign finance rules are adequately enforced.

►eucrim ID=0801173

### GRECO: Third Round Evaluation Report on Iceland

On 16 April 2008, GRECO published its Third Round Evaluation Report on Iceland. As to the criminalisation of corruption, GRECO arrived at the conclusion that Icelandic criminal legislation largely complies with the relevant provisions of the CoE Criminal Law Convention on Corruption. However, Iceland has to ensure that Members of Parliament are covered by the provisions on bribery and trading in influence. GRECO further recommended that a more proactive approach in the detection, prosecution, and punishment of corruption start being pursued in Iceland. Regarding the transparency of party funding, GRECO recommends the introduction of a new legislative framework on political financing. Furthermore, several shortcomings were found. For example, transparency rules in relation to the campaign finances of presidential candidates are still needed.

►eucrim ID=0801174

### GRECO: Third Round Evaluation Report on Estonia

On 15 April 2008, the report on Estonia was published. With regard to the criminalisation of corruption, GRECO confirmed that the criminal law of Estonia complies to a large extent with the relevant provisions of the CoE Criminal Law Convention on Corruption, even if some shortcomings were identified, such as the limited scope of application of bribery provisions. In this context, GRECO welcomed the preparation of draft amendments to the Estonian Penal Code which is currently underway. GRECO nevertheless recommended to the Estonian authorities that they criminalise active and passive bribery of domestic and foreign arbitrators in accordance with the Additional Protocol to the Criminal Law Convention on Corruption and sign and ratify this instrument as soon as possible. Concerning the transparency of party funding, GRECO found that the political financing sys-

tem in Estonia suffers from ineffective supervision and a lack of enforcement of existing rules despite some recent improvements.

►eucrim ID=0801175

### GRECO: Third Round Evaluation Report on the United Kingdom

The Third Round Evaluation Report on the United Kingdom was published on 3 April 2008. The report states that the criminal law of the United Kingdom also complies with the relevant provisions of the CoE Criminal Law Convention on Corruption. Nonetheless, the United Kingdom is called upon to establish an entirely coherent legal framework for corruption offences and review its position regarding two reservations with respect to the Criminal Law Convention on Corruption, notably through the criminalisation of trading in influence. As to the transparency of party funding, GRECO praised the existing legal system of the United Kingdom which is of a high standard. Nevertheless, public trust could be strengthened if the United Kingdom would further strengthen the transparency requirements for political parties, candidates, and third parties, confer a more proactive role on the Electoral Commission, and introduce more flexible sanctions for less serious violations of political financing rules.

►eucrim ID=0801176

### GRECO: Third Round Evaluation Report on the Slovak Republic

On 14 March 2008, GRECO published the report on the Slovak Republic. Therein, GRECO criticised the complex and cumbersome nature of Slovakia's legal provisions dealing with corruption and recommended quite a number of improvements. In contrast, as regards the transparency of party funding, GRECO stressed that the legal regulations in this area are, to a large extent, in line with the relevant standards of the CoE. Indeed, some shortcomings should be eliminated in the near future, such as the expenditure incurred by individual can-

didates, which is inadequately regulated, and the supervision of political parties' compliance with the regulations which is too fragmented and formalistic.

►eucrim ID=0801177

### GRECO: Joint First and Second Round Evaluation Report on Monaco

On 14 November 2008, GRECO published its Joint First and Second Round Evaluation Report on Monaco. After the recent ratification of the CoE Criminal Law Convention on Corruption (ETS 173) by the Principality, this report is considered to serve as a basis for discussions and new initiatives in respect of the introduction of specific anti-corruption measures.

The report states that only few cases of corruption genuinely pass through the justice system. One reason for this is that the country pays great attention to preserving its image. Furthermore, significant gaps in the legal anti-corruption framework are identified. For example, many mechanisms in the area of detection, seizure, and confiscation of proceeds from crime, introduced in the last few years in the anti-money laundering context, are limited only to organised crime and drug trafficking and are therefore not fully applicable in the field of corruption. Additionally, only few preventive measures already exist and, beyond that, they are often ignored by public officials.

In total, GRECO made 28 recommendations to Monaco, such as introducing new criminal provisions or adopting a working programme to raise awareness of the importance of combating corruption.

►eucrim ID=0801178

### GRECO: Joint First and Second Round Evaluation Report on Switzerland

On 2 June 2008, GRECO published its Joint First and Second Round Evaluation Report on Switzerland. It arrives at the conclusion that the major efforts made by Switzerland since 2000 must be continued in order to increase its ability to prevent, detect, and punish corruption

in its various domestic forms, for example in connection with public procurement and tendering as well as the issuing of permits, authorisations, and licences, which are among the areas at risk. It is also mentioned that the country's highly decentralised structure is disadvantageous for anti-corruption investigations and, therefore, more dialogue on this point is needed.

It is positively stressed that measures are available to combat the proceeds of corruption, and the basic machinery is in place for preventing corruption in government, including the introduction of corporate criminal liability in 2003. However, as regards the latter aspect, the report makes recommendations for a better application of the law. Further efforts are also needed concerning transparency, access to information, financial audits, etc.

►eucrim ID=0801179

### New Anti-Corruption Projects – State of Play

In eucrim 1-2/2007, p. 44, it was reported that the CoE launched three new Anti-Corruption projects to support the governments of Azerbaijan, Georgia, and Turkey in their ongoing reforms and efforts to restrict and prevent corruption and strengthen good governance in line with European standards. The following reports on the latest developments in these projects:

#### Azerbaijan: AZPAC

After the start-up conference of the AZPAC project in December 2007, several activities took place: A "Training on Performance Evaluation for the Civil Servants of Azerbaijan" took place in Baku on 15-16 September 2008, aiming at assessing and reviewing the draft civil service commission regulations. On 22 July 2008, the CoE and the U.S. Department of Justice held a public awareness seminar on money laundering and the financing of terrorism. In addition, a joint round table discussion was organised within the frameworks of AZPAC and

GEPAC (see below) in Baku on 16 and 17 July 2008 in order to present different methodologies and best practices on the conduction of surveys on corruption.

Further activities took place in March 2008: Two events on introducing the anti-corruption strategy and action plan were organised by the CoE in order to increase public awareness of reforms and commitments with regard to combating corruption. They took place in two different regions of the Republic of Azerbaijan – in Sheki on 17 March 2008 and in Ganja on 18 March 2008. On 21 February 2008, a workshop on the new anti-corruption strategy and action plan was held in Baku, Azerbaijan. A further workshop on drafting and the assessment of training needs and modalities for the Civil Service Commission was held on 31 January 2008 in Baku, Azerbaijan with 80 participants.

AZPAC is the new anti-corruption project in Azerbaijan, called “Support to the Anti-corruption Strategy of Azerbaijan”. For further information, see also eucrim 1-2/2007, p. 44, and eucrim 3-4/2007, p. 115.

➤eucrim ID=0801180

#### Georgia: GEPAC

Further activities took place in the context of the new GEPAC project: On 8 October 2008, the GEPAC Steering Group (SG) held its 2nd meeting in Tbilisi. One issue of this meeting was, inter alia, the review and update of the Anti-Corruption Strategy and Action Plan. The Georgian representatives seized the opportunity to stress that, in the future, GEPAC activities will also take into account GRECO recommendations addressed to Georgia and highlight the upcoming ratification of the United Nations Convention against Corruption (UNCAC).

In June and July 2008, three regional workshops on public access to information took place in Signagi, Kutaisi, and Batumi. They aimed at presenting the legal and practical framework and solutions for efficient and lawful dissemination of public information to representa-

tives of local authorities. On 22 April 2008, the 1st GEPAC Project Steering Group Meeting was held. From 20 to 21 April 2008, two trainings on the Code of Ethics for senior prosecutors took place. On 6 March 2008, a further round table discussion on possible options for the future of specialised anti-corruption structures in Georgia was organised. In addition, a round table discussion on tools for the reporting and implementation of anti-corruption measures was held on 28 January 2008 in Tbilisi, Georgia; a round table on the elaboration of integrity assessment also took place from 4 to 5 March 2008 in Tbilisi, Georgia; and a training on the newly adopted law on legalisation of property in Georgia was held on 22 February 2008.

The GEPAC project aims at strengthening Georgian institutions' capacities in their anti-corruption efforts (see also eucrim 1-2/2007, p. 44, and eucrim 3-4/2007, p. 115).

➤eucrim ID=0801181

#### Turkey: TYEC

With regard to the cooperation project with Turkey, the so-called TYEC project, several activities took place for the support of the implementation of the Turkish Regulation on the Principles of Ethical Behaviour for Public Officials (Code of Ethics) across the public administration. The matter concerns one of four main aims of the TYEC project.

From 19-24 October 2008, the first ethic training activity was held in a Turkish public sector training company. Between 9 and 13 June 2008, a study visit took place with the participation of the members of the Council of Ethics, the TYEC Long Term Advisor, and the Secretariat of the Council of Europe. The aim of this meeting was to review and improve the work of the Council of Ethics by exchanging experiences with similar institutions, namely the EU Audit Commission, the UK Commission on Standards in Public Life, the Standards Board for England, and the Irish Government's Standards in Public Office Commission.

On 27 May 2008, a conference on international standards on the principals of ethics took place in Ankara, Turkey, which aimed at comparing the practices of other homologous institutions and sharing good practices. It focused on the Practical Value of Ethics Training, Infrastructure, and Useful Tools in the United Nations system, and on the adoption of the Ethics Framework in the European Union Member States.

The TYEC “Project on Ethics for the Prevention of Corruption in Turkey” primarily aims at supporting the implementation of the Turkish Code of Ethics across the public administration in line with GRECO recommendations (see also eucrim 1-2/2007, p. 44, and eucrim 3-4/2007, p. 115).

➤eucrim ID=0801182

#### Ukraine: UPAC

Further activities also took place regarding the current anti-corruption project in the Ukraine (UPAC; see eucrim 1-2/2006, p. 21, and eucrim 3-4/2006, p. 84). The project aims at strengthening Ukrainian institutions' capacities in their anti-corruption efforts. A round table on the effectiveness of the national anti-corruption policy and the role of civil society and the private sector was held in Kyiv on 16 October 2008. One month earlier, another round table (organised jointly by the CoE and the European Commission) aimed at improving legislation and practices on identification, seizure, and confiscation in order to meet with international and European standards. Both entities also organised a conference on the prevention of political corruption on 1 and 2 July in Kyiv, providing the opportunity to review and discuss issues such as the funding of political parties and electoral campaigns, immunities, the integrity of elected representatives, and lobbying. From 26 to 30 May 2008 a study visit about existing practices in different European Anti-corruption Services took place in Paris, France and Ljubljana, Slovenia. Beforehand, a meeting of the UPAC Project

Steering Committee took place on 31 March 2008 in Strasbourg, France. On 28 January 2008, a workshop on European standards regarding legislation, regulations, and practices on the financing of political parties and electoral campaigns in the light of European standards was also held in Strasbourg, France. A round table discussion on “Development of proposals on establishing anti-corruption body in Ukraine” had already taken place on 15 January 2008.

► [eucrim ID=0801183](#)

## Money Laundering

### MONEYVAL Third Round Evaluation Reports – General Remarks

Similar to the activities in the field of corruption, an expert committee of the Council of Europe (CoE), abbreviated MONEYVAL, carries out evaluations and peer reviews to ensure that its member states have effective systems to counter money laundering and terrorist financing in place. The aim is to comply with the relevant international standards in these fields, including the 40 recommendations of the Financial Action Task Force (FATF) of 2003 as well as UN, CoE, and EC law. The evaluations consider the practice and rules of the FATF. Evaluated by MONEYVAL are those Council of Europe’s Member States (and the Council of Europe’s applicants which apply to join the terms of reference) which are not members of the FATF (see also [eucrim 1-2/2007](#), p. 44).

Part of the evaluation procedure is the collection of information through a questionnaire and an on-site country visit by an expert team. MONEYVAL has launched three evaluation rounds so far. The current third evaluation round runs from 2005-2010 and focuses on the effectiveness of the legal, financial and law enforcement measures in place to combat both money laundering and financing of terrorism.

The following continues the overview of evaluation reports in [eucrim 3-4/2007](#), pp.115-117, presenting country by country the reports which have been published over the last months. The reports analyse the structures in place and provide recommendations on how certain aspects of the national systems could be improved. It also sets out the respective country’s level of compliance with the so-called FATF 40 + 9 Recommendations. As to the compliance with these recommendations, all countries are required to provide a progress report 12 months after the adoption of the third round report. The Committee may invoke further peer pressure through a “compliance enhancing procedure”, consisting of a graduated series of steps to ensure compliance with specific aspects of the mutual evaluation report. More information about the activities and functioning of MONEYVAL can be retrieved via the following website.

► [eucrim ID=0801184](#)

### MONEYVAL Third Round Evaluation Report on “FYOM”

On 3 December 2008, the Council of Europe’s MONEYVAL Committee presented the Third Round Evaluation report on the Former Yugoslav Republic of Macedonia (FYOM) to the public. The evaluators welcomed FYOM’s efforts to improve the legislative framework against money laundering and terrorist financing, in particular through the new law on the prevention of money laundering and other proceeds of crime of 2004. It also noted that the regulation regarding the money laundering offence is basically in line with international standards, though it partly even exceeds these standards, e.g. by also criminalising negligent money laundering. Major deficits, however, appear in the application of the law since for example only few money laundering cases are pending before the courts. Furthermore, anti-money laundering investigations have focused nearly exclusively on tax evasion, seemingly not taking into account

money laundering in relation to other predicate offences, such as fraud, bribery or trafficking in human beings.

As regards financing of terrorism, the report negatively remarks that no autonomous criminal offence of financing of terrorism is provided for and that there are several shortcomings with respect to the implementation of the penal provisions of the UN Convention on the Suppression of Terrorist Financing in substantive criminal law. Moreover, the preventive law addresses the prevention of terrorist financing in an insufficient way. It is also noted that the Financial Intelligence Unit (FIU) is an administrative body with no investigative powers whose main task is to gather information on transactions with a view to submitting reports to the authorised bodies.

► [eucrim ID=0801185](#)

### MONEYVAL: Third Round Evaluation Report on Romania

On 17 October 2008, MONEYVAL published its Third Round Evaluation Report on Romania. The report states that, compared to the second evaluation round, the Anti-Money-Laundering (AML) and the Combating the Financing of Terrorism (CFT) legislation seems to be in place and in line with the international requirements. Though, at the time of the on-site visit, the new provisions on Financing of Terrorism had not yet been examined in any investigation of prosecution. As regards the preventive legal framework, the report identifies a number of gaps in key areas. For example, the AMT/CFT preventive measures don’t address designated non financial businesses and professions. Furthermore, the report criticises that the Romanian Financial Intelligence Unit NOPCML lacks sufficient staff in respect of the large number of entities to be supervised.

► [eucrim ID=0801186](#)

### MONEYVAL: Third Round Evaluation Report on the Russian Federation

As a result of a joint evaluation by the FATF, MONEYVAL and the Eurasian



Group (EAG), the Third Round Evaluation Report on the Russian Federation was published on 1 October 2008. Firstly, it was found that with regard to money laundering, Russia now follows an “all crimes approach”, covering all designated categories of offences apart from insider trading and market manipulation. However, Russia has not yet complied with the recommendations of the last report as to the criminalisation of negligent money laundering and the establishment of a criminal liability for legal persons. Secondly, the report criticises the Russian supervisory authorities’ lack of an adequate level of sanctioning powers and the missing specific prohibition of criminal ownership of financial institutions.

► eucrim ID=0801187

#### **MONEYVAL: Third Round Evaluation Report on San Marino**

On 22 September 2008, MONEYVAL published its Third Round Evaluation report on San Marino. As to the criminalisation of money laundering, the legislation of San Marino was supposed to be in line with the international standards. Instead, the anti-terrorist financing legal framework doesn’t meet the requirements and deserves review. This also applies to the preventive system dealing with customer identification. In this context, the experts identified deficiencies in AML/CFT supervision in the banking area and recorded that designated non-financial businesses and professions are neither supervised nor monitored. Additionally, staff resources appeared to be inadequate.

Serious concerns were raised regarding the Financial Intelligence Unit of San Marino. It was recommended to adopt specific legislation to clearly define its functions, responsibilities and powers as an independent agency.

► eucrim ID=0801188

#### **MONEYVAL: First Evaluation Report on Israel Published**

On 17 September 2008, the report on Israel was published. Although it is within

the third evaluation round, it is the first report concerning Israel. Though the Israeli AML/CFT system seems to be in place, MONEYVAL recommended to close some legislative gaps and to remove some financial thresholds that restrict the requirements of AML/CFT regimes. Furthermore, MONEYVAL stated that the legal system of confiscation of criminal proceeds is modern and robust, but limited on only a number of important areas like drug trafficking and organised crime. Therefore, the experts suggested the extension of the confiscation measures to all relevant offences.

The experts also appreciated the vital and professional role of the Israeli Financial Intelligence Unit IMPA that has established confiding relations to the reporting entities. As regards the supervision mechanisms, it was criticised that there is no mechanism for ensuring a consistent implementation of an appropriate and sufficient level of supervision across the whole financial sector. Only the arrangements regarding AML/CFT in the context of supervising banking corporations, portfolio managers and insurers seemed to be satisfactory.

► eucrim ID=0801189

#### **MONEYVAL: Third Round Evaluation Report on Andorra**

In the Third Round Evaluation Report on Andorra, published on 28 July 2008, MONEYVAL first of all acknowledged that the laundering offence of the Criminal Code enacted in 2005 now covers more predicate offences of money laundering than before. Since 2004, the provision has been used in 38 proceedings with several convictions achieved. At the same time though, areas like laundering by negligence or criminal liability of legal persons are no longer covered.

As regards the preventive measures, a number of gaps were pointed out. For instance, at the time of the on-site visit, designated non-financial businesses and professions have never been supervised in practise. Professions offering a range

of services to companies and individuals like accountants and tax advisers have not made any suspicious transaction reports at all. Additionally, there are no legal obligations to report suspicions of terrorist financing.

Furthermore, MONEYVAL observed that Andorra, which doesn’t have a special legal framework for the implementation of international sanctions, manages to apply these sanctions and to respond to requests from abroad by using a flexible interpretation of general criminal law. In principle, Andorra is also able to grant legal assistance. However, several recommendations were made to improve the international cooperation in criminal matters.

► eucrim ID=0801190

#### **MONEYVAL: Third Round Evaluation Report on Bulgaria**

On 4 July 2008, the Third Round Evaluation Report on Bulgaria was published. First of all, MONEYVAL observed some legislative reforms: In the Bulgarian Criminal Code, money laundering is now a stand-alone crime and separate criminal offences of terrorist financing have been introduced. Furthermore, the Law for the Measures against Financing Terrorism (LMFT) has been adopted. The Law on Forfeiture of Proceeds of Crime now allows the confiscation of a defendant’s direct and indirect proceeds of significant value after conviction for identified serious offences. The procedure for confiscation also includes a reversal of the burden of proof and applies to third parties.

As to preventive measures, MONEYVAL mentions the broad scope of reporting entities, including privatisation bodies, sport organisations or political parties. The supervision is jointly performed by the Financial Intelligence Agency (FIA) as the central responsible authority and several other authorities. Having in mind the number of reporting entities and limited resources of FIA, the experts recommended that the power to impose sanctions should also be given to

all supervisory authorities and the FIA should be granted additional resources.

► [eucrim ID=0801191](#)

### **MONEYVAL: New Report on Croatia**

On 14 April 2008, MONEYVAL, published its Third Round Evaluation Report on Croatia. As regards the money laundering situation, the experts found that the money laundering offence is – apart from some inconsistencies – basically in line with international standards. For example, criminal liability has been extended to legal persons. As to the financing of terrorism, Croatia will have to do more to tackle terrorist financing in a satisfactory manner. Financing of terrorism is only to a very limited extent provided for as an autonomous offence and, moreover, the preventive law addresses the prevention of terrorist financing in an insufficient way. This may be due to the fact that the Croatian authorities are of the opinion that Croatia is not exposed to terrorist threats.

► [eucrim ID=0801192](#)

### **MONEYVAL: Report on Money Laundering Schemes in the Securities Market**

In November 2008, MONEYVAL released a report which analyses typologies with regard to money laundering in the securities market. The securities market was identified to be particularly vulnerable to money laundering activities of criminal organisations. However, an up-to-date review concerning typical schemes of money laundering in this sector of the financial market has been lacking. The objectives of the project were to:

- obtain details of money laundering schemes in the securities sector,
- obtain details of other types of fraud conducted in the securities market within the MONEYVAL jurisdiction and to consider the relationship between these types of fraud and money laundering,
- develop recommendations to enhance the detection and investigation of money laundering schemes, including identifi-

ers (red flags) as well as to develop recommendations on improved cooperation between regulators and law enforcement agencies.

The report analyses the underlying vulnerabilities of the securities markets and highlights a number of methodologies which have been employed in laundering money through securities transactions. It also provides guidance on techniques to prevent and detect money laundering and gives a brief description of some of the main products that are traded in the securities markets. 19 MONEYVAL countries contributed to the report upon a survey by the Committee.

► [eucrim ID=0801193](#)

### **Ukraine: MOLI-UA 2**

Over the last months, several activities took place within the MOLI-UA 2 project, a follow-up project against money laundering and terrorist financing in the Ukraine. On 12 November 2008, an anti-money laundering course was held in Kyiv. From 17 to 21 November 2008, a study visit to Sweden was organised for 13 Ukrainian experts representing the State Committee for Financial Monitoring and the Ukrainian financial sector. The aim was to visit Swedish training institutions, study training solutions, and thereby exchange best practices. In September and October, several trainings and workshops were organised for appeal court judges as well as for employees of prosecution services on central and local level, customs and tax authorities.

On 26 June 2008, a training seminar on the use of special investigative techniques in combating money laundering and terrorist financing was held for law enforcement authorities in Kyiv. From 11 to 13 June 2008, 15 international and over 50 Ukrainian experts participated in the 2nd anti-money laundering and combating terrorist financing conference in Yalta, Crimea. Its main objective was to provide the law enforcement agencies and financial sector regulators with updated knowledge on anti-money laundering and combating terrorist financing

issues, including new typologies. On 5 and 6 June 2008, a training for judges on international standards and some practical issues with regard to criminal proceedings on money laundering cases was held at the premises of the State Academy of Judges. From 10 to 11 April 2008, a training course for financial regulators and participants from the banking sector took place in Sumy, Ukraine. On 4 April 2008, a seminar for prosecutors and law enforcement agencies was held in Kyiv, Ukraine. Two experienced CoE experts from Belgium trained the participants in international cooperation in the field of anti-money laundering and combating the financing of terrorism.

See also [eucrim 1-2/2006](#), p. 22, [eucrim 3-4/2006](#), p. 84, and [eucrim 1-2/2007](#), p. 45.

► [eucrim ID=0801194](#)

### **Russia: MOLI-RU 2**

With regard to the twin-project in Russia, MOLI-RU 2, an international conference, entitled “Legalization of illegally gained proceeds as a threat to economic security of Russia; Harmonization of international and national legal anti-money laundering mechanisms”, was held from 26 to 28 June in Nizhny Novgorod. It focused on the issues of cooperation between the Financial Intelligence Units and the law-enforcement agencies, on confiscation and related issues as well as on the use of offshore financial centers for laundering illegal proceeds. A seminar on further improvement of supervision for anti-money laundering purposes was held from 15 to 16 May 2008 in St. Petersburg.

On 29 April 2008, the 6th International Conference “Cooperation of self-regulating organisations and supervising authorities in combating money laundering and terrorist financing” took place at the Association of Russian Banks in Moscow. Two seminars on confiscation procedures took place on 21 and 22 April 2008 in Moscow. There, representatives from several governmental and non-governmental bodies discussed various

aspects of confiscation both in Russia and abroad. From 18 to 19 March 2008, a further meeting was held in Moscow where international experts from Sweden, the United Kingdom, and a representative from Europol reported on new trends in money laundering and terrorist financing. See also eucrim 1-2/2007, p. 45.

➤ eucrim ID=0801195

## Counterfeiting

### Training to Fight More Effectively Counterfeit Medicines

From 26 to 27 June 2008, some 30 police officers, customs officers and inspectors attended a training seminar course in Strasbourg in order to learn how to combat counterfeit medicines more effectively. The participants, who came from 13 European countries, looked at various issues raised by counterfeiting of medicines, existing control systems and practical investigation procedures, the standard procedure in use and cooperation methods. During the training course, it was stressed that counterfeiting of medical products, from manufacture through supply to the patient, is a serious criminal offence which endangers human lives and undermines public confidence in health care systems.

The training course was organised by the European Directorate for the Quality of Medicines & Health Care, which is part of the CoE.

➤ eucrim ID=0801196

## Cybercrime

### CoE Project against Cybercrime: Report

On 11 August 2008, the third progress report on the CoE Project against Cybercrime was brought out. It summarises the activities implemented in the project from September 2006 to July 2008.

As to important activities in 2008, the report mentions the 2008 Octopus Con-

ference, at which inter alia guidelines for the cooperation between law enforcement and Internet service providers were adopted (see *infra*), as well as the expansion of activities to Africa and the Caribbean.

Furthermore, the report highlights the extraordinary success of the Convention on Cybercrime. The Convention now serves as the primary reference standard for the development of cybercrime legislation in more than 90 countries. An increasing number of countries worldwide has legislation in line with the Convention. In 2008, Slovakia and Italy ratified and Azerbaijan and Georgia signed the Convention. Only six of the 47 CoE member states haven't yet signed the Convention.

The CoE Project against Cybercrime will end in February 2009. Until then, the project will continue to support the strengthening of cybercrime legislation and to disseminate the law enforcement-ISP guidelines. The report also stresses that the project has been able to produce results and to make an impact, and that there is much demand for continued support of a similar nature. Such a follow-up project should

- support the implementation of the Cybercrime Convention and its Protocol,
- promote standards for data protection, trafficking in human beings and protection of children,
- help to make international cooperation more effective,
- support the implementation of guidelines for law enforcement – ISP cooperation,
- support the training of judges,
- strengthen cooperation with other organisations and activities.

An opportunity to launch such a phase 2 project could be the Global Octopus Interface Conference on 10-11 March 2009.

➤ eucrim ID=0801197

### Octopus: Annual Conference 2008

The annual conference of the Octopus programme, the so-called Octopus

Interface 2007, was again dedicated to cybercrime. In the context of "Cooperation against Cybercrime", more than 200 cybercrime experts from 65 countries, international organisations, and the private sector met from 1 to 2 April 2008 in Strasbourg, France to discuss new threats and trends and to review the effectiveness of cybercrime legislation and international cooperation.

The participants stressed that cybercrime is a continuously evolving phenomenon that needs to be closely monitored so that legislative and other responses can be adjusted at the national and international levels as well as within the private sector. As to the effectiveness of cybercrime legislation, they noted a clear global trend in that countries all over the world are strengthening their legislation using the CoE Convention on Cybercrime as a guideline. Countries which signed this treaty were called upon to accelerate the ratification of the Convention, and other countries were encouraged to seek accession. During the conference, Georgia signed the Convention, the Philippines was invited to accede, and the Dominican Republic made a request for accession. In this context, it is important to know that non-Member States to the CoE, such as the Philippines and the Dominican Republic, can basically also become members of the CoE Convention on Cybercrime; parties to European treaties may not only be the Member States of the CoE but also non-Member States or the European Community.

The participants further focussed on the effectiveness of international cooperation, including the network of 24/7 points of contact and the improvement of coordination at the national level. With regard to this issue, they especially agreed that the CoE and the G8 High-tech Crime Subgroup should maintain a joint directory of contact points.

➤ eucrim ID=0801198

Of further interest is that the participants finally adopted guidelines for cooperation between law enforcement and

Internet service providers in the investigation of cybercrime which shall be disseminated all over the world in order to help law enforcement and Internet service providers structure their cooperation. These – albeit non-binding – guidelines, which are the result of several rounds of discussions with representatives from industry and law enforcement who met between October 2007 and February 2008 under the auspices of the CoE, recommend a plethora of measures, such as informing service providers via law enforcement authorities about cybercrime trends, regular meetings of law enforcement authorities and Internet service providers, or the development of written procedures for cooperation.

► eucrim ID=0801199

The Octopus programme of the CoE is an umbrella programme for technical cooperation in the fight against economic crime. Information about the Octopus Interfaces 2005, 2006, and 2007 can be found in eucrim 1-2/2006, p. 21, eucrim 3-4/2006, p. 83, and eucrim 1-2/2007, p. 45.

► eucrim ID=0801200

## Procedural Criminal Law

### CCJE: Opinion on Quality of Judicial Decisions

On 18 December 2008, the Consultative Council of European Judges (CCJE), the Council of Europe's advisory body on issues relating to the independence, impartiality and competence of judges, adopted an opinion on the quality of judicial decisions. The opinion first addresses the question which factors are relevant for the quality of judicial decisions. Second, mechanisms on how to evaluate the quality of judicial decisions are discussed. The opinion contains a number of conclusions and recommendations which are designed to ensure that people do not only have access to

the courts, but can gain confidence in the outcome of the judicial process through the quality of judicial decisions.

As to the factors, the opinion distinguishes between external and internal indicators on which the quality of judicial decisions depends. Significant factors are, inter alia:

- The quality of legislation, so that it is important that national parliaments carry out impact assessments of legislation.
- Adequate human, financial and material resources
- Training of judges and other legal professionals
- Professionalism, including the development of a culture of independence, ethics and deontology, is considered the most important internal factor influencing a judicial decision.
- A hearing in accordance with the ECHR and the case law of the ECtHR is seen as a further important basis for the quality of the decision, in particular in respect of the acceptance of the judiciary.
- Additionally important are elements inherent to the decision, such as clarity, sound reasoning, unambiguous language and effective enforcement.

As to evaluation, the CCJE first of all prescribes the main parameters of the evaluation. In this context, the opinion states, as a principle, that the judicial system as a whole has to be examined in order to evaluate the quality of judicial decisions. Attention should be given to the length, transparency and the conduct of the proceedings. The opinion continues by assessing the best evaluation methods. Here, the CCJE stresses that it is desirable to combine different methods of evaluation, linked to different quality indicators and multiple information sources. It is recommended that

- peer reviews and self evaluations of judges are carried out more,
- independence regarding the evaluation of the quality of decisions is ensured (preferably under the aegis of a Council of the judiciary).

► eucrim ID=0801201

### CEPEJ: Presentation of the Second Report on the Evaluation of European Judicial Systems

The Council of Europe's Commission for the Efficiency of Justice (CEPEJ) has published its 2nd report on the evaluation of European judicial systems. The report, published in October 2008, tries to point out the main tendencies and conclusions concerning the application of fundamental principles and European standards in the field of justice in all CoE-states except for Liechtenstein and San Marino. In doing so, it compares key indicators like public spending on the judicial system, the respective legal aid systems, the organisation of jurisdictions, the number of judicial personnel, the length of proceedings, the number of lawyers and notaries. The report is based on figures from 2006.

► eucrim ID=0801202

The 2008 report on the evaluation of judicial systems forms the basis for further in-depth studies. The CEPEJ invites the European scientific community to work on three specific topics: (1) „single judge and panel of judges“, (2) „the role of lawyers in judicial proceedings“ and (3) „the organisation of court clerk offices“. A new evaluation cycle will result in a new report in 2010.

► eucrim ID=0801203

The CEPEJ is mandated to cooperate with CoE Member States to promote effective implementation of CoE instruments concerning the organisation of the justice system, ensuring that public policies in judicial matters take the users of the justice system into account and helping to disencumber the European Court of Human Rights by giving the member countries effective upstream solutions by preventing violations of Article 6 of the European Convention on Human Rights. Regarding the work of CEPEJ, please refer also to eucrim 3-4/2007, p. 118.

### CEPEJ: 2009 Activity Programme

At its plenary meeting from 10-11 December 2008, the CEPEJ adopted its activity programme for 2009. Upon

the above-mentioned mandate, the programme is designed around the following areas of the CEPEJ's responsibility:

- Developing tools for analysing the functioning of justice and ensuring that public policies of justice are geared to greater efficiency and quality
- Promoting the implementation of European standards in the field of efficiency and quality of justice in the member states
- Developing a targeted cooperation at the request of one or more states
- Strengthening relations with users of the justice system and with national and international bodies.

► eucrim ID=0801204

### Network of Pilot Courts: 3rd Plenary Meeting

The 3rd plenary meeting of the CEPEJ Network of pilot courts was held on 24 October 2008 in Catania (Italy). The meeting's focal topic was: "How to contribute in setting up a quicker justice and a justice of quality?". The pilot courts adopted also operational conclusions for contributing to the implementation of the CEPEJ activity programme.

The Network of pilot courts from European States was set up by the CEPEJ and is designed to

- support the activities of the CEPEJ through a better understanding of the day to day functioning of courts, and
- highlight best practices which could be presented to policy makers in European States in order to improve the efficiency of judicial systems.

The CEPEJ relies on the Network to promote innovative time-reduction and time-management projects introduced by courts. The Network is not only a forum of information and consultation, some pilot courts can also – as regards the local level – implement specific measures proposed by the CEPEJ.

► eucrim ID=0801205

### CCPE: Third Plenary Meeting

On 15-17 October, the Consultative Council of European Prosecutors

(CCPE) held its third plenary meeting in Strasbourg. The CCPE was set up as a consultative body to the Committee of Ministers of the Council of Europe on 13 July 2005. The CCPE prepares opinions on issues related to the prosecution service and promotes the effective implementation of Recommendation Rec(2000)19 of 6 October 2000 on the role of public prosecution in the criminal justice system.

During the meeting, the CCPE adopted its Opinion No. 2 on "alternatives to prosecution" and Opinion No.3 on "the role of prosecutors outside the criminal law field". These two opinions are summarised in the following.

► eucrim ID=0801206

### CCPE: Opinion on Alternatives to Prosecution

Article 3 of the Recommendation on the role of public prosecution in the criminal justice system (Rec(2000) 19) states that "in certain criminal justice systems, public prosecutors (...) decide on alternatives to prosecution". In its Opinion No. 2, the CCPE reflects on certain aspects of this subject.

First of all, the CCPE states that a modern criminal justice system should use alternatives to prosecution when the nature and the circumstances accompanying the offences allow it. Impositions of financial penalties as well as imprisonment as the only responses to lawbreaking are not adequate anymore in the early 21st century. Therefore, CoE Member States should take into account new instruments and alternatives providing various appropriate responses to crime. As examples for such alternative measures, the CCPE mentions inter alia the "rappel à la loi" (judges' warning), the placement in medical, social or professional facilities, educational activities for juvenile offenders as well as mediation and conciliation. Many of these measures already exist in the CoE member states.

Furthermore, the CCPE points out a number of requirements for the applica-

tion of alternative measures to prosecution. In order to guarantee fair, consistent and efficient public prosecution, clear rules and general guidelines for the application of alternative measures should be established and publicised by the relevant state authorities. Prosecutors should initiate and, if it lies within their authority, effectively apply such alternative measures.

The CCPE also emphasises the victims' situation. Alternative measures to prosecution should never disregard the acknowledgement and protection of the victims' rights. Moreover, the respective alternative measure should allow the victims to be more involved by improving the system of redress and the speed of the response as well as by opening, if appropriate, the dialogue between offender and victim.

Also, alternative measures should never lead to an imposition of a measure in order to circumvent the rules of fair trial e.g. when the identified offender's criminal liability is doubted and therefore a conviction is questionable.

► eucrim ID=0801207

### CCPE: Opinion on the Role of Prosecutors outside the Criminal Law Field

In its opinion No. 3, the CCPE gives the following conclusions and recommendations regarding the role of the prosecution outside the criminal law field:

The CCPE observes that in some CoE Member States the prosecution does not have powers outside the criminal law field whereas in other Member States they have. In the latter case, the areas of competence vary and include a wide range of fields (e.g., civil, family, labour, administrative law as well as the protection of the environment, social rights and the rights of vulnerable groups).

In addition, in many States the role of the ombudsman is increasing. In this context, the CCPE stresses the necessity that people must have the right to choose the official or non-official procedure for the protection of their interests.

In respect of States where the prosecution services have powers beyond the criminal law field, the CCPE recommends that the functions should be carried out in consideration of certain principles, the main of which are:

- The principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights.
- The respect of impartiality and fairness should characterise the action of prosecutors as well.
- Competencies of prosecutors outside the criminal law field should be regulated by law as precisely as possible.
- The principle of equality of arms should be respected.
- Prosecution services should set up specialised units.
- Prosecution services are invited to cooperate with ombudsman and ombudsman-like organisations when appropriate.

Lastly, the CCPE advises the Committee of Ministers to consider elaborating common European principles on, in particular, the status, powers, and practice of public prosecutors outside the criminal law field.

➤ [eucrim ID=0801208](#)

## Legislation

### New CoE Anti-Terrorist Convention in Force

The 2005 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (ETS No. 198) came into force on 1 May 2008. Till this day, the Convention has been ratified by Albania, Bosnia and Herzegovina, Malta, Moldova, Poland, and Romania, where it has been legally binding since May 2008. Another 23 countries have signed it:

### Ratifications and Signatures (Selection)

Council of Europe Treaty	State	Date of ratification (r) or signature (s)
Convention on the Suppression of Terrorism (ETS No. 90)	Monaco	18 September 2007 (s+r)
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)	Monaco Andorra Moldova	1 October 2008 (s) 6 May 2008 (r) 28 February 2008 (r)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167),	Croatia	10 October 2008 (r)
Criminal Law Convention on Corruption (ETS No. 173)	Andorra France Georgia Belarus	6 May 2008 (r) 25 April 2008 (r) 10 January 2008 (r) 6 November 2007 (r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Estonia Serbia Monaco FYROM Andorra Austria Switzerland Latvia	15 December 2008 (s) 8 December 08 (r) 1 October 2008 (s) 26 September 2008 (r) 6 May 2008 (r) 4 April 2008 (s) 20 December 2007 (r) 21 November 2007 (r)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	FYROM Montenegro Luxembourg Bosnia and Herzegovina	18 December 2008 (r) 20 October 2008 (r) 30 January 2008 (s) 7 November 2007 (r)
Convention on Cybercrime (ETS No. 185)	Azerbaijan Italy Georgia Slovakia	30 June 2008 (s) 5 June 2008 (r) 1 April 2008 (s) 8 January 2008 (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)	Croatia Norway South Africa	4 July 2008 (r) 29 April 2008 (s+r) 4 April 2008 (s)
Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190)	Azerbaijan France Czech Republic	2 December 08 (r) 9 January 2008 (r) 27 November 2007 (s)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	France Montenegro Serbia	25 April 2008 (r) 17 March 2008 (r) 9 January 2008 (s+r)
Convention on the Prevention of Terrorism (ETS No. 196)	Ireland Montenegro Moldova Andorra France Norway	3 October 2008 (s) 12 September 2008 (r) 13 May 2008 (r) 6 May 2008 (r) 29 April 2008 (r) 9 April 2008 (s)

Council of Europe Treaty	State	Date of ratification (r) or signature (s)
Convention on the Prevention of Terrorism (ETS No. 196)	Poland Croatia Finland Bosnia and Herzegovina Lithuania Hungary	3 April 2008 (r) 21 January 2008 (r) 17 January 2008 (r) 11 January 2008 (r) 10 October 2007 (s) 10 October 2007 (s)
Convention on Action against Trafficking in Human Beings (ETS No. 197)	UK Poland Montenegro Armenia	17 December 2008 (r) 17 November 2008 (r) 30 July 2008 (r) 14 April 2008 (r)
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198)	Montenegro Croatia Slovakia Netherlands Armenia Croatia Malta Bosnia and Herzegovina Slovakia Moldova	20 October 2008 (r) 10 October 2008 (r) 16 September 2008 (r) 13 August 2008 (a) 2 June 2008 (r) 29 April 2008 (s) 30 January 2008 (r) 11 January 2008 (r) 12 November 2007 (s) 18 September 2007 (r)

► eucrim ID=0801209

Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, Greece, Iceland, Italy, Latvia, Luxembourg, Montenegro, Netherlands, Portugal, San Marino, Serbia, Slovakia, Slovenia, Sweden, “the former Yugoslav Republic of Macedonia” (FYROM), Turkey, and Ukraine.

The new 2005 CoE Convention reinforces the arrangements of the 1990 CoE Convention against money laundering and introduces new practical measures. The 1990 CoE Convention needed to be modernised and updated because money laundering techniques and anti-money laundering strategies have significantly evolved since its adoption.

Furthermore, it is important that the 2005 CoE Convention is the first binding international legal instrument covering both the prevention and control of money laundering and the financing of terrorism. One reason for including provisions

concerning the financing of terrorism is the clear link between the financing of terrorism and money laundering which has been internationally recognised; of further relevance is that the tools which have proved effective to counter money laundering should be equally effective in combating the financing of terrorism. The 2005 CoE Convention text therefore addresses the fact that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures.

The Convention also includes a monitoring mechanism to ensure the proper implementation by parties of its provisions. Therefore, a Conference of Parties will be established by May 2009 to monitor the implementation of the Convention in detail.

► eucrim ID=0801210

## Cooperation

### Ukraine: Activities in the UPIC Programme

From 30 June to 1 July 2008, an international conference on economic crime with a specific focus on money laundering and tax evasion was held in Warsaw, Poland. Representatives from Israel, Latvia, Lithuania, Poland, Sweden, Turkey, Ukraine, the United Kingdom and the United States participated. First of all, its aim was to give the Ukrainian participants a better understanding of current money laundering initiatives. The conference was supported by the Project Against Money Laundering and Terrorist Financing in Ukraine, MOL-UA 2. Beforehand, a training seminar on the recognition and execution of foreign judgments took place from 18 to 19 June in Truskavets, Ukraine. It was jointly organised by the Ministry of Justice, the Office of the Prosecutor General, and several Judges involved in international cooperation in criminal matters, in order to give practitioners the opportunity to enhance their knowledge as to the transfer of prisoners, conditionally sentenced or released offenders, the international validity of criminal judgments and other related issues. From 7 to 11 April 2008, a Ukrainian delegation visited Italy and Switzerland in order to become familiar with institutions engaged in international cooperation in criminal matters. They stayed in Rome (Italy), Bern and Geneva (both Switzerland). From 25 to 27 February 2008, a training seminar on confiscation, extradition, and mutual legal assistance took place in Kyiv, Ukraine. Yet another workshop on the future cooperation manual was held on 28 February 2008.

These events were organised within the UPIC project which deals with international cooperation in criminal matters in Ukraine. See also eucrim 1-2/2006, p. 22, eucrim 3-4/2006, p. 86, eucrim 1-2/2007, p. 47, and eucrim 3-4/2007, p. 119.

► eucrim ID=0801211

# Eurojust – The Heart of the Future European Public Prosecutor’s Office

José Luís Lopes da Mota<sup>1</sup>

## I. Introduction

The Treaty of Lisbon, and, in particular, the creation of a European Public Prosecutor’s Office, is central to the construction of a European criminal judicial area. The nature of the role of a European Public Prosecutor’s Office raises questions on how to integrate this new body into the European judicial area currently under construction, which is more far-reaching than judicial co-operation in criminal matters between the Member States as developed under the current framework of the Treaties (Articles 29-42 EU Treaty and Articles 61-69 EC Treaty).

In 2002, when Eurojust – the first European body with competences in criminal matters – was established, the Member States could only envisage Eurojust as a judicial co-operation body. Eurojust was set up in order to achieve three objectives: (1) to improve the co-operation between the competent national authorities; (2) to stimulate the co-ordination of investigations and prosecution of serious crimes involving two or more Member States; and (3) to support national authorities when dealing with serious cross-border cases.

Eurojust represents a new dimension in the traditional horizontal co-operation between the Member States tackling criminal problems from a local and national perspective. Together with other initiatives, Eurojust works towards promoting a new overall European approach to cross-border crime by contributing to the development of a European criminal justice area, based on the different national legal systems of the Member States. Today, we are seeing a more ambitious concept, the creation of the European Public Prosecutor’s Office from Eurojust.

Recent developments in the European judicial area clearly show that Eurojust builds the foundation for the establishment of a European Public Prosecutor’s Office. The Convention on the Future of Europe, launched in 2002, continued the decade-old controversial debate and allowed the discussions to be consolidated and clarified, specifically regarding the “Corpus Juris” project<sup>2</sup> and the Commission’s Green Paper on the European Public Prosecutor.<sup>3</sup> The efforts of the “Corpus Juris” project and the proposals of the Commission’s Green Paper to establish the European Prosecutor on the basis of the Treaty on the European Communities by amending Article 280 or

inserting a new Article 280A were not taken up by the Intergovernmental Conference, which prepared the Treaty of Nice. Instead of supporting the Commission’s proposal to insert a new Article 280A, the Conference decided to include Eurojust in the Treaty on European Union (Article 31 para. 2).

The issue was then addressed by the Convention on the Future of Europe, which prepared the Treaty establishing a Constitution for Europe. A legal provision on the creation of a European Public Prosecutor’s Office from Eurojust was integrated into the text of the Constitution (Article III-274). The Treaty of Lisbon, signed on 13 December 2007, was inspired by the text of the Constitution and took up the outcome of the Constitution in Article 69-E<sup>4</sup> of the Treaty establishing the European Community: a European Public Prosecutor’s Office may be established “from Eurojust”.<sup>5</sup> The Treaty of Lisbon, however, went a step further: It anticipated a special procedure, through which the European Public Prosecutor may be established on the basis of a request by at least nine Member States in case of absence of unanimity in the Council. In spite of the complexity of the issues to be addressed, this special legislative procedure may allow for the acceleration of the establishment of a European Public Prosecutor’s Office in the short term.

## II. Open Questions

The creation of the European Public Prosecutor’s Office will face new major challenges. First of all, as a starting point, there should be a need to identify and address the main questions opened by the Lisbon Treaty. These questions are focused, essentially, on six points: the adoption of the legal instrument setting up this new body, its organisation and operation, its competences, the rules on criminal proceedings that must be observed, its capacity for investigation, and the jurisdictional control of acts that affect fundamental rights.

### a) Legal Establishment of the European Public Prosecutor

According to Article 86 (1) of the Treaty on the Functioning of the European Union (TFEU), in order to combat crimes affecting the financial interests of the Union, the Council, acting



unanimously after obtaining the consent of the European Parliament, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. As mentioned above, the decision of at least nine Member States suffices to set up the European Public Prosecutors' Office in case of absence of unanimity.<sup>6</sup> If the decision is taken mutually by a limited number of Member States the territorial area, in which the European Public Prosecutor's Office has competence to act, is limited. As a consequence of this limitation, it will be necessary to reflect on the relationship with those States that do not participate in the establishment of the European Public Prosecutor's Office. Two aspects must be addressed here: first, the direct relationships between the States taking part in the European Public Prosecutor's office and those which do not, and, second, relationships with and through Eurojust, in which all of the States currently participate.

### b) Organisation and Operation

There is a need to determine the way in which the European Public Prosecutor's Office should be organised and how the European Public Prosecutor's Office should operate, taking Eurojust as a starting point. It will be important to determine how the organisation and operation of Eurojust will influence the organisation and operation of the European Public Prosecutor's Office, both at the internal level and in its relationships with the Member States' authorities, or within the Member States themselves, taking into consideration, in this respect, the status and role of Eurojust's national correspondents. It will also be important to address the terms under which relationships between Eurojust and the European Public Prosecutor's Office are defined in the future. These relationships must take into account the differences relating to their nature and competence as well as the need to optimise resources and exploit synergies between the two bodies, based on existing structures, experience, and relationships between Eurojust and national authorities. Taking into account the nature of Eurojust, its composition and powers, notably the new powers provided by the Treaty of Lisbon, one can imagine the national members of Eurojust being given stronger powers as prosecutors and members of the European Public Prosecutor's Office; acting as a college or through its national members, Eurojust could be enabled to investigate, prosecute and bring criminals to national courts or, at least, to coordinate directly these types of activities in the Member States in liaison with the Prosecutors Generals or Directors of Prosecutions in the Member States. In addition to the prosecutors appointed by the Member States, one can also imagine another member of the European Public Prosecutor's Office being appointed by the European Union.

### c) Competences

The powers of the European Public Prosecutor's Office will have to be addressed in two different moments, which are provided for in the Lisbon Treaty: According to Article 86 (1) TFEU the European Public Prosecutor's Office shall be given the competence to deal with crimes affecting the financial interests of the Union. However these powers may be extended to include serious cross-border crimes.<sup>7</sup> The types of crime relating to the protection of the EU's financial interests must be defined and harmonised, taking into account the existing legislation on these matters, in particular the Convention on the Protection of the Financial Interests of the Community dated from 1995 and its additional protocols of 1996 and 1997 respectively,<sup>8</sup> and not ignoring the need for an effective protection of the euro, as an interest of the European Union, through the European criminal law and bodies. With respect to this point, Eurojust's competence must be stressed in relation to these forms of criminality and also with regard to finding coherent solutions that should preserve the existing competences of Eurojust regarding the countries not participating in the European Public Prosecutor's Office. In addition to this, it will be interesting to see whether and to which extent the Member States are ready to take a more ambitious step by extending its competence to investigate and prosecute serious, cross-border criminal activities affecting two or more Member States.

### d) Rules on Criminal Procedure

There will be a need to consider which criminal procedural rules are necessary for the European Public Prosecutor's Office to exercise its functions, including those rules relating to territorial competence and conflicts of jurisdiction. Legal clarity is required. It will not be possible for the European Public Prosecutor's Office to work solely with applicable Member States' procedural criminal rules on a case-by-case basis, as this may create irresolvable problems regarding transnational investigations and prosecution. In order to prevent these kinds of problems, the experience of Eurojust confirms the need for basic common rules for cases falling within the competence of the European Public Prosecutor's Office. Experience also demonstrates the need to take into account the relationships with national procedural legal orders, not only in the preliminary phase of the proceedings, but also during the trial phase, where the problems relating to the validity of evidence must be considered. In this respect, it seems advisable to explore all the possibilities that the principle of mutual recognition is able to offer in order to overcome difficulties arising from the absence or insufficiency of common, harmonised procedural rules.

### e) Capacity

The debate must also focus on capacity as regards investigation. The point is to know which entities and authorities must carry out the investigation and collect evidence under the direction of the European Public Prosecutor's Office, in such a way that its legal powers become effective. Otherwise, the European Public Prosecutor runs the risk of being a head without a body, legs, or arms, incapable of moving or taking any action. In this context, it will be important to analyse and define the roles of OLAF and Europol and the strengthening of their competences. OLAF should continue to exercise an essential role in the area of administrative inspection and investigation, and in the detection of criminal offences that will be the competence of the European Public Prosecutor's Office. However, its role should not end there. OLAF could become an essential support for the European Public Prosecutor's Office. It could, for instance, be granted powers to carry out or participate in criminal investigations under the direction of the European Public Prosecutor's Office, eventually also in collaboration with Eurojust, Europol, and the national police authorities. In addition, with regard to Europol, the development of operational powers in liaison with the national authorities, when conducting investigations under the direction of the European Public Prosecutor, must be examined. Finally, the relationship between the European Public Prosecutor's Office, national public prosecution services and other national and local authorities should not be forgotten. The investigations are still to be conducted at a local level, and it is at this level that the effectiveness of the European Public Prosecutor's Office will be demonstrated. Eurojust's experience in co-ordinating investigations and prosecution has shown that adequate solutions are needed in order to conduct effective investigations and prosecution. The use of joint investigation teams in cross-border investigations to be dealt with by the European Public Prosecutor's Office should also be explored as much as possible as an appropriate solution.

### f) Judicial Control

Finally, there will be a need to consider the control by the judiciary of actions taken by the European Public Prosecutor's Office that may affect the fundamental rights of individuals. The point is not only to know which tribunals or judges should exercise such control, but also how to ensure this control; this is to say, how the protection of fundamental rights will be ensured in an equivalent way in all the Member States by the rules of procedure applicable to the judicial authorisation or review of procedural measures taken by the European Public Prosecutor's Office in performing its functions. The Treaty of Lisbon introduces significant advances in this field by recog-

nising the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the EU, which shall have the same legal value as the Treaties, and by the adherence of the EU to the European Convention on Human Rights (Article 6 EU Treaty), which will form the basis for a common European legal framework. Here, too, Eurojust is in a position to offer its expertise in matters related to the protection of individual rights in the area of judicial co-operation. It will be difficult to organise the judicial control of cross-border investigations and prosecution solely at a local level. A comprehensive strategic overall approach is required in order to avoid the risks of a lack of unity, coherence, and effectiveness. Taking into account these risks, one should not exclude the possibility of creating a judicial authority at the (European) court level, with territorial competence equivalent to that of a European Public Prosecutor having the competence to authorise specific co-ordinated actions on a transnational level. In combination with a solution of this nature, it seems also advisable to consider the possibilities offered by the principle of mutual recognition of the decisions taken by national judicial authorities when such decisions have to be considered in different national jurisdictions.

## III. Challenges

Effective legal measures against crime must be sought within a legislative framework of criminal procedures that, by definition, have to implement constitutional rules and principles aiming at protecting the rights of individuals. This shows the importance and sensitivity of the project. The Treaty of Lisbon reflects an evolution by linking the European Public Prosecutor's Office to the Area of Freedom, Security and Justice, an area of shared competences between the EU and the Member States.<sup>9</sup> The issue of the European Public Prosecutor's Office must be analysed in this context. It is neither a technical question nor a purely rhetorical exercise but, rather, must take into account the framework on the basis of which the construction of the European judicial area takes place.

Future considerations on the European Public Prosecutor's Office must take into account the Commission's Green Paper on the establishment of the European Prosecutor as an important element; however, its coherence with the establishment of Eurojust needs to be assessed. The Green Paper is a proposal that is both ambitious – because its concept is a body with capacity to investigate and prosecute criminal offences – and limited – because its powers are limited to a specific type of criminality related to the protection of the financial interests of the Communities. Although this proposal does not take into account all the progress made in the area of the Third Pillar after the Treaty of Amsterdam entered into force in 1999 (specifically,

the creation of Eurojust), it must now be considered within the framework defined in the Treaty of Lisbon.

When compared with the proposal contained in the Green Paper, Eurojust presents a fundamental conceptual difference. Eurojust is based on different national legal systems, co-operating together, forming the basis of the European criminal judicial area, and having the flexibility to adapt itself to the systems of every Member State. Acting as an autonomous body, Eurojust's competence covers all forms of serious and organised crime, including criminal offences against the EU's financial interests. It is based on an asymmetric principle reflecting the differences between the judicial systems of the Member States, providing the flexibility to be operationally effective.

These key concepts form the basis to enshrine Eurojust and its relationships with the authorities of the Member States; they must continue to be considered when examining the creation of the European Public Prosecutor's Office from Eurojust. These factors will also benefit the operation of the European Public Prosecutor's Office in its relations with national authorities and with Eurojust.

Any future development cannot ignore the main differences in criminal policy that inspire the creation of the European Public Prosecutor's Office and of Eurojust. Although there may be an area of overlap in their missions, their functions are different. Eurojust, as a body of judicial co-operation, has as its objective the improvement of co-ordination and co-operation between national authorities; the European Public Prosecutor's Office aims to centralise criminal procedures and investigations and to direct public prosecutors responsible for the proceedings.

Regarding the conditions, the creation of regulations and procedures in criminal law, necessary for the European Public Prosecutor's Office to exercise its functions, one must further consider the progress already achieved in the European judicial area, specifically in the areas of harmonisation of legislation and the application of the principle of mutual recognition of judicial decisions.

#### IV. Concluding Remarks

The creation of a European Public Prosecutor's Office is a complex project. Its creation must be realised from Eurojust – a logical solution that I support for reasons of principle, coherence and practicality.

Eurojust is still a recent organisation in the stage of development. The Council reached a political agreement in July 2008 on a Council Decision on the Strengthening of Eurojust, amending the legal instrument setting up Eurojust.<sup>10</sup> The aim of this decision is to overcome the existing difficulties and create conditions in which its effectiveness can be improved. The proposal for this new Council Decision amending the Council Decision of 28 February 2002 was presented by 14 Member States<sup>11</sup> and was the result of an assessment carried out by Eurojust and Member States, through a questionnaire and a seminar held in Lisbon with the support of the Portuguese Presidency, and the Commission's Communication of October 2007 on the Future of Eurojust and the European Judicial Network.<sup>12</sup>

I am convinced that the experience gained by Eurojust and the progress it has made form a fundamental basis upon which we can contemplate answers to questions relating to the conception, organisation, and operational conditions of the European Public Prosecutor's Office. In particular, I would like to emphasise the experience gained on an operational level and the internal development of the organisation of Eurojust, in particular the technological developments facilitating the exchange of information with national authorities and the development of relationships with national authorities, third States, and other European bodies and institutions. In this context, I would like to refer to the relationship with the Commission and especially with OLAF. Given the importance that the creation of the European Public Prosecutor's Office assumes in the area of protecting the EU's financial interests, I am firmly convinced that the moment has arrived in which we must begin to prepare, together, a future that has already begun. This also means that we must continue to walk down the road, which, as the poet Antonio Machado would have said, is made by walking, a road illuminated by a lighthouse, and that lighthouse is the Treaty of Lisbon.

1 The views expressed here are solely those of the author. The article is based on a speech on The European Public Prosecutor's Office which the author held at the Prosecutor General's Office in Madrid in January 2008.

2 Cf. Delmas-Marty, Mireille/Vervaele, John A.E. (eds.), *The Implementation of the Corpus Juris in the Member States*, Vol. 1, Antwerp 2000. Art. 18 et seq. refer to the European Public Prosecutor. The text of the Corpus Juris proposal of 2000 (English and French) is available via the following Internet site: [http://ec.europa.eu/anti\\_fraud/green\\_paper/links.html](http://ec.europa.eu/anti_fraud/green_paper/links.html) (last visited 12/08). The site also contains translations of the original text into Bulgarian, Dutch, Finnish, German, Greek, Italian, Polish, Romanian, Slovenian, Spanish, and Swedish.

3 Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715 final. The Green Paper, the documentation of the public consultation, as well as further background information is available at: [http://ec.europa.eu/anti\\_fraud/green\\_paper](http://ec.europa.eu/anti_fraud/green_paper) (last visited 12/08).

4 Article 86 of the Treaty on the Functioning of the European Union (consolidated version as amended by the Treaty of Lisbon), hereinafter referred as to TFEU.

5 Article 85 TFEU establishes the mission and tasks of Eurojust. These tasks may include "the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relat-



**José Luís Lopes da Mota**  
President of Eurojust  
National Member for Portugal

ing to offences against the financial interests of the Union” and “the coordination of investigations and prosecutions”. This provision reinforces the competences of Eurojust and must be seen as the basis from which the creation of the European Public Prosecutor’s Office is to be considered.

6 In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to es-

tablish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply (Article 86, paragraphs 2 and 3 TFEU).

7 The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission (Article 86 (4) TFEU).

8 As regards the current state of play of the implementation of the different European instruments for the protection of the EC’s financial interests, see Killmann, eucrim 1-2/2007, pp. 48-51.

9 Article 4 (2) lit. j) TFEU.

10 See Council Doc. 11653/08 (Presse 205), Press Release 2887th Council Meeting, Justice and Home Affairs, Brussels, 24 and 25 July 2008, p. 20. See also the analysis in the news section by Wahl/Staats in this eucrim issue.,

11 OJ 2008, C 54, p. 4; see also Thomas Wahl, eucrim 3-4/2007, pp. 84-85.

12 The described development is outlined by Thomas Wahl, in: eucrim 3-4/2007, pp. 85-86; see also Wade/Kiesel, eucrim 3-4/2006, p. 53 for the seminar 2006 in Vienna.

## La perspective de réforme des traités européens et la lutte contre la fraude

Prof. Dr. Lorenzo Picotti

The article analyses the different provisions in the criminal law area introduced by the new Reform Treaty of Lisbon, in particular as regards their repercussions for the protection of the EU’s financial interests. The author classifies these provisions into three concentric circles: first, the general provisions dedicated to judicial cooperation and the approximation of criminal law (I.), second, the specific competence of the EU in view of the protection of its financial interests (II.), and, third, the legal basis for the establishment of a European Public Prosecutor (III). As to the first circle, the article holds that the Lisbon Treaty confers upon the EU a strong autonomous legitimation for a common or equivalent criminal law protection of both proper European interests (an example of which is the protection of financial interests) and interests of European significance (such as the protection of the environment). For the second circle, the article underscores the exceptional legal position of the protection of the financial interests as expressed by Art. 325 of the Treaty on the Functioning of the European Union. In this context, the difference between Art. 325 and its forerunner – the current Art. 280 TEC – in both wording and content is assessed. The article emphasises the “politico-criminelle” importance of this provision since it represents the autonomous and independent legal basis for the creation of European criminal law in the strict sense regarding this specific field. In the third part, the article looks into the creation of the system of a European Public Prosecutor with its uniform European procedural rules and its directly applicable powers in the jurisdiction of the EU Member States. The author concludes that the Lisbon Treaty entails a revolutionary “tournoi”. It provides the legal basis for a beginning unification of criminal law on the European level, which is quite near the proposed “Corpus Juris model”.

### I. De l’européanisation des droits pénaux nationaux à la réalisation de l’espace de liberté, de sécurité et de justice

Le long et toujours plus pressant processus d’évolution vers l’«européanisation» et l’«harmonisation» des systèmes pénaux des Etats membres est désormais proche d’une nouvelle

étape qui s’annonce, sous de nombreux aspects, comme un tournant décisif : la naissance d’un véritable «système» de droit pénal de l’Union européenne, valable pour tout son territoire et doté d’un ensemble propre de règles et de directives concernant les infractions et les sanctions pénales, ainsi que de dispositions procédurales et d’organes spécialisés pour leur

application. Le passage du *phénomène* de pénétration du droit communautaire dans les systèmes, même pénaux, des Etats membres, à la *création délibérée* d'un «système» nouveau et autonome de droit pénal européen requiert, par ailleurs, des décisions politiques conscientes et des dispositions normatives explicites, qui aujourd'hui trouvent une prévision et une perspective de réalisation concrète avec la base juridique offerte par la réforme des Traités européennes contenue dans le Traité de Lisbonne.<sup>1</sup> Il s'agit, en premier lieu, de réaliser l'objectif - déjà promis avec l'institution de l'Union européenne par le Traité de Maastricht - d'offrir aux citoyens européennes «un espace de liberté, de sécurité et de justice sans frontières intérieures, au sein duquel est assurée la libre circulation des personnes, en liaison avec des mesures appropriées en matière de contrôle des frontières extérieures, d'asile, d'immigration ainsi que de prévention de la criminalité et de lutte contre ce phénomène» (art. 2, maintenant 3, paragraphe 2, TUE).

Un tel processus fait émerger des exigences de protection toujours plus complexes et en même temps pressantes, qui requièrent des interventions de nature pénale caractérisés par des *standards* de prévention et répression «effective et équivalente» dans tout le territoire européenne, pour protéger les intérêts «communs» ou dont l'Union est titulaire en tant que telle. On peut en effet distinguer deux grandes catégories fondamentales de biens juridiques dignes de protection pénale dans une dimension européenne :<sup>2</sup> d'une part, ceux qui sont «propres» à l'Union, en tant que *personne* juridique autonome dotée, en plus de sa personnalité juridique (nouvel art. 47 TUE), de son budget, de ses institutions ainsi que de son appareil administratif, comme tel distincte des Etats nationaux ou d'autres entités. D'autre part, les intérêts «communs» qui ont acquis une *importance européenne* par les *actions* ou «politiques» communautaires qui les protègent et développent dans un cadre d'intégration économique et sociale toujours plus poussée et étendue, ainsi que par la dimension supranationale de la criminalité que ceux-ci lésent, fondant un intérêt à la combattre sur une base commune. Les *intérêts financiers* de l'Union européenne, liés à l'expansion de son budget, qui a désormais atteint des dimensions considérables, sont emblématiques de la première catégorie, avec également une augmentation parallèle des atteintes auxquelles ils sont exposés ainsi que des préjudices pour tous les contribuables européens, parfois par organisation et actions qui ont aussi une dimension internationale.<sup>3</sup>

Dans ce cadre complexe, les dispositions concernant l'«espace de liberté, de sécurité et de justice» prévues par le titre IV TFUE - en manière similaire au contenu du chapitre 4 du titre III du Traité constitutionnel - sont le fondement *principal*, mais pas l'unique, des compétences pénales de l'Union pour protéger ses intérêts. Dans le Traité de réforme de Lisbonne, comme déjà dans le Traité constitutionnel, le droit pénal est

mis en relief à différents niveaux, que l'on peut concevoir, pour l'exposé, comme *trois cercles concentriques*: après le plus large et le plus général, constitué par les dispositions du chapitre 4 dédié à la «coopération judiciaire en matière pénale» (art. de 82 à 89), il y en a un plus restreint, qui donne une compétence immédiatement *efficace*, concernant les mesures de protection (y compris celles pénales) des intérêts financiers de l'Union, qui sont l'objet d'obligations contraignantes d'initiative de sa part et de celle des Etats membres (art. 325 TFUE, déjà art. 280 TCE : cf. *infra*, point 2) . Enfin il y a aussi une base juridique explicite pour l'institution d'un parquet européen, compétent pour l'exercice de l'action pénale pour un nombre limité d'infractions qui lèsent les intérêts financiers européens (art. 86 TFUE: cf. *infra*, point 3).

Le premier domaine dans lequel on peut parler de droit pénal européen est défini conformément au texte du Traité constitutionnel, sauf des modifications formelles de dénomination des sources («règlements» et «directives», en lieu que «lois européennes» et «lois cadre européennes»). Il s'agit d'une compétence pénale *partagée* entre l'Union et les Etats membres (art. 4, par. 2, lettre j) TFEU), dans le respect des principes généraux d'attribution, de subsidiarité et de proportionnalité (cf. la nouvelle formulation de l'art. 5 TUE, déjà art. 5 TCE). Une compétence potentiellement très large en tant que visé à la réalisation de l'«espace de liberté, de sécurité et de justice» pour laquelle trois voies sont indiquées, à savoir: «mesures de coordination et de coopération entre autorités policières et judiciaires et autres autorités compétentes», «reconnaissance mutuelle des décisions judiciaires en matière pénale» et - si nécessaire - «rapprochement des législations pénales» des Etats membres (nouvel art. 67, paragraphe 3 TFUE).

L'intention de la réforme n'est naturellement pas de souligner les discontinuités par rapport aux normes des textes aujourd'hui en vigueur, mais les élargissements et surtout le remarquable changement d'assiette des attributions et des sources sont évidents : du dépassement de la dichotomie entre premier et troisième Pilier par la disparition formelle de ce dernier (sauf ce qui sera dit à propos de la procédure législative spéciale pour l'institution du parquet européen et la possibilité de suspension de la procédure législative par un Etat membre), à l'affirmation simultanée d'une compétence pénale explicite de l'Union, concurrente de celle des Etats pour les matières énumérées. Il en résulte le caractère opérationnel immédiat de toutes les sources normatives déjà «communautaires» et maintenant européennes (règlements et directives), qui sont dotées de «primauté» sur le droit national (déclaration n. 17 de l'annexe au Traités, n'ayant pas été maintenu dans ceci un texte correspondant à l'art. I-6 Traité constitutionnel) et soumises à l'interprétation préjudicielle de la Cour de Justice, en même temps que leur violation entraîne la responsabilité

des Etats tant envers l'Union et les autres Etats qu'envers les citoyens intéressés.

L'art. 82, paragraphe 1 TFUE – qui ouvre le chapitre 4 spécialement dédiée, comme on l'a dit, à la matière pénale – ne se limite pas à envisager le «*principe de la reconnaissance mutuelle des jugements et des décisions judiciaires*» comme un simple *instrument* de la coopération opérationnelle. Cette norme fonde plutôt la coopération judiciaire sur le principe de la «*confiance mutuelle*» que l'on considère comme un indicateur d'homogénéité et de comparabilité substantielle des *garanties* et des *standards* de protection de chacun des systèmes des Etats membres. Evidemment, une décision prise par l'autorité judiciaire d'un Etat de l'Union ne peut être directement exécutée dans un autre système juridique que pour autant que les systèmes de l'un et l'autre pays soient également homogènes d'un point de vue substantiel. Et c'est dans cette perspective plus large que «*le rapprochement des dispositions législatives et réglementaires des Etats membres*» développe un projet stratégique plus ambitieux d'*harmonisation* des normes, qui n'est pas limité ou destiné seulement à la coopération et à la reconnaissance des décisions judiciaires, mais semble même être le prélude à une *unification* de la réglementation pénale et de la procédure pénale dans des domaines particuliers.

Dans ce scénario s'insère la compétence des directives européennes à établir également des «*règles minimales*» communes de nature *procédurale*, portant non seulement sur l'admissibilité mutuelle des preuves, les droits des personnes dans la procédure pénale et ceux des victimes, mais aussi sur d'autres éléments spécifiques de procédure, à identifier par une décision du Conseil (nouvel art. 82, paragraphe 2, lettre a-d TFUE). A son tour, dans le cadre du droit pénal *substantiel*, le nouvel art. 83, paragraphe 1 TFUE prévoit – par des dispositions correspondant partiellement aux actuelles art. 31 et 34 TUE – que l'Union (Parlement et Conseil) *peut* établir par une directive «*conformément à la procédure législative ordinaire*» des «*règles minimales* relatives à la définition des infractions pénales et des sanctions dans des domaines de criminalité particulièrement *grave* revêtant une dimension *transfrontalière*, résultant du caractère ou des incidences de ces infractions *ou* d'un besoin particulier de les combattre sur des bases communes».<sup>4</sup>

Donc, la coopération et la reconnaissance des décisions judiciaires ne sont pas mentionnées comme unique objectif ou comme limite de la compétence européenne en matière de droit pénal substantiel, qui s'appuie sur des bases et des critères *autonomes*, relatifs aux domaines de criminalité qui en sont l'objet et sont expressément énumérés au second alinéa de ce même paragraphe 1. Il s'agit d'une liste bien plus large et précise que celle en vigueur contenue dans l'actuel art. 29, paragraphe 2, TUE, comprenant le «*terrorisme, la traite des êtres*

humains et l'*exploitation sexuelle des femmes* et des enfants, le trafic illicite de drogues, le trafic illicite d'armes, le *blanchiment d'argent*, la corruption, la *contrefaçon de moyens de paiement*, la *criminalité informatique* et la criminalité organisée».<sup>5</sup> La «*fraude*», très opportunément, n'est en revanche plus mentionnée parce que – comme on le verra sous peu, au point 2 – elle trouve sa sphère autonome d'application et de réglementation. Il est ensuite expressément prévu que, «*en fonction des développements de la criminalité*», d'*autres* domaines – répondant aux mêmes critères – pourront s'ajouter par une «*décision*» du Conseil prise à l'unanimité après approbation du Parlement (art. 83, paragraphe 1, alinéa 3, TFUE).

A côté de cette *première* catégorie ouverte d'infractions «*particulièrement*» graves et revêtant une dimension transfrontalière – certaines d'autres pouvant s'y ajouter, si remplissent les critères visés, auxquels semble donc strictement reliée la détermination des pouvoirs d'harmonisation législative examinés – on trouve une *seconde* catégorie d'infractions qui, tout en ne présentant pas (ou pouvant ne pas présenter) les caractéristiques structurelles mentionnées ci-dessus, font également l'objet des compétences pénales de l'Union. Le paragraphe 2 du nouvel art. 83 TFUE établit en effet que si «*le rapprochement des dispositions législatives et réglementaires des Etats membres en matière pénale s'avère indispensable pour assurer la mise en œuvre efficace d'une politique de l'Union dans un domaine ayant fait l'objet de mesures d'harmonisation, des directives peuvent établir des règles minimales relatives à la définition des infractions pénales et des sanctions dans le domaine concerné*» (art. 83, paragraphe 2, alinéa 1 TFUE).

Dans ce cas, le but n'est pas (uniquement) de favoriser la coopération judiciaire ou la reconnaissance des décisions, étant donné que les dites «*mesures d'harmonisation*» sont explicitement destinées à un but différent qui est d'assurer «*la mise en œuvre efficace*» d'une politique de l'Union. Même si n'ait pas été retenu le critère plus large visant à attribuer à l'Union une compétence pénale générale, étendue à la protection tant des biens juridiques «*propres*», c'est-à-dire ceux dont elle est titulaire – comme ses intérêts financiers – que des biens qui sont «*communs*», c'est-à-dire ceux qui ont acquis une dimension européenne par l'effet des politiques communautaires, l'extension prévue de la réforme des traités est indiscutablement importante en s'ouvrant à un futur accueil formel des exigences changeantes de protection. Ces exigences sont reliées au développement des politiques communautaires dont l'instrument pénal est institutionnellement destiné à faire partie, avec la seule limite extrinsèque qu'il s'agisse de domaines «*ayant fait l'objet de mesures d'harmonisation*». Extension donc plus grande et articulée de celle qui sortisse de la jurisprudence de la CJE sur les décisions-cadres en matière de protection pénal de l'environnement et contre la pollution maritimes.<sup>6</sup>

En conclusion, la compétence législative de l'Union en matière pénale et, en particulier, en droit pénal substantiel, trouve sa légitimation autonome dans l'exigence d'une protection « commune » ou équivalente des intérêts européennes – tels que les intérêts financiers – ou de relevance européenne – tel que la protection de l'environnement – au-delà du simple but de favoriser la coopération judiciaire et renforcer l'action des structures *opérationnelles* (telles qu'*Eurojust*, à qui est consacré l'art. 85 TFUE<sup>7</sup> et *Europol* à qui se réfère en revanche l'art. 88 TFUE, colloqués dans le chapitre 5), toutefois très importants pour garantir l'efficacité concrète de ladite protection pénale.

## II. La compétence pénale de l'Union en matière de lutte contre les fraudes et les autres activités illégales portant atteinte à ses intérêts financiers

Le principe, selon lequel des *devoirs* d'action spécifiques et contraignants pour la protection des intérêts financiers communautaires incombent aux Etats membres et à l'Union elle-même, est fondé sur l'obligation générale de « *loyauté communautaire* » découlant de l'appartenance des Etats membres à la communauté ainsi qu'à l'Union européenne. Ce principe trouve son fondement explicite à l'art. 10 – et déjà 5 – TCE (auquel correspond le nouvel art. 4, par. 3 TUE) et a été consolidé par la jurisprudence de la Cour de Justice des Communautés européennes de la fin des années '80. Ledit devoir d'action implique, si nécessaire, le recours à des sanctions de nature pénales qui doivent être (au minimum) « équivalentes » à celles prévues pour la protection des intérêts nationaux correspondants et, de toute façon, « efficaces, proportionnées et dissuasives ».<sup>8</sup> Cette spécification a été expressément reconnue dans le traité communautaire toujours en vigueur, à la suite des modifications introduites par celui de Maastricht, d'abord (art. 209 A, TCE), et d'Amsterdam, ensuite (art. 280 TCE),<sup>9</sup> établissant une distinction claire entre les instruments de protection des intérêts financiers qui sont « propres » à la Communauté, et qui sont (ou devraient être) l'objet des compétences du premier Pilier, et les exigences de simple harmonisation des systèmes pénaux nationaux, déferées au contraire aux instruments du troisième Pilier. Seule la violation des premiers entraîne une responsabilité spécifique des Etats et de la Communauté elle-même, avec la possibilité d'ouverture d'une procédure d'infraction par la Commission européenne sur laquelle la Cour de Justice a compétence pour juger en rendant des jugements de condamnation avec d'éventuelles obligations de dédommagement envers les citoyens ordinaires de l'Union.

Le traité de l'Union ne se limite donc pas à confier la protection pénale des intérêts financiers « propres » à l'Union aux simples compétences d'harmonisation, largement *discrétionnaires*, prévues en général pour la réalisation de l'« espace de liberté,

de sécurité et de justice ». Celles-ci regardent la prévention et la répression de la criminalité grave et transfrontalière (art. 83, par. 1 TFUE) et le soutien général des « politiques » européennes dans des domaines qui ont déjà été l'objet d'harmonisation (art. 83, par. 2 TFUE), tandis que la lutte contre la fraude est réglée spécifiquement dans un chapitre autonome (art. 325 TFUE, correspondant à l'art. 280 TCE), en soulignant qu'il y a une nécessité plus concrète et pressante de protection pénale du budget et des ressources européennes.

A leur expansion et à leur importance est étroitement liée l'accroissement corrélatif des atteintes auxquelles sont exposés tous les contribuables européens et des dommages intolérables pour ceux-ci. Leur protection, qui doit être *effective* et *équivalente* sur tout le territoire de l'Union, constitue une prémisses institutionnelle, ou même l'avant-poste, de toute politique ou objectif de l'Union, y compris celui de réaliser l'« *espace de liberté, de sécurité et de justice* ».

La disposition spécifique et contraignante contenue à l'art. 325 TFUE est donc pleinement justifiée, en ce qu'elle détermine un deuxième – ou mieux : le plus direct – cadre de compétence pénale de l'Union, tout en se plaçant systématiquement *en dehors* du titre consacré à l'« *espace de liberté, de sécurité et de justice* ». Si, dans ce dernier domaine, les notions sont toutes formulées en termes de simple « *possibilité* » de recourir à des instruments d'harmonisation, de rapprochement et de coopération ou de créer dans le futur un « système » de droit pénal et procédural commun, axé sur l'institution du procureur européen (« *peut* », « *peuvent* », lit-on dans les art. 82, 83, 86 TFUE: cf. *supra*, points 1 et *infra*, point 3), les instruments nécessaires pour mettre en oeuvre l'*obligation* immédiate de la « lutte contre la fraude » sont en revanche coercitifs et trouvent une expression dans des règles formulées avec des verbes à la forme indicative (« *combattent* », « *prennent les mesures* », « *coordonnent* », « *organisent* », « *établit* », « *est prise* », etc. : art. 325 TFUE).

Art. 325 est une règle de grande importance pour le droit européen, et pas seulement pénal, comme le démontre le fait qu'elle occupe toute le chapitre 6 – expressément dédiée à la « lutte contre la fraude » et composée uniquement de cet article – du titre II, concernant les « dispositions financières », de la partie VI TFUE. Ce n'est qu'à première vue que la nouvelle formulation calque le texte de l'actuel art. 280 TCE. Elle présente en réalité des modifications de libellé significatives et des différences dans le contenu, parmi lesquelles est particulièrement évidente celle – apportée par le Conseil européen lors de la phase de révision du texte constitutionnel – concernant l'extension explicite de son domaine opérationnel aux « institutions, organes et organismes de l'Union » (paragraphe 1 et 4 de l'art. 325 TFUE)<sup>10</sup>. L'affirmation selon laquelle « l'Union et les Etats membres combattent la fraude et toute autre activité

*illégale*» – parmi lesquelles il faut *in primis* inclure la corruption – «portant atteinte aux intérêts financiers de l'Union, par des mesures prises conformément au présent article», acquiert ainsi une cohérence bien supérieure : les règles doivent être «dissuasives» et offrir «une protection *effective*» non seulement «dans les Etats membres», mais aussi «dans les institutions, organes et organismes de l'Union» (art. 325, par. 1, TFUE; caractères italiques ajoutés).

Seul le paragraphe 2 ne présente pas de nouveauté dans la formulation par rapport à l'art. 280 TCE, en se limitant à répéter l'obligation de respecter – comme *standard minimum* immédiat – le principe d'assimilation selon lequel «pour combattre la fraude portant atteinte aux intérêts financiers de l'Union, les Etats membres prennent les mêmes mesures que celles qu'ils prennent pour combattre la fraude portant atteinte à leurs propres intérêts financiers» : c'est à dire mesures qui en application de l'acquis PIF comprennent déjà aujourd'hui des sanctions pénales. Le paragraphe 3 contient en revanche une clause de réserve expresse («sans préjudice d'autres dispositions des traités»), qui souligne son autonomie par rapport aux règles du chapitre 4 sur l'«espace de liberté, de sécurité et de justice» (y compris l'art. 86 TFUE dont on parlera tout de suite), avant de dicter des mesures de coordination horizontale entre Etats et de collaboration «étroite et régulière» entre les autorités compétentes et la Commission.

Le paragraphe 4 enfin, qui contient les nouveautés les plus nettes, est d'une grande importance, lorsqu'il dispose que «Le Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire [...] adoptent les *mesures nécessaires* dans les domaines de la *prévention* de la fraude portant atteinte aux intérêts financiers de l'Union et de la *lutte* contre cette fraude en vue d'offrir une protection *effective* et *équivalente* dans les Etats membres ainsi que dans les institutions, organes et organismes de l'Union» (art. 325, paragraphe 4 TFUE; caractères italiques ajoutés). Il y a là, avant tout, l'adoption expresse de la procédure législative ordinaire pour la réglementation de la matière, mais pas seulement avec des «directives», instrument en revanche exclusivement réservé pour le rapprochement des législations pénales nationales (voir art. 82 et 83 TFUE). Il s'ensuit que la compétence pénale de l'Union en matière de lutte contre les fraudes peut aller bien au-delà des «règles minimales» d'harmonisation auxquelles se réfèrent les art. 82 et 83 TFUE, en vue de définir des règles pénales achevées ayant aussi une efficacité directe dans les Etats membres, comme celle des «règlements», conformément au caractère coercitif déjà souligné de ces interventions.

Mais la différence de formulation la plus voyante de la nouvelle disposition normative par rapport au texte de l'actuel art. 280 TCE est constituée par la suppression de la limite contro-

versée contenue à la seconde phrase du paragraphe 4, selon laquelle «ces mesures ne concernent pas l'application du droit pénal national ou l'administration de la justice dans les Etats membres». La disparition de cette incise démontre, *a contrario*, le but de la réforme de *permettre* que les «mesures nécessaires» pour la prévention et la «lutte» contre la fraude – y compris donc les mesures de nature répressive et à caractère de sanction – aient aussi des répercussions sur le droit pénal et sur l'administration de la justice dans les Etats membres.

L'art. 325 TFUE représente par conséquent une «base juridique» *spécifique* et *autonome* pour la création d'un noyau de droit pénal européen au sens strict, destiné à la défense des intérêts financiers «propres» de l'Union et qui peut être immédiatement opérationnel en ce qui concerne aussi bien la définition des délits et la détermination des sanctions de droit pénal substantiel, que le droit procédural pénal – tout comme peuvent l'être les dispositions de la partie générale qui seraient considérées comme essentielles, selon un modèle *d'unification* normatif analogue à celui tracé par les articles 1 à 17 (ainsi que 35, pour la partie qui intéresse le droit matériel) du *Corpus Juris*. C'est une voie qui peut être empruntée directement par un règlement, avec la seule limite qu'il s'agisse de «mesures nécessaires» pour assurer une protection *effective* et *équivalente* sur tout le territoire de l'Union (art. 325, paragraphe 4 TFUE).

Le caractère *spécial* et *autonome* de tels instruments de lutte contre les «fraudes communautaires» et les «autres activités illégales portant atteinte aux intérêts financiers» européens signifie que ces instruments peuvent, et même doivent, opérer *indépendamment* des phases et des modes de réalisation de l'objectif plus général de l'«espace de liberté, de sécurité et de justice» ou de l'institution plus lointaine du procureur européen, dont on va parler maintenant. Il s'agit donc d'un choix d'une grande importance politico-criminelle, en plus de juridique, qui entend dépasser la malheureuse expérience d'harmonisation, au parcours tortueux jusqu'à ce jour et avec des résultats insuffisants, tentée dans le cadre du troisième Pilier par la Convention de 1995 pour la protection des intérêts financiers communautaires et ses différents protocoles additionnels de 1996 et 1997, pas encore complètement mis en oeuvre ou de manière satisfaisante dans tous les Etats membres.<sup>11</sup>

### III. La possibilité d'institution d'un parquet européen et d'un «système» de droit pénal commun pour la protection des intérêts financiers de l'Union

Le changement de perspective dans les relations entre droit pénal et Union européenne, apporté par la réforme des traités, se constate enfin à propos du tout *nouvel* espace d'action, qui



touche lui aussi les plans opérationnels et normatifs et s'ouvre avec la possibilité d'instituer – « par voie de règlements conformément à une procédure législative spéciale » - un « Parquet européen à partir d'Eurojust », compétent non seulement pour *enquêter* sur « les infractions portant atteinte aux intérêts financiers de l'Union », mais aussi *en exerçant* l'action pénale correspondante devant les organes juridictionnels compétents des Etats membres (art. 86 TFUE). La nouvelle disposition a ainsi expressément posé les bases juridiques pour la création d'un « système » de droit pénal européen commun – même si ce n'est que dans un domaine – doté de *ses propres* règles d'incrimination et dispositions répressives de source supranationale, avec des règles de procédure européennes et des autorités spécifiques à l'Union, compétentes pour en promouvoir directement l'application.

La nouveauté absolue de ce système, en comparaison du cadre examiné jusqu'à présent ainsi que l'autonomie de ses sources, ressortent sous divers aspects. Avant tout, la possibilité d'instituer – par décision à l'unanimité du Conseil et avec l'approbation du Parlement – un Parquet européen, à qui il revient de « *rechercher, poursuivre et renvoyer en jugement (...) les auteurs d'infractions* » mentionnées ensuite (art. 86, paragraphe 2, TFUE), ainsi que d'exercer l'action pénale qui y est relative, conduit à une extension sans précédent des compétences des organes européens dans le domaine judiciaire, en allant jusqu'à la reconnaissance de la *titularisation* du pouvoir pour l'action publique.

S'y ajoute une compétence de l'Union qui concerne tant le plan *opérationnel* que *réglementaire*, à savoir le point de vue procédural et le point de vue substantiel de la matière.

Sur le plan de la procédure, il y a en effet la création d'un *nouvel organe* (le Parquet européen) et la perspective de *règles* spécifiques *de procédure et d'admissibilité des preuves*. Un nouvel organe donc, qui n'est pas un « juge européen », mais le ministère public européen, c'est-à-dire la personne titulaire du pouvoir de saisir la juridiction, qui reste dans les mains des Etats membres, mais avec un noyau de règles communes qui doivent être acceptées également pendant l'instance. Sur le plan substantiel, il existe une compétence exclusive pas moins importante de nature *normative*, qui concerne la *définition* des infractions rentrant dans sa compétence. Mais il faut faire attention car il ne s'agit pas nécessairement, pour ces deux points de vue, de la même compétence normative que celle examinée aux points précédents relative – d'un côté – au pouvoir d'harmonisation qui s'exerce au moyen de « *règles minimales* » de rapprochement des dispositions législatives et réglementaires des Etats membres (art. 82 et 83 TFUE) ou qui descende – d'autre côté – du devoir de prendre les mesures indispensables pour une lutte « efficace et équivalente » contre la fraude dans tout le territoire de l'Union (art. 325 TFUE).

L'art. 86 TFUE en revanche *n'opère pas* de renvoi aux sources mentionnées. Il s'agit d'une compétence nouvelle et autonome, qui ne trouve pas d'équivalent direct dans les traités en vigueur à ce jour, et qui se fonde en substance sur deux expériences différentes. D'un côté, le projet *Corpus Juris*, né des études du groupe d'experts chargés par la Commission et par le Parlement de présenter un système efficace de droit pénal de l'Union pour la protection de ses intérêts financiers (une première version en 1997, la seconde en 2000) et puis retravaillé et proposé à nouveau par la Commission dans son « Livre vert sur la protection pénale des intérêts financiers communautaires et la création d'un Procureur européen » (en 2001).<sup>12</sup> De l'autre côté, l'institution et le développement de l'activité d'*Eurojust*, expressément mentionnée par la réglementation examinée et à laquelle on a déjà fait allusion auparavant.

Une unique *source* est en tout cas prévue pour *instituer* le Parquet européen (art. 86, paragraphe 1), *définir* les infractions pour lesquelles il est compétent (art. 86, paragraphe 2) et *fixer* le « statut » du nouvel organe, ainsi que les « règles de procédure » spécifiques applicables (art. 86, paragraphe 3), à savoir, un « règlement » qui requiert une délibération du Conseil « *à l'unanimité*, après approbation du Parlement européen » (art. 86, paragraphe 1, dernière partie). Il ne s'agit par conséquent pas des mêmes sources (les directives) que celles prévues pour l'établissement des « règles minimales » de rapprochement, relatives à des éléments particuliers de procédure (aux termes de l'art. 82 TFUE) ou aux définitions des infractions et des sanctions (aux termes de l'art. 83 TFUE: voir point II).

Même les infractions qui peuvent rentrer dans la compétence du Parquet européen sont déterminées d'une autre manière et de façon plus restrictive que celles pour lesquelles est prévue la compétence d'harmonisation mentionnée auparavant. Seules « les infractions portant atteinte aux intérêts financiers » sont en effet expressément mentionnées à l'art. 86, paragraphe 1, et cette formulation est répétée aussi au paragraphe 2, où il est textuellement précisé : « *tels que déterminés* par le règlement prévu au paragraphe 1 » (art. 86, paragraphe 2, TFUE; caractères italiques ajoutés). Au paragraphe 4 qui suit, il est établi que le Conseil – par décision délibérée à l'unanimité et après approbation du Parlement européen – peut modifier le paragraphe 1 pour étendre également les attributions du Parquet européen et la réglementation procédurale qui y est relative, « *à la lutte contre la criminalité grave ayant une dimension transfrontalière* », en précisant que la modification vise en conséquence aussi le paragraphe 2 « *en ce qui concerne les auteurs et les complices de crimes graves affectant plusieurs Etats membres* » : autrement dit pour ce qui se rapporte, entre autres, précisément à la définition de ces infractions.

## IV. Conclusions

Dans le «système» axé sur la figure du Parquet européen, la compétence pénale de l'Union va bien au-delà de l'harmonisation des droits pénaux nationaux, en menant à une véritable *unification* au niveau européen, selon un «modèle» proche de celui proposé par le *Corpus Juris*.<sup>13</sup> Le problème est que la réalisation concrète de ce tournant révolutionnaire demeure confiée à un cadre politique très incertain, surtout concernant les étapes de sa mise en œuvre qui dépendent d'une ou plusieurs décisions  *futures* « à l'unanimité » du Conseil, après approbation du Parlement, dans une Europe désormais élargie et à laquelle participent 27 Etats membres. Très difficile donc. Mais la règle de l'unanimité trouve un balancement dans la possibilité d'instituer une «coopération renforcée» entre au moins neuf États membres qui la souhaitent (art. 86, paragraphes 1, alinéa 3 TFEU). Cette perspective, qui représente l'innovation la plus éclatante en la matière en respect au texte de

l'art. III-274 du Traité constitutionnel, reçoit donc une concrète possibilité de réalisation mais en temps qui ne peuvent être sûrement rapides.

Et malgré la forte charge innovante, l'art. 86 ne peut certes pas satisfaire les exigences urgentes que requiert la protection pénale des intérêts financiers de l'Union en vue de laquelle il est textuellement introduit. Ainsi, en l'absence d'une volonté politique unanime (et rapide) du Conseil et du Parlement en vue d'instituer le procureur européen et le système de droit pénal matériel et procédural qui s'y rattache, dans le cadre de l'art. 86, une alternative est l'introduction, justifiée dès maintenant, de définitions des infractions pénales et de règles de droit pénal substantiel et procédural, valables sur tout le territoire de l'Union, aux termes de l'art. 325 TFUE. La perspective de ce domaine de compétence pénal ultérieur pour l'Union apparaît en cela non seulement justifié, mais même nécessaire pour respecter l'actuel *acquis communautaire* en la matière.



**Prof. Dr. Lorenzo Picotti**  
Professeur ordinaire de droit pénal,  
Université de Vérone

1 Signé à Lisbonne le 13 décembre 2007, concerne soit – avec son Art. 1 – le « Traité sur l'Union européenne » (TUE), contenant les principes généraux et les dispositions sur l'organisation institutionnelle, soit – avec son Art. 2 – le « Traité sur le fonctionnement de l'Union européenne » (TFEU), concernant la répartition des compétences et les règles pour leur exercice concret, sur la base de l'originaire « Traité pour l'institution de la Communauté européenne » dont est changée la dénomination, en tant que l'Union absorbe la Communauté. Le texte « consolidé » de deux Traités a été publié en Journal Officiel UE du 9 mai 2008 C-115.

2 Une bipartition, partiellement différente, était proposée autrefois par Grasso G., *Comunità europea e diritto penale*, Milan 1989, p. 9 et suiv., et est aujourd'hui développée, sur base d'une analyse articulée des sources juridiques communautaires, par Sicurella R., *Diritto penale e competenze dell'Unione europea*, Milan 2005, p. 326 et suiv.; déjà Picotti L., *Diritto penale comunitario e Costituzione europea*, en: Canestrari S., Foffani L. (éd.), *Il diritto penale nella prospettiva europea*, Milan 2005, p. 332 et suiv.

3 Cfr. pour l'ensemble Sieber U., *Subventionsbetrug und Steuerhinterziehung zum Nachteil der Europäischen Gemeinschaft*, dans *Schweizerische Zeitschrift für Strafrecht*, 1996, p. 358 et suiv.

4 Caractères italiques ajoutés par l'auteur.

5 Les ajoutés et les compléments apportés par le traité constitutionnel sont mis en évidence en italique.

6 Cf. eucrim 1-2/2006, p. 3 et eucrim 1-2/2007, p. 7-8.

7 La norme a été amendée plusieurs fois par rapport à la disposition d'origine de la Convention, afin d'établir clairement qu'*Eurojust* a compétence, outre pour la « coordination » (nouvelle lettre b), également pour le déclenchement d' « enquêtes pénales » ainsi que pour faire la « proposition de déclenchement de poursuites » conduites par les autorités nationales compétentes (lettre a amendée).

L'objet de l'action d'Eurojust est « la criminalité grave affectant deux ou plusieurs Etats membres ou exigeant une poursuite sur des bases communes, à partir des opérations effectuées et des informations fournies par les autorités des Etats membres et par *Europol* ».

8 Cour de Justice CE, 21.9.1989, C-68/88.

9 Sur l'importance de cette norme, comme potentielle « base juridique » pour la mise en œuvre immédiate du projet *Corpus Juris*, qu'il soit permis de renvoyer à Picotti L., *Potestà penale dell'Unione europea nella lotta contro le frodi comunitarie e possibile « base giuridica » del Corpus Juris*. In margine al nuovo art. 280 del Trattato CE, en Grasso G. (éd.), *La lotta contro la frode agli interessi finanziari della Comunità europea tra prevenzione e repressione. L'esempio dei fondi strutturali* (Actes du séminaire de Catane, 19-20 juin 1998), Milan 2000, p. 357 et suiv., en particulier p. 373. Une doctrine qui fait autorité s'était déjà exprimée dans un sens identique (Tiedemann K., *Pour un espace juridique après Amsterdam*, dans Agon, 1997, n° 17, p. 12 et suiv. ; et plus largement *Id.*, EG und EU als Rechtsquellen des Strafrechts, dans Roxin-FS, 2001, p. 1401, 1406 et suiv.), trouvant un large consensus y compris la position « officielle » de la Commission européenne prise dans la présentation de la proposition de Directive 23 mai 2001 COM (2001) 272 fin. pour la protection pénale des intérêts financiers européennes.

10 Cfr. l'acte du Conseil du 25 novembre 2003 CIG 50/03, p. 232, qui a inséré cette formule tant à la fin du par. 1 que dans le par. 4 de l'art. III-321 (= art. III-415) traité const., en complétant la référence d'origine aux seuls « Etats membres ».

11 Cfr. le deuxième rapport de la Commission du 14.2.2008 COM(2008) 77 final, après le premier du 25.10.2004. Voyez aussi Wahl, T., eucrim 3-4/2007, p. 87 et suiv. pour le deuxième rapport et Killmann, B., eucrim 1-2/2007, p. 48 et suiv. pour une analyse du premier rapport. Pour un cadre critique concernant le système italien, Picotti L., *L'attuazione in Italia*, cit., passim.

12 Présenté par la Commission en date du 11.12.2001 COM (2001) 715 final, est aussi reproduit en différentes langues sur le site spécial créé par l'OLAF [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/index\\_fr.html](http://europa.eu.int/comm/anti_fraud/green_paper/index_fr.html).

13 En raison de la forte connexion systématique entre éléments de droit pénal substantiel et de droit pénal procédural, le modèle le plus proche apparaît celui proposé par le projet de *Corpus Juris*, plutôt que par le Livre vert, cit.; pour des références critiques sur ce dernier, on renvoie à Picotti L., *Du « Livre vert » sur l'institution d'un procureur européen à un « système » de droit pénal communautaire*, cité sous le n° 22 dans le rapport de synthèse de la Commission des Communautés européennes (éd.), *Rapport sur les réactions au Livre vert sur la protection pénale des intérêts financiers communautaires et la création d'un Procureur européen*, en date du 19.3.2003 COM (2003) 128 final (cfr. en particulier p. 23, in [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/index\\_it.html](http://europa.eu.int/comm/anti_fraud/green_paper/index_it.html)).

# Folgen der Bindung des mitgliedstaatlichen Strafgesetzgebers an die europäischen Regelungen und das Verhältnismäßigkeitsprinzip

Dr. Nuria Pastor Muñoz<sup>1</sup>

The article deals with several observations concerning the phenomenon of the Europeanisation of criminal law in the EU Member States. It particularly examines the implications that result from the national legislator's commitment to respect both the European regulations and the principle of proportionality as well as further fundamental principles of criminal law. First of all, this paper describes the normative instruments that allow the European Community and the European Union to influence the criminal law of its Member States. Afterwards, the modifications of the §§ 232, 233 of the German Penal Code, which implement the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, are analysed. In this case, although the German legislator has fulfilled its European compromises, the principle of proportionality was not respected and therefore inconsistencies were established in the German criminal law: this case is an example of unsatisfactory implementation of European regulations. On the basis of the results of this analysis, the paper formulates proposals for a reasonable „Europeanisation“ of criminal law in the EU Member States and in particular for an adequate methodology of legislation. In this context, the article emphasises the co-responsibility of the European Community / European Union on the one hand and the Member States on the other hand for this “Europeanisation process”. The work concludes with observations regarding the coordination of European and national criminal law policy.

## I. Einführung

1. Das Europarecht konfrontiert die nationalen Rechtsordnungen mit einer neuen und komplexen Situation, die dadurch gekennzeichnet ist, dass die Europäische Gemeinschaft (nachfolgend EG) und die Europäische Union (nachfolgend EU) Einfluss auf die Gesetze der Mitgliedstaaten nehmen dürfen. Dabei bildet das jeweilige mitgliedstaatliche Strafrecht keine Ausnahme: Es ist weder eine gemeinschaftsrechts- noch unionsrechtsresistente Materie.<sup>2</sup> Denn der EG wie auch der EU sind mittels der einschlägigen Verträge [Vertrag zur Gründung der Europäischen Gemeinschaft (EGV) und Vertrag über die Europäische Union (EUV)] Wege eröffnet worden, unmittelbar oder mittelbar auf das Strafrecht der Mitgliedstaaten einzuwirken. Beispiele dieser Instrumente sind u.a. das Assimilierungsgebot, die Anweisungskompetenz und die rechtliche Harmonisierung durch Rahmenbeschlüsse. Dies bringt eine „neue Realität in Europa“ mit sich und zwar „das Phänomen des integrierten Staates, der sich in immer größeren Anteilen seiner Aktivitäten als „Mitglied“-Staat und nicht mehr als singuläres Staatssubjekt definiert. Dadurch ist eine Verbundstruktur entstanden, die durch eine Doppelung der Rechtsebenen – eine Ergänzung, Überlagerung und Verzahnung – geprägt ist.<sup>3</sup> Dieses Phänomen findet sich in einer ähnlichen Weise im Bereich der internationalen Vereinbarungen (z.B. der OECD, der VN, usw.). In Europa zeigt es sich mit besonderer Intensität; erstens wegen der Institutionalisierung der Einflussmechanismen auf die Strafrechtsordnungen der Mitgliedstaaten

und zweitens wegen des Umfangs der von diesem Einfluss betroffenen Bereiche des Strafrechts.

2. Zwar ließe sich anführen, die Existenz europäischer Regelungen, die geeignet sind, Einfluss auf die mitgliedstaatlichen Strafrechtsordnungen auszuüben, berge keine besondere Problematik: Jeder Mitgliedstaat solle schlicht die unmittelbare Anwendbarkeit bestimmter europäischer Normen akzeptieren und in den eigenen Strafgesetzen die Änderungen verwirklichen, die von der EG bzw. EU in der Ausübung ihrer Zuständigkeiten entschieden wurden. Hiernach wären die mit der Europäisierung verbundenen Hauptprobleme in erster Linie politischer Natur, wie z.B. der in den politischen Debatten innerhalb einiger Mitgliedstaaten häufig formulierte Vorbehalt dem Gemeinschafts- bzw. Unionsrecht gegenüber (Stichwort: Euroskeptiker). Jedoch ist diese Betrachtungsweise unvollständig, um die Wirklichkeit des Einflusses der EG und der EU auf das Strafrecht der Mitgliedstaaten zu erklären. Dieser Einfluss ist eine Quelle von Komplexität für die mitgliedstaatlichen Strafrechtsordnungen, die über die bloße Tatsache der Erfüllung bestimmter Kompromisse hinausgehend den Kern des Strafrechts trifft. In der Tat bereitet das Verhältnis zwischen dem Europarecht und den Rechtsordnungen der Mitgliedstaaten zahlreiche Probleme wie z.B. die Legitimation der EG und der EU für den Erlass von das Strafrecht beeinflussenden Regelungen sowie die hierfür von den Verträgen bestimmten Grenzen der Zuständigkeiten der EG und der EU

etc. Selbst wenn all diese Probleme gelöst würden, bliebe noch eine weitere zu thematisierende Frage, die sich aus der Perspektive der Mitgliedstaaten stellt, und diese lautet: Wie soll der mitgliedstaatliche Strafgesetzgeber angesichts der europäischen Regelungen seine gesetzgeberischen Aufgaben erfüllen, also nach welchen Kriterien soll sich eine richtige europäisierte nationale Strafgesetzgebung richten?

3. Diese Komplexität wird klar anhand einer kritischen Betrachtung der deutschen Strafgesetzgebung im Bereich des Menschenhandels. Der deutsche Gesetzgeber hat durch das 37. Änderungsgesetz vom 11.2.2005 einige Änderungen im Strafgesetzbuch (§§ 232, 233) vorgenommen,<sup>4</sup> die großzügig die Mindestanforderungen des Rahmenbeschlusses des Rates vom 19. Juli 2002 zur Bekämpfung des Menschenhandels erfüllen.<sup>5</sup> Diese Umsetzung des Rahmenbeschlusses ist jedoch problematisch.

Insbesondere ist der Fall des Lohnwuchers (Beschäftigung in ungünstigen Arbeitsverhältnissen) zu nennen, der bis zum 37. Änderungsgesetz mit einer relativ milden Strafe bewehrt war (§ 291 StGB) und seit dessen Inkrafttreten durch § 233 StGB erfasst wird.<sup>6</sup> Mit dem Änderungsgesetz hat der deutsche Strafgesetzgeber *Wertungswidersprüche* in das StGB eingefügt,<sup>7</sup> da der Lohnwucher heute mit einer schwereren Strafe bewehrt ist als jeder andere Wucherfall, ohne dass ein die unterschiedliche Behandlung auf der Straffolgende Seite rechtfertigender Grund besteht. Unten (s. III) soll die mit diesen Vorschriften einhergehende Problematik näher erläutert werden; jedoch soll bereits an dieser Stelle ein zentraler Gedanke dieses Beitrags kurz skizziert werden: Der mitgliedstaatliche Strafgesetzgeber ist sowohl an die europarechtlichen Vorgaben als auch an die Prinzipien des Strafrechts, insbesondere an den Verhältnismäßigkeitsgrundsatz, gebunden. Dies schließt eine „automatische“ Umsetzung bzw. Übernahme der europäischen Regelungen aus, da die Prinzipien des Strafrechts dem Handlungsspielraum des Strafgesetzgebers Grenzen setzen. Dies erfordert nachfolgende Betrachtung der entstandenen Implikationen dieser Doppelbindung des mitgliedstaatlichen Strafgesetzgebers an die europäischen Vorgaben einerseits und an den Verhältnismäßigkeitsgrundsatz andererseits. Besonderes Augenmerk wird auf die mitgliedstaatliche Strafgesetzgebungstechnik sowie auf die Auslegung des Umfangs der Zuständigkeiten der EG und der EU zu richten sein.

## II. Auf das Strafrecht der Mitgliedstaaten ausstrahlende Instrumente der EG und der EU

1. Bezüglich der Verträge der EG und der EU werden zahlreiche strafrechtsrelevante Aspekte thematisiert. So wird über die Zugehörigkeit der von den auf Gemeinschaftsebene zu

verhängenden Sanktionen zum Strafrecht diskutiert wie auch über den Umfang der Zuständigkeiten der EG und der EU im Bereich des Strafrechts und über die Grenzen der durch die Verträge geschaffenen Einwirkungsinstrumente auf die nationalen Strafrechtsordnungen. Vorliegend soll das Interesse jedoch nur der Skizzierung der von der EG und der EU angewandten Instrumente gelten, die eine Einflussnahme auf die nationalen Strafrechtsordnungen gestatten.

2. Aus der Perspektive des Strafrechts sind folgende vier *Auswirkungen des Gemeinschaftsrechts* hervorzuheben: Nach dem *Grundsatz des Vorrangs des Gemeinschaftsrechts*<sup>8</sup> findet im Fall eines Konflikts zwischen dem Gemeinschaftsrecht und der nationalen Rechtsordnung ersteres Anwendung. Demzufolge sind die mit dem Gemeinschaftsrecht – mit seinen Grundprinzipien des Verhältnismäßigkeitsgrundsatzes, des Diskriminierungsverbots, usw. oder mit den von dem Gemeinschaftsrecht anerkannten Grundfreiheiten der Warenverkehrsfreiheit, der Dienstleistungsfreiheit, dem freien Verkehr von Personen und von Kapital –<sup>9</sup> unvereinbaren nationalen Strafvorschriften unanwendbar, wie der Gerichtshof der Europäischen Gemeinschaften (EuGH) mehrfach festgestellt hat.<sup>10</sup> Darüber hinaus ist der mitgliedstaatliche Strafgesetzgeber aufgrund des Gebots der Gemeinschaftstreue bzw. der Loyalitätspflicht (Art. 10 EGV) dazu verpflichtet, diejenigen nationalen Strafvorschriften zu ändern, die im Widerspruch zum Gemeinschaftsrecht stehen.

Aus dem Gebot der Gemeinschaftstreue (Art. 10 EGV) hat der EuGH auch das *Assimilierungsgebot* als positive Auswirkung des EG-Rechts abgeleitet. Gemäß dem Assimilierungsgebot sind die Mitgliedstaaten verpflichtet, die Gemeinschaftsinteressen gleich den entsprechenden nationalen Interessen zu schützen.<sup>11</sup> Wenn aber das jeweilige mitgliedstaatliche Recht keine Regelung vorsieht, die die entsprechenden nationalen Interessen schützt (und es erscheint aus der europarechtlichen Perspektive notwendig, bestimmte Gemeinschaftsinteressen vor Beeinträchtigungen zu schützen), sind die Mitgliedstaaten verpflichtet, diesen Schutz durch wirksame, verhältnismäßige und abschreckende Sanktionen – die sogenannte Mindesttrias – zu gewährleisten.<sup>12</sup> In dem bedeutsamen Fall des Schutzes der finanziellen Interessen der EG sind diese Pflichten nunmehr ausdrücklich in Art. 280 II EGV festgelegt.

Nach der *Anweisungskompetenz der EG* ist die EG berechtigt, die Mitgliedstaaten zur Sanktionierung bestimmter Verhaltensweisen zu verpflichten. Die dafür wesentlichen Instrumente sind die *Richtlinien* (Art. 249 III EGV), deren inhaltlicher Umfang heftig diskutiert wird.<sup>13</sup>

Schließlich ist das *Gebot der gemeinschaftskonformen Auslegung* von großer Bedeutung, wonach die Mitgliedstaaten die

nationalen Gesetze nach Möglichkeit im Einklang mit dem Gemeinschaftsrecht auslegen müssen: Dies gilt nicht nur für die von den Richtlinien unmittelbar betroffene nationale Gesetzesregelung, sondern auch für die gesamte Rechtsordnung der Mitgliedstaaten.<sup>14</sup>

3. Im Bereich des *Unionsrechts* finden sich im Rahmen der polizeilichen und justiziellen Zusammenarbeit (der dritten Säule) die wichtigsten Instrumente, die den Einfluss des Europarechts auf das Strafrecht der Mitgliedstaaten ermöglichen. Die dritte Säule der EU bezweckt die Gewährleistung eines Raums „der Freiheit, der Sicherheit und des Rechts“ durch die „Verhütung und Bekämpfung von Kriminalität, insbesondere des Terrorismus, Menschenhandels und der Straftaten gegenüber Kindern, des illegalen Drogen- und Waffenhandels, der Bestechung und Bestechlichkeit sowie des Betruges“ (Art. 29 EUV). Für das Erreichen dieses Ziels spielt die „Annäherung der Strafvorschriften der Mitgliedstaaten“ (Art. 29 II EUV) eine wesentliche Rolle.

Besonders wichtig ist das auf die Strafrechtsharmonisierung gerichtete Instrument des *Rahmenbeschlusses*, der – wie die übrigen Handlungsmöglichkeiten in der dritten Säule – intergouvernementalen Charakter hat. Die Rahmenbeschlüsse bestimmen diejenigen Mindestvoraussetzungen, die von den Mitgliedstaaten in der eigenen Strafgesetzgebung umgesetzt werden müssen (Art. 31 lit. e EUV). Sie entfalten keine unmittelbare Wirkung, sind aber verbindlich für die Mitgliedstaaten. Von besonderer Relevanz hierbei ist, dass Rahmenbeschlüsse Mindesthöchststrafen für die vorgesehenen Verhaltensweisen (Mindestvorschriften) enthalten dürfen.<sup>15</sup> Im Übrigen hat der EuGH das Prinzip der gemeinschaftskonformen Auslegung auf die Rahmenbeschlüsse übertragen, d.h. das Prinzip der *unionskonformen Auslegung* in diesem Zusammenhang bejaht.<sup>16</sup> Außerdem findet sich im Bereich des EU-Rechts ein weiteres für den vorliegenden Beitrag interessantes Instrument der Harmonisierung und zwar das *völkerrechtliche Übereinkommen* unter Mitgliedstaaten (Art. 34 II lit. d EUV) – ein bekanntes Beispiel hierfür bildet das Übereinkommen über den Schutz der finanziellen Interessen der EG vom 26. Juli 1995.

4. Die vorstehend kurz bezeichneten Instrumente sind jene formell anerkannten Wege, über welche die EG bzw. die EU Einfluss auf die nationalen Strafrechtsordnungen der Mitgliedstaaten ausüben vermag. Die etwaige Notwendigkeit eines zusätzlichen Tätigwerdens des jeweiligen mitgliedstaatlichen Strafgesetzgebers schließen einige dieser Instrumente – z.B. die gemeinschaftskonforme Auslegung – aus, da diese unmittelbare Auswirkung auf das mitgliedstaatliche Strafrecht haben. Daher sollen diese Instrumente nicht weiter Gegenstand der folgenden Überlegungen sein, da sie lediglich für den

Strafrechtsanwender von Bedeutung sind. Hingegen sind Instrumente für die hier darzustellende Problematik von besonderer Relevanz, die einer zusätzlichen strafgesetzgeberischen Tätigkeit des Mitgliedstaates bedürfen. Als Beispiele hierfür lassen sich die Richtlinien, Rahmenbeschlüsse und Übereinkommen anführen, die allesamt den mitgliedstaatlichen Strafgesetzgeber mit der Verantwortung konfrontieren, die eigene *Strafrechtsordnung anzupassen*, zu „europäisieren“. Die nachfolgenden Überlegungen stellen diesen Gesichtspunkt am Beispiel der EU-Vorgaben zum Menschenhandel dar.

### III. Die §§ 232 und 233 StGB: Wertungswidersprüche infolge einer unbefriedigenden Umsetzung europäischer Regelungen

1. Das Beispiel der §§ 232 und 233 StGB, die den Rahmenbeschluss des Rates vom 19. Juli 2002 zur Bekämpfung des Menschenhandels<sup>17</sup> in die deutsche Strafrechtsordnung umsetzen, dient der konkreten Darstellung der in der Einführung erwähnten Problematik, die als solche in allen durch europäische Regelungen betroffenen Gebieten des materiellen Strafrechts auftreten kann.<sup>18</sup>

Dem Rahmenbeschluss nach treffen die Mitgliedstaaten die erforderlichen Maßnahmen, um sicherzustellen, dass bestimmte Handlungen unter „wirksame, angemessene und abschreckende“ Strafen gestellt werden (Art. 3). Die entsprechenden Handlungen werden in Art. 1 und 2 beschrieben. Art. 1 erfasst

(1) die Anwerbung, Beförderung, Weitergabe, Beherbergung und spätere Aufnahme einer Person, einschließlich Tausch der Kontrolle oder Weitergabe der Kontrolle über sie, wenn eine der folgenden Voraussetzungen gegeben ist:

- a) Anwendung oder Androhung von Gewalt oder anderen Formen der Nötigung, einschließlich Entführung, oder
- b) arglistige Täuschung oder Betrug, oder
- c) Missbrauch einer Machtstellung oder Ausnutzung einer Position der Schwäche, in einer Weise, dass die betroffene Person keine wirkliche und für sie annehmbare andere Möglichkeit hat, als sich dem Missbrauch zu beugen, oder
- d) Gewährung oder Entgegennahme von Zahlungen oder Vergünstigungen mit dem Ziel, das Einverständnis einer Person zu erhalten, die die Kontrolle über eine andere Person hat, zum Zwecke der Ausbeutung der Person durch Arbeiten oder Dienstleistungen, mindestens einschließlich unter Zwang geleisteter Arbeiten oder Dienstleistungen, Sklaverei oder der Sklaverei oder der Knechtschaft ähnlichen Verhältnissen, oder zum Zwecke der Ausbeutung einer Person mittels Prostitution oder anderer Formen der sexuellen Ausbeutung einschließlich Pornografie.

(2) Das Einverständnis eines Opfers von Menschenhandel zur beabsichtigten oder tatsächlich vorliegenden Ausbeutung ist unerheblich, wenn eine der in Absatz 1 aufgeführten Voraussetzungen gegeben ist.

(3) Betrifft die Handlung nach Absatz 1 ein Kind, so ist sie auch dann als Menschenhandel unter Strafe gestellt, wenn keine der in Absatz 1 aufgeführten Voraussetzungen gegeben ist.

(4) Im Sinne dieses Rahmenbeschlusses bezeichnet der Ausdruck „Kind“ Personen im Alter von unter 18 Jahren.

Art. 2 sieht die Bestrafung der Anstiftung und Beihilfe sowie des Versuches dieser Verhaltensweisen vor. Zudem bestimmt der Rahmenbeschluss, dass die in Art. 1 und 2 tatbestandlich erfassten Handlungen mit Freiheitsstrafen im Höchstmaß von mindestens acht Jahren geahndet werden, wenn sie unter bestimmten Umständen begangen werden (siehe Art. 3). Die nach der Umsetzung dieses Rahmenbeschlusses erfolgten Änderungen im deutschen StGB lauten wie folgt:<sup>19</sup>

§ 232 Menschenhandel zum Zweck der sexuellen Ausbeutung

(1) Wer eine andere Person unter Ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist, zur Aufnahme oder Fortsetzung der Prostitution oder dazu bringt, sexuelle Handlungen, durch die sie ausgebeutet wird, an oder vor dem Täter oder einem Dritten vorzunehmen oder von dem Täter oder einem Dritten an sich vornehmen zu lassen, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft. Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Satz 1 bezeichneten sexuellen Handlungen bringt.

(2) Der Versuch ist strafbar.

(3) [...]

(4) [...]

(5) In minder schweren Fällen des Absatzes 1 ist auf Freiheitsstrafe von drei Monaten bis zu fünf Jahren, in minder schweren Fällen der Absätze 3 und 4 ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu erkennen.

§ 233 Menschenhandel zum Zweck der Ausbeutung der Arbeitskraft

(1) Wer eine andere Person unter Ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist, in Sklaverei, Leibeigenschaft oder Schuldknechtschaft oder zur Aufnahme oder Fortsetzung einer Beschäftigung bei ihm oder einem Dritten zu Arbeitsbedingungen, die in einem auffälligen Missverhältnis zu den Arbeitsbedingungen anderer Arbeitnehmerinnen oder Arbeitnehmer stehen, welche die gleiche oder eine vergleichbare Tätigkeit ausüben, bringt, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft. Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren in Sklaverei, Leibeigenschaft oder Schuldknechtschaft oder zur Aufnahme oder Fortsetzung einer in Satz 1 bezeichneten Beschäftigung bringt.

(2) Der Versuch ist strafbar.

(3) § 232 Abs. 3 bis 5 gilt entsprechend.

Die vom deutschen Gesetzgeber vorgenommene Umsetzung des Rahmenbeschlusses zur Bekämpfung des Menschenhandels wirft zahlreiche Fragen auf. Besondere Aufmerksamkeit verdienen aber zwei Punkte und zwar der Fall der Ausbeutung der Arbeitskraft in § 233 StGB sowie der durch § 232 Abs. 1 Satz 2 StGB erfasste Fall des Bringens einer Person unter einundzwanzig Jahren zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Satz 1 des genannten Paragraphen bezeichneten sexuellen Handlungen.

### – Wertungswidersprüche im Hinblick auf § 233 StGB –

2. Was den neuen § 233 StGB angeht, muss zunächst die neue strafrechtliche Behandlung des Lohnwuchers erörtert werden. Vor dem 37. Änderungsgesetz war dieses Verhalten durch § 291 StGB (Wucher) erfasst,<sup>20</sup> der eine Freiheitsstrafe bis zu

drei Jahren oder eine Geldstrafe vorsieht. Nach Inkrafttreten des genannten Änderungsgesetzes ist aber der Lohnwucher auch durch § 233 StGB (genauer: unter der Beschäftigung zu ungünstigen Arbeitsbedingungen) erfasst.<sup>21</sup> Diese Konkurrenz wird kraft Spezialität zugunsten letzterer Vorschrift entschieden,<sup>22</sup> sodass der Lohnwucher mit einer Freiheitsstrafe von sechs Monaten bis zu zehn Jahren oder in minder schweren Fällen mit einer Freiheitsstrafe von drei Monaten bis zu fünf Jahren (§ 233 Abs. 3 StGB) bewehrt ist. Nun sollen um des *Verhältnismäßigkeitsgrundsatzes* willen die vom Gesetzgeber ausgewählten Strafrahmen ja stets eine Bewertung der Schwere der Straftat ausdrücken. Aus diesem Grund stellt sich angesichts der in § 233 StGB eingefügten Änderung die Frage, ob sich der deutsche Gesetzgeber seiner Bindung an den Verhältnismäßigkeitsgrundsatz bewusst war, d.h. ob die für den Lohnwucher aktuell vorgesehene Strafe der Schwere dieses Verhaltens entspricht.

Es sind lediglich zwei Erklärungen für diese Änderung denkbar: Entweder hat eine Wertungsänderung stattgefunden, nach der der Lohnwucher nach dem 37. Änderungsgesetz als schwerer bewertet wird, wobei die Gründe einer solchen Veränderung unbekannt bleiben; oder der deutsche Gesetzgeber wollte keine veränderte Bewertung des Lohnwuchers zum Ausdruck bringen und hat wegen einer fehlerhaften Gesetzgebungstechnik lediglich übersehen, dass er durch die genannte Änderung Inkohärenzen in der strafrechtlichen Behandlung der Wucherfälle auslöst und damit das dem Verhältnismäßigkeitsprinzip folgende Erfordernis der *Kohärenz* innerhalb der Strafgesetzgebung *verletzt*. Letztere Erklärung ist überzeugend und noch interessanter ist die hervorzuhebende Tatsache, dass der deutsche Gesetzgeber diesen Wertungswiderspruch hätte vermeiden können, und zwar durch das umfassende Ausnutzen des Spielraums des Rahmenbeschlusses.<sup>23</sup> In seinem Art. 1 bezieht sich der Rahmenbeschluss gar nicht auf die Aufnahme oder Fortsetzung einer Beschäftigung „zu Arbeitsbedingungen, die in einem auffälligen Missverhältnis zu den Arbeitsbedingungen anderer Arbeitnehmerinnen oder Arbeitnehmer stehen, welche die gleiche oder eine vergleichbare Tätigkeit ausüben“. Vielmehr verlangt der Rahmenbeschluss von den mitgliedstaatlichen Strafgesetzgebern lediglich, die Ausbeutung durch *unter Zwang* geleisteten Arbeiten oder Dienstleistungen, *Sklaverei oder der Sklaverei oder Knechtschaft ähnlichen Verhältnissen* unter Strafe zu stellen; nicht dagegen die Kriminalisierung sämtlicher Formen der Ausbeutung der Arbeitskraft.

Selbst wenn mit dem Argument, der Lohnwucher sei der Knechtschaft ähnlich, die Ansicht vertreten werden könnte, dass der Lohnwucher eine der in Art. 1 des Rahmenbeschlusses eingeschlossenen Verhaltensweisen darstellt, so hätte nicht die Notwendigkeit bestanden, dass der deutsche Strafgesetzgeber die bis zum 37. Änderungsgesetz für den Lohnwucher vorge-

sehene Strafe erhöht. Denn Art. 3 des Rahmenbeschlusses sieht lediglich vor, dass die in Art. 1 und 2 beschriebenen Straftaten von jedem Mitgliedstaat „mit wirksamen, angemessenen und abschreckenden Strafen geahndet werden“ müssen, ohne ein Mindestmaß an Strafe zu bestimmen und ohne zu suggerieren, dass alle in Art. 1 des Rahmenbeschlusses vorgesehenen Fälle dasselbe Ausmaß an Unrecht besitzen und deshalb gleich behandelt werden müssen. Folglich hätte der Lohnwucher mit derselben Strafe weiter geahndet werden können, die vor dem 37. Änderungsgesetz für diesen gesetzlich vorgesehen war.

3. Darüber hinaus findet die in § 233 StGB vorgesehene *Gleichsetzung* von (1) Sklaverei, (2) Leibeigenschaft, (3) Schuldknechtschaft und (4) Beschäftigung zu ungünstigen Arbeitsbedingungen auch keine Erklärung. In der Tat weisen die vier genannten Fälle unterschiedliche Ausmaße an Relevanz auf.<sup>24</sup> Der in dem o.g. Fall (4) erfasste Lohnwucher – wie erwähnt, bis zum 37. Änderungsgesetz mit der milden Strafe des Wuchers bewehrt – ist minder schwer als die Sklaverei und darf deshalb nicht wie Letztere behandelt werden.<sup>25</sup> Anscheinend wollte der deutsche Gesetzgeber unter dem Begriff „ungünstiges Arbeitsverhältnis“ ein „sklavereiähnliches Verhältnis“ fassen; jedoch ist in der Legaldefinition „keines der die Sklavereiähnlichkeit charakterisierenden Elemente (eingeschränkte Freiheit, zumindest faktisch beschränkte Rechtspersönlichkeit, Ausbeutung) enthalten – allen anderen Erfolgsmerkmalen des § 233 StGB (Sklaverei usw.) sind diese Elemente dagegen schon vom Begriff her immanent“.<sup>26</sup>

Auch die Gleichsetzung von Schuldknechtschaft – ein Arbeitsverhältnis, bei dem der Gläubiger die Arbeitskraft eines Schuldners über Jahre mit dem Ziel ausbeutet, dass tatsächlich bestehende oder vermeintliche Schulden abgetragen werden<sup>27</sup> – und Beschäftigung zu ungünstigen Arbeitsbedingungen überzeugt nicht, denn es bestehen Unterschiede im Unrechtsausmaß beider Verhaltensweisen: Obwohl beim Lohnwucher wie auch bei der Schuldknechtschaft die Arbeitsleistung und der Lohn bzw. die Reduzierung der Schuld in einem auffälligen Missverhältnis zu den normalen Arbeitsbedingungen stehen, besteht zwischen beiden Fällen ein wichtiger Unterschied. Denn im Fall des Lohnwuchers ist die Zwangslage unabhängig von dem Täter vorhanden, während im Fall der Schuldknechtschaft der Täter eine besondere Machtstellung in seinem Verhältnis zum Opfer innehat; eigentlich erscheint das Unrecht der Schuldknechtschaft dem Unrecht der Sklaverei und der Leibeigenschaft näherzustehen als dem Unrecht des Lohnwuchers.<sup>28</sup> Hier stellt sich erneut die Frage, ob anstelle eines Wertungswiderspruchs von einer Veränderung in der Wertung auszugehen ist, wobei letztere Hypothese unwahrscheinlich sein dürfte.<sup>29</sup> Und das Überraschende ist, dass der deutsche Gesetzgeber allein vom Rahmenbeschluss her wieder nicht verpflichtet war, eine solche Regelung zu fassen, da der

Rahmenbeschluss ihm noch immer Spielraum genug gelassen hätte, die bis zum 37. Änderungsgesetz im StGB vorhandene Wertehierarchie beizubehalten.

4. An den Mängeln der Strafgesetzgebungstechnik in § 233 StGB ändert auch die Tatsache nichts, dass die *Rechtsprechung* den Versuch unternimmt, die vom deutschen Strafgesetzgeber eingefügten Wertungswidersprüche zu korrigieren. Erstens könnte die Rechtsprechung aufgrund der minderen Schwere des Lohnwuchers stets die mildere Strafe des § 233 Abs. 3 StGB verhängen. Durch eine solche Auslegung würde zwar der Strafunterschied zwischen dem Lohnwucher und den übrigen Wucherfällen seinen Ausdruck finden. Jedoch bestünde bei derartigen Auslegung immer noch ein ungerechtfertigter, schwer zu legitimierender Unterschied zwischen der Bestrafung des Lohnwuchers und den übrigen Wucherfällen. Eine Alternative für die Rechtsprechung wäre zweitens, nur die Lohnwucherfälle unter § 233 StGB zu subsumieren, die von „sklavereiähnlichen Merkmalen“ begleitet sind, und die übrigen Lohnwucherfälle im Anwendungsbereich des § 291 StGB zu belassen: Dies bedeutete eine teleologische Reduktion des Anwendungsbereichs des § 233 StGB,<sup>30</sup> die die systematische Kohärenz der deutschen Strafrechtsordnung aufrechterhalten würde und die darüber hinaus auch als unionskonforme Auslegung des § 233 StGB bezeichnet werden könnte, da sie wahrscheinlich dem Telos des Rahmenbeschlusses näher wäre als der Wortlaut des § 233 StGB.

#### – Wertungswidersprüche im Hinblick auf § 232 StGB –

5. Der zweite an dieser Stelle zu thematisierende Aspekt der Umsetzung des Rahmenbeschlusses zur Bekämpfung des Menschenhandels ist der letzte Satz des § 232 Abs. 1 StGB:

Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Satz 1 bezeichneten sexuellen Handlungen bringt.

Dieser Satz birgt ebenfalls Probleme, da hierin jede Veranlassung zu einer der in Satz 1 genannten Tätigkeiten unter Strafe gestellt ist, ohne eine Zwangslage vorauszusetzen. Davon ausgehend, dass das Opfer dieses Tatbestands jede Person unter 21 Jahren sein kann, wird deutlich, dass „diese Regelung zu dem wertungswidrigen Ergebnis einer Bestrafung desjenigen führen kann, der eine 20-jährige Prostituierte zur Fortsetzung einer (nicht ausbeutenden) Beschäftigung nach § 1 II ProstitutionsG bewegt“.<sup>31</sup> Hier ist wiederum festzustellen, dass das Verhältnismäßigkeitsprinzip durch den deutschen Gesetzgeber nicht in ausreichendem Maß Beachtung gefunden hat; jedoch ergeben sich die *Ungereimtheiten* diesmal *zwischen dem Strafrecht und einem Gesetz nicht strafrechtlicher Natur*. Der deutsche Strafgesetzgeber hätte entweder die im Rahmenbeschluss enthaltene Regelung anders umsetzen müssen – wozu dieser

im Übrigen befugt war, denn der Rahmenbeschluss hat ihm auch hier genug Spielraum belassen, sodass der oben genannte Fall straflos geblieben wäre – oder er hätte dann die Änderung der deutschen Regelungen, hier des ProstitutionsG, in Gang setzen müssen, die mit der neuen Vorschrift nicht mehr zu vereinbaren waren.

#### IV. Gedanken zu einer angemessenen Europäisierung der mitgliedstaatlichen Strafrechtsordnungen

1. Das Beispiel der Umsetzung des Rahmenbeschlusses des Rates vom 19. Juli 2002 zur Bekämpfung des Menschenhandels in das deutsche StGB und die mit ihr verbundenen Probleme zeigen die Notwendigkeit, dass jeder mitgliedstaatliche Gesetzgeber sich bewusst werden muss, dass er bei der Europäisierung der eigenen Strafrechtsordnung *sowohl die „europäischen“ Verpflichtungen als auch die Prinzipien des Strafrechts, insbesondere das Verhältnismäßigkeitsprinzip zu beachten hat*. Denn es wäre nicht überzeugend, wenn die mitgliedstaatlichen Gesetzgeber europäische Regelungen blind übernehmen, in der Folge Wertinkohärenzen in das eigene Strafrecht einfügen und die Lösung der Systemwidrigkeiten den Gerichten überließe. Selbstverständlich kann der Richter angesichts einer unverhältnismäßigen, Inkohärenzen enthaltenden Gesetzgebung den Versuch unternehmen, eine nicht vorhandene Rationalität des Gesetzgebers aufzubauen, um die Systemwidrigkeiten dann zu überwinden. Trotzdem muss eine angemessene Behandlung des Problems der Europäisierung in erster Linie im Bereich der Gesetzgebung stattfinden und hierfür ist eine überzeugende Gesetzgebungstechnik vonnöten.

2. Damit die Europäisierung der nationalen Strafrechtsordnungen nicht zu Wertungswidersprüchen in den nationalen Strafgesetzen führt, sollte *prinzipiell* die EU versuchen, den mitgliedstaatlichen Strafgesetzgebern genügend Spielraum zu belassen, um die entsprechenden Änderungen durchzuführen und gleichzeitig den Verhältnismäßigkeitsgrundsatz beachten zu können. Dies ergibt sich aus dem Schonungsgebot (Art. 6 III EUV: „Die Union achtet die nationale Identität ihrer Mitgliedstaaten.“) und ist ferner ein im Rahmen der Tätigkeit der EU vom Rat ausdrücklich anerkanntes Ziel.<sup>32</sup> Daraus lässt sich schließen, dass die EU eine Kriminalpolitik der Harmonisierung unter Beachtung der nationalen Besonderheiten vertritt. Dies aber muss konkrete Folgen zeitigen, nämlich eine wirkliche Bezugnahme auf die kriminalpolitischen mitgliedstaatlichen Besonderheiten bzw. die mitgliedstaatlichen Strafwürdigkeits- und -bedürftigkeitserwägungen. Davon ließe sich der *gemeinsame Nenner* ableiten, der die Mindeststandards des Strafrechts in der EU definieren soll, *welche den Mitgliedstaaten so viel Raum wie möglich lassen für eigene von den nationalen Besonderheiten geprägte Strafwürdigkeits- und*

*-bedürftigkeitserwägungen*.<sup>33</sup> Dies bedeutet aber nicht, dass um der europäischen kriminalpolitischen Erfordernisse willen nationale kriminalpolitische Erwägungen nie Änderungen unterworfen werden können (siehe zu der Situation, mit der der mitgliedstaatliche Strafgesetzgeber dann konfrontiert wird, V). *Die EU trägt also zur „ersten Hälfte“ die Verantwortung für eine angemessene Europäisierung der nationalen Strafrechtsordnungen*.<sup>34</sup> Damit ist aber noch nicht eine richtige Europäisierung der mitgliedstaatlichen Strafrechtsordnungen gewährleistet, denn es liegt in den Händen des Strafgesetzgebers jedes Mitgliedstaates, bei der Strafgesetzgebungstätigkeit den Spielraum des Rahmenbeschlusses auf eine Weise auszunutzen, dass die in der eigenen Strafrechtsordnung sich widerspiegelnde Wertehierarchie so weit wie möglich gewahrt bleibt. *Die „zweite Hälfte“ der Verantwortung einer überzeugenden, die Prinzipien des Strafrechts achtenden Europäisierung der nationalen Strafrechtsordnungen obliegt also den mitgliedstaatlichen Strafgesetzgebern*.

3. Nun aber darf die Tatsache nicht aus den Augen verloren werden, dass sich der Fall ergeben kann, in dem es einem Mitgliedstaat nicht möglich ist, die Europäisierung der eigenen Strafgesetze durchzuführen, ohne in Anbetracht einer etwaigen unflexiblen europäischen Regelung die in seiner Strafrechtsordnung bis dahin herrschende Wertehierarchie zu verändern. Diese Situation kann als Folge eines in seinem Regelungsgehalt starren Rahmenbeschlusses entstehen. Auch im Rahmen des Gemeinschaftsrechts kann der Mitgliedstaat dazu gezwungen werden, die eigene Wertehierarchie zu verändern, z.B. wenn das Assimilierungsgebot den Mitgliedstaat dazu verpflichtet, ein Verhalten unter Strafe zu stellen, das bis dahin straffrei war, muss der Mitgliedstaat die entsprechende Kriminalisierung durchführen und damit seine Wertung des entsprechenden Verhaltens verändern. Was genau geschieht in diesen Fallkonstellationen? Dies soll im folgenden Abschnitt näher ausgeführt werden.

#### V. „Mittelbare“ Zuständigkeit der EG und EU im nationalen Strafrecht durch den Verhältnismäßigkeitsgrundsatz

1. In den soeben erwähnten Fällen verliert der nationale Strafgesetzgeber die Autonomie, über die strafrechtliche Antwort auf bestimmte Verhaltensweisen zu entscheiden dadurch, dass eine bestimmte Wertung durchgesetzt wird. In der Tat muss hier der mitgliedstaatliche Strafgesetzgeber einige seiner Strafwürdigkeits- und Strafbedürftigkeitserwägungen durch die von „Europa“ formulierten ersetzen. Dieser Verlust an Autonomie muss nicht stets kritisch betrachtet werden. Selbstverständlich kann dieser Verlust Folge des Mangels an Bezugnahme auf die jeweiligen mitgliedstaatlichen kriminalpolitischen Anschauungen bei der Konzeption der europäischen Regelungen



sein; jedoch könnte dieser Verlust an Autonomie und die damit einhergehende Notwendigkeit der Änderung mitgliedstaatlicher Wertvorstellungen gerechtfertigt sein. Wann eine solche Änderung gerechtfertigt ist, lässt sich nicht einfach bestimmen. Dieses Problem kann an dieser Stelle nicht eingehend behandelt werden. Es soll jedoch darauf hingewiesen werden, dass die durch die europäische Kriminalpolitik erzwungenen Änderungen aus der Perspektive der mitgliedstaatlichen Kriminalpolitik überzeugend erscheinen, wenn es erstens um den *Schutz der europäischen Interessen* geht. Eine solche europäische Kriminalpolitik soll von den Mitgliedstaaten unterstützt werden, denn „Europa“ bleibt sonst keine Strafgewalt, um seine Rechtsgüter gegen Beeinträchtigungen zu schützen, und es geht letzten Endes um Bestimmungen, die genuin europäische Rechtsgüter betreffen.<sup>35</sup> Einen zweiten Bereich bildet die *grenzüberschreitende Kriminalität*. In diesem Fall herrschen zwei Ansichten: Die erste vertritt eine Harmonisierung der materiellen Strafvorschriften, während im Rahmen der anderen Ansicht vertreten wird, dass die Lösung des Problems eher durch die Verbesserung der Zusammenarbeit erreicht werden könnte.<sup>36</sup> Der dritte, etwas umstrittenere Bereich umfasst die *Formen internationaler Kriminalität* (Terrorismus, Drogenhandel, usw.).

Diese drei sind Bereiche, in denen „Europa“ die Durchsetzung einer eigenen Kriminalpolitik rechtfertigen kann, wobei jeweils eine profunde und konkret begründete Argumentation der verabschiedeten Regelung erforderlich ist. Insbesondere darf dabei das Strafrecht nicht als ein weiteres Instrument der europäischen Politik betrachtet werden.<sup>37</sup> Vielmehr ist seine Natur – d.h. sind seine wesentlichen Prinzipien, seine Rolle in Bezug auf die übrige Rechtsordnung, usw. – zu respektieren, sodass die Strafe nur für die gravierenden Fälle vorgesehen und nicht z.B. als ein zu den verwaltungsrechtlichen Sanktionen paralleles Instrument angewandt wird. Nur so kann die Europäisierung der mitgliedstaatlichen Strafrechtsordnungen in einer „harmonischen“ Art und Weise stattfinden.

2. Nun stellt sich die Frage, ob die Tatsache, dass die europäische Kriminalpolitik mit der nationalen Kriminalpolitik gegebenenfalls nicht mehr zu vereinbaren ist, weitere Implikationen hat, die über die Pflicht des mitgliedstaatlichen Strafgesetzgebers, die entsprechenden Vorschriften zu ändern, hinausgehen. Die Frage ist zu bejahen, denn der mitgliedstaatliche Strafgesetzgeber, der eine nationale Strafvorschrift als Folge der Übernahme einer europäischen Regelung ändern muss, ist wegen des Verhältnismäßigkeitsgrundsatzes auch dazu verpflichtet, andere Vorschriften zu ändern, obwohl sie von der europäischen Regelung ausdrücklich nicht betroffen sind, und das Europarecht zu deren Änderung nicht verpflichten kann, weil dafür weder eine Zuständigkeit der EG noch eine der EU vorhanden ist. Es handelt sich um die Vorschriften, die mit der als Folge einer europäischen Regelung zu ändernden Vor-

schrift *valorativ verbunden* sind. In der Tat muss der Strafgesetzgeber, der eine Wertungsänderung infolge der Übernahme einer europäischen Regelung vornimmt, auch sämtliche andere Aspekte der Strafgesetze – und sogar manchmal Aspekte nicht strafrechtlicher Gesetze – ändern, die mit der geänderten Wertehierarchie nicht kompatibel sind. So wäre z.B. der Strafgesetzgeber eines Mitgliedstaates, dessen Strafgesetze den gegenüber dem Staat begangenen Subventionsbetrug nicht unter Strafe stellen, dazu verpflichtet, nicht nur den Subventionsbetrug gegen die finanziellen Interessen der EG, sondern auch den Subventionsbetrug gegen die finanziellen Interessen dieses Mitgliedstaates strafrechtlich zu ahnden; ansonsten würde dieser Gesetzgeber den Verhältnismäßigkeitsgrundsatz durch Unterlassung verletzen. Und dies, obwohl das Problem des gegen den Staat begangenen Subventionsbetrugs nicht zu den Zuständigkeiten der EG gehört.<sup>38</sup> Daher ist der Mitgliedstaat, der wegen einer bestimmten europäischen Regelung bestimmte Strafvorschriften ändern muss, wegen des Verhältnismäßigkeitsprinzips auch dazu verpflichtet, alle anderen Vorschriften zu ändern, die mit den aus der Übernahme europäischer Regelungen erfolgten Vorschriften nicht mehr vereinbar sind, sodass keine Wertungswidersprüche im nationalen Strafrecht entstehen.<sup>39</sup>

3. Die Erfüllung dieser Pflicht bringt als Folge mit sich, dass die EG und die EU durch den Verhältnismäßigkeitsgrundsatz eine Zuständigkeit für Bereiche erlangen können, die außerhalb der durch die entsprechenden Verträge über die EG und der EU zugeschriebenen Zuständigkeiten stehen. In der Tat haben in diesen Fällen sowohl die EG als auch die EU durch das Verhältnismäßigkeitsprinzip eine *mittelbare Zuständigkeit* in einigen der EG und der EU formell nicht zugeschriebenen Bereichen, denen jedoch eine *valorative Beziehung* zu den Gebieten innewohnt, die ihrerseits sehr wohl zu den Zuständigkeiten der EG und der EU zählen. Diese Ausweitung der Zuständigkeiten der EG und der EU ist nicht lediglich faktischer Natur, sondern folgt rechtlichen Grundlagen, nämlich den Prinzipien, an die der nationale Strafgesetzgeber gebunden ist. Deshalb verdient die eben genannte Zuständigkeitsausdehnung auch eine Analyse aus rechtswissenschaftlicher Perspektive. Dabei ist die Schlussfolgerung zwingend, dass das Prinzip der Einzelermächtigung der EG<sup>40</sup> als Abgrenzungskriterium der Zuständigkeiten und deshalb als das Verhältnis zwischen den Rechtsordnungen der Mitgliedstaaten und dem Gemeinschaftsrecht bestimmendes Prinzip relativiert werden muss. Gleiches gilt für die in dem Vertrag der EU vorgesehenen Harmonisierungsbereiche. In der Tat müsste man die Zuständigkeiten der EG und der EU neu formulieren und zwar wie folgt: *Die EG und die EU sind zuständig sowohl in allen ihnen explizit zugeschriebenen Bereichen als auch in allen anderen Bereichen des nationalen Strafrechts, die mit den ausdrücklichen Zuständigkeiten der EG und der EU valorativ*

verbunden sind. Daraus folgt, dass die Intensität der Einflussnahme des Europarechts auf das mitgliedstaatliche Strafrecht größer ist, als es auf den ersten Blick scheint.

## VI. Schlussbetrachtung

Selbstverständlich sind die oben erörterten Probleme des Verstoßes gegen den Verhältnismäßigkeitsgrundsatz durch den nationalen Gesetzgeber kein ausschließliches Problem der „Europäisierung“ des Strafrechts, da ein solches Panorama immer wieder bei der Umsetzung völkerrechtlicher Regelungen – und noch häufiger innerhalb des nationalen Strafrechtssystems – entstehen kann, d.h. immer dann, wenn der Strafgesetzgeber eine Ände-

rung des Strafgesetzes vornimmt, ohne vorher die Tauglichkeit der einzuführenden Vorschrift mit dem Ziel einer systematisch kongruenten Einordnung in das schon vorhandene Strafrecht zu analysieren. Nun aber gewinnt diese Problematik im Rahmen der europäischen Integration wegen der intensiven Verzahnung des Europarechts mit den mitgliedstaatlichen Rechtsordnungen an Bedeutung und verlangt deshalb besondere Aufmerksamkeit. Wie weit die Harmonisierung der mitgliedstaatlichen Strafrechtsordnungen gehen soll, ist eine schon seit Langem thematisierte Frage. Hier ist jedoch nicht der Versuch unternommen worden, diese zu beantworten, sondern lediglich zu skizzieren, wie der mitgliedstaatliche Gesetzgeber angesichts der bereits vorhandenen europäischen Regelungen die Aufgabe der Europäisierung des Strafrechts durchführen soll.



### Dr. Nuria Pastor Muñoz

Privatdozentin an der Universität Pompeu Fabra, Barcelona. Gegenwärtig Forschungsstipendiatin der Alexander von Humboldt-Stiftung an der Universität Bonn (Institut für Strafrecht).

1 Die Verfasserin dankt Assessor *Andreas Dornseifer* für die hilfreichen Korrekturen.  
 2 *Satzger*, Internationales und Europäisches Strafrecht, 1. Aufl., 2005, § 8, Rn. 1 ff.; *Weigend*, ZStW 105 (1993), 778.  
 3 *Dannecker*, ZStW 117 (2005), 747.  
 4 BGBl I, 239.  
 5 Zu dieser Reform, siehe *Renzikowski*, JZ 2005, 879 ff.  
 6 *Lackner/Kühl*, StGB, 26. Aufl., 2007, § 232, Rn. 5; *Tröndle/Fischer*, StGB, 54. Aufl., 2006, § 233, Rn. 7 ff.  
 7 *Frisch*, GA 2007, 264; *Silva Sánchez*, Revista penal, Januar 2004, 143.  
 8 Dieser von der Rechtsprechung des EuGH (EuGHE 1964,1251 - Rs. 6/64 v. 15.7.1964, *Costa/ENEL*) entwickelte Grundsatz wurde vom BVerfG in den Entscheidungen „Solange I“ vom 29.5.1974 (BVerfGE 37, 271) und „Solange II“ vom 22.10.1986 (BVerfGE 73, 339) relativiert. Siehe *Satzger*, Die Europäisierung des Strafrechts. Eine Untersuchung zum Einfluß des Europäischen Gemeinschaftsrechts auf das deutsche Strafrecht, 2001, S. 483 ff.; *Hecker*, Europäisches Strafrecht, 2. Aufl., 2007, § 9, Rn. 6.  
 9 *Ligeti*, Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union, 2005, S. 249.  
 10 Siehe unter anderem EuGH-Urteil „Costa/ENEL“ [Fn. 8].  
 11 Siehe hierzu *Böse*, Strafen und Sanktionen im Europäischen Gemeinschaftsrecht, 1996, S. 415 ff.; *Ligeti* [Fn. 9], S. 253 ff.; *Tiedemann*, ZStW 116 (2004), 950 ff.  
 12 *Satzger* [Fn. 8], S. 331 ff., mit Hinw. auf die Rechtsprechung des EuGH („Mais-Urteil“ vom 21. 9. 1989).  
 13 Siehe *Böse*, GA 2006, 209. Kritisch *Hefendehl*, Der EuGH stellt die strafrechtliche Kompetenzordnung auf den Kopf – und wundert sich über Kritik, in: *Joerden*, *Jan C./ Szwarc*, *Andrzej J.* (Hrsg.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen, 2007, S. 41-58.

14 *Böse* [Fn. 11], S. 425 ff.; *Ligeti* [Fn. 9], S. 258; *Satzger* [Fn. 2], § 8 Rn. 80 ff., 84 ff.; *Weigend*, ZStW 105 (1993), 781.  
 15 *Hecker* [Fn. 8], § 11, Rn. 2-6.  
 16 EuGH 16.6. 2005 – C-105/03, Fall „Pupino“.  
 17 ABIEG 2002 Nr. L 203/1.  
 18 Zu den Problemen für die Wahrung der Kohärenz der nationalen Strafrechtsordnung in den nordischen Ländern, siehe *Elholm*, FS-Jung, 2007, S. 136 ff.  
 19 Die infolge der Umsetzung des Rahmenbeschlusses eingefügten Änderungen werden lediglich in den für den vorliegenden Beitrag relevanten Absätzen wiedergegeben.  
 20 *Lampe*, Der Strafrechtliche Schutz der Arbeitskraft, in: Festschrift für Reinhard Maurach, 1972, S. 387; *Schroeder*, NJW 2005, 1394.  
 21 *Schönke/Schröder/Eisele*, StGB Kommentar, 27. Aufl., 2006, § 233, Rn. 5, 6.  
 22 *Kindhäuser*, Strafgesetzbuch. Lehr- und Praxiskommentar, 3. Aufl., 2006, § 233, Rn. 8; *Tröndle/Fischer*, § 233, Rn. 9.  
 23 *Schönke/Schröder/Eisele*, § 233, Rn. 9.  
 24 So *Renzikowski*, JZ 2005, 884.  
 25 *Schroeder*, GA 2005, 308; *Schönke/Schröder/Eisele*, § 233, Rn. 9.  
 26 *Eydner*, NSTZ 2006, 13 f.  
 27 *Kindhäuser*, StGB, § 233 Rn. 4; *Schroeder*, NJW 2005, 1396.  
 28 *Eydner*, NSTZ 2006, 12.  
 29 Dieser Meinung sind zu Recht *Eydner*, NSTZ 2006, 14, und *Schroeder*, NJW 2005, 1396.  
 30 So auch *Eydner*, NSTZ 2006, 14; *Schroeder*, NJW 2005, 1396; ähnlich *Schönke/Schröder/Eisele*, § 233, Rn. 9. Dagegen *Lackner/Kühl*, § 233, Rn. 5.  
 31 *Kindhäuser*, StGB, § 232 Rn. 10; *Lackner/Kühl*, § 232, Rn. 8; *Schönke/Schröder/Eisele*, § 232, Rn. 20; *Wolters*, SK-StGB, § 232, Rn. 25; *Tröndle/Fischer*, § 232, Rn. 17 f.  
 32 Siehe KOM(2004) 334, S. 18, zitiert bei *Elholm* [Fn. 18], S. 146.  
 33 *Hassemer*, ZStW 116 (2004), 314 f.; *Satzger* [Fn. 8], S. 325 ff.  
 34 *Hryniewicz*, Europäische Delikte, Europäische Rechtsgüter, in: *Joerden/Szwarc* [Fn. 13], S. 59-60.  
 35 Dies wäre das Strafrecht „im Dienst der Gemeinschaft“ (*Satzger* [Fn. 8], S. 295 ff.).  
 36 So z.B. *Frisch*, GA 2007, 267.  
 37 *Braum*, wistra 2006, 124; *Satzger*, Neue Kriminalpolitik, 3/2007, 95 f.  
 38 Kritisch zu den Unterschieden zwischen dem Tatbestand des Subventionsbetruges gegen den Staat und dem Tatbestand des Subventionsbetruges gegen die EG: *Dannecker*, ZStW 117 (2005), 728; *Zieschang*, ZStW 113 (2001), 267.  
 39 *Dannecker*, ZStW 117 (2005), 728 ff.  
 40 Zur Diskussion über die Grenzen dieses Prinzips siehe u.a. *Hefendehl* [Fn. 13], S. 47 ff.

# EU Terrorism Lists in the Eye of the Rule of Law

Dr. Frank Meyer, LL.M.

## I. Introduction – The Road to *Kadi*

When the UN and the EU launched their campaign against the financing of terrorism after a series of major terrorist attacks in the late 1990s, they certainly did not envision that their activities would not only cause a public outcry but also spark a continual chain of litigation that has affected the legal landscape in the EU dramatically. In the recent *Kadi/Al Barakaat* judgment, the European Court of Justice (ECJ) has taught European governments a painful lesson.<sup>1</sup> At least in the ambit of the European Union, they are not *hors de la loi*. When democratic accountability mechanisms and parliamentary control revealed their ineffectiveness and fundamental principles of European law were on the brink of derogation, the ECJ stepped up to vindicate the rule of law. The Court concluded that Community courts must ensure full review of the lawfulness of all Community acts, including review of Community measures that are designed to give effect to Resolutions adopted by the UN Security Council.

The EU had erected a two-track listing scheme seeking to implement a regime of smart sanctions targeting individuals or private organisations that engage in or support terrorist activities imposed by the Security Council.<sup>2</sup> Assets and other financial resources of persons and entities were ordered to be immediately frozen upon inclusion in these lists, one merely implementing a blacklist administrated by a Sanctions Committee of the Security Council (UN list) whereas target objects of the other list were to be determined by an autonomous decision of the EC Council (EU list). The following years were marked by a succession of legal challenges brought before the Community courts by persons and entities seeking removal from these lists. In the matters of *Kadi* and *Yusuf/Al Barakaat*, the Court of First Instance (CFI) had originally dismissed their actions in 2005, holding that the Court has to refrain from reviewing their inclusion in the UN list for compliance with fundamental Community rights and principles.<sup>3</sup> Although the challenged Regulation was an EC legal act subject to legal constraints of EC law, it ultimately rests on a Security Council decision adopted under Chapter VII of the UN Charter, the obligations of which take precedence over EC law. The CFI merely saw fit to scrutinise the Regulation for its compatibility with mandatory rules of international public law, since those standards were binding on the Security Council too. On the

merits, the Court could not detect a violation of the applicant's rights that would have amounted to an infringement of the international *ius cogens* though. The applicants appealed the judgment before the ECJ. *Yusuf* later abandoned his appeal and was struck from the Court's register.

In his opinion delivered on the appeal, Advocate General (in the following: AG) Maduro rejected the CFI's opinion and argued that Community courts had unlimited jurisdiction to review whether the contested Regulation interfered with the appellants' fundamental rights.<sup>4</sup> Dismissing the notion of UN supremacy, he effectively called on the ECJ to apply the same scope and density of control that Community courts already use in proceedings reviewing inclusions in the EU list. In its landmark decision, the ECJ has now followed this recommendation, set aside the judgment of the CFI, and annulled the contested Regulation in so far as it concerned the appellants.

## II. Major Findings and Reasoning of the Court

The ECJ seemed caught in a structural dilemma between either denying legal protection or weakening the normativity and authority of Security Council Resolutions. However, in the face of the political sensitivity of the legal questions involved, which forced the ECJ into a precarious passage between *Skylla* and *Charybdis*, the Court has risen to the occasion and delivered a scrupulous, well-reasoned judgment that expresses a profound commitment to the rule of law but avoids shrill overtones. Initially, the Court confirms that the Council was competent to adopt the Regulation on the joint basis of Articles 60, 301, 308 TEC. Secondly, the Court finds that the CFI erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested Regulation. Such a review of any Community measure must be considered to be the expression of a constitutional guarantee stemming from the EC Treaty. As an autonomous legal system, the Community legal order may not be prejudiced by an international agreement. The Court concludes that the Community courts must ensure the full review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures, which, like the contested Regulation, are designed

to give effect to Resolutions adopted by the Security Council. Addressing the specific actions for annulment brought by *Kadi* and *Al Barakaat*, the Court turned to the actual circumstances surrounding the inclusion of the appellants' names on the UN list and found that the rights of the defence, in particular the right to be heard, the right to property, and the right to effective judicial review of those rights, were patently not respected. In particular, the ECJ highlights the fact that the effectiveness of judicial review necessitates that the Community authority in charge of the listing procedure is required to state the grounds on which the measure at issue is based. In the light of this reasoning, the ECJ actually would have had to annul the Regulation as far as it concerned the applicants. The Court, however, recognised that annulment with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures, which the Court generally considered legitimate. To prevent abuse of the period before the challenged Regulation is replaced and funds frozen anew, the ECJ decided to maintain the effects of the Regulation for a period of no more than three months, starting from the day of the judgment, in order to allow the Council to remedy the infringements found.

The ruling of the ECJ is a drastic departure from the reasoning of the CFI. The various ingredients in the judgment demand careful analysis, not least due to its far-reaching repercussions on the relationship between the EU and the UN. This article will follow the cadence of the ECJ's argumentation and start off with the Court's reflections on the proper legal basis for the challenged Regulation in EC law before turning to the main reasons underlying the expansion of the scope of review and their repercussions on the trilateral network of ECJ, European Court of Human Rights (ECtHR) and national courts, and on the juridification of international relations.

### III. The Power to Act

Although most legal experts seem to concur that the EC was competent to act, they disagree on the necessity of having recourse to the flexibility clause as well as on the legitimacy of pursuing TEU objectives with TEC instruments. At the outset, the Council had adopted the contested Regulation on the joint basis of Articles 60, 301, and 308 TEC. The Court of First Instance did not find a legal error on this score. Whereas it was not possible to have recourse to Articles 60 and 301 TEC, in the light of their wording to impose smart sanctions against individuals in the CFI's view, Article 308 TEC could be construed as allowing the targeting of individuals and entities in interdependence with Articles 60 and 301 TEC. The latter were conceived as a bridge for the implementation of objectives of the Treaty on European Union in the sphere of

common foreign and security policy in situations where action by the Community may prove to be necessary in order to achieve one of the objectives specifically assigned to the European Union by Article 2 TEU and not one of the objects of the Community as fixed by the EC Treaty.

The ECJ did not endorse this argumentation but found that the CFI erred in law when it treated Articles 60 and 301 TEC as a bridge between Community instruments and objectives of the EU Treaty. The Court explains, however, that the contested Regulation could nevertheless be adopted on the joint basis of Articles 60, 301, and 308 TEC on other legal grounds as the objective pursued by the contested Regulation might be made to refer to one of the objectives of the TEC. Articles 60 and 301 TEC, while they cannot be conceived as being a bridge to pursue EU policies with EC means, have to be understood as expressions of an implicit underlying Community objective of enabling the adoption of measures of an economic nature in order to implement actions decided on under the Common Foreign and Security Policy through the efficient use of a Community instrument.<sup>5</sup> In consideration of the fact that Articles 60 and 301 TEC were indeed created – inter alia – for the purpose of authorising the Community to implement UN legal acts pursuant to Chapter VII uniformly and effectively as a Community interest in its own right,<sup>6</sup> the ECJ's alternative solution is convincing. The Court was therefore not compelled to annul the Regulation despite the legal error in the ruling of the CFI.<sup>7</sup>

In deciding that recourse to Article 308 TEC as a legal basis for this Regulation, in addition to Articles 60, 301 TEC, is warranted to provide a robust foundation for such a measure, the ECJ likewise rejects the position the Commission took up during the appellate proceedings. The Commission – which had reconsidered its original point of view – argued that Articles 60 and 301 TEC, with regard to their wording and context, constituted in themselves appropriate and sufficient legal bases for the adoption of the contested Regulation. The Commission also maintained that the measure at issue falls within the scope of the common commercial policy, with regard to the effect on trade of measures prohibiting the movement of economic resources, and even maintained that such measures constitute provisions relating to the free movement of capital, since they involve the prohibition of transferring economic resources to individuals in third countries.

In the context of the decision at hand this conflict appears to be an issue of minor importance. What makes this dispute so interesting though is its being characteristic for large quantities of litigation before Community courts. *Cullen/Charlesworth* have aptly coined the expression “legal basis litigation” for this kind of jurisdictional conflict.<sup>8</sup> Even when fundamental

principles of the EU legal order are at stake, the usual suspects apparently cannot help but start cockfights over the most opportune legal basis. The Commission could have expanded its position of power into the ambit of foreign and security policy – under the cloak of traditional Community competences relating to the common commercial policy as well as the free movement of capital – had its string of argumentation been accepted. It would have escaped the narrow preconditions of Articles 301 und 308 TEC and gained significant leverage over Council and Member States. An inflation of said competences also would have shifted power from the European Parliament (EP) to the Commission since unlike Article 308 TEC, decision-making processes under Articles 60 EC and 301 TEC provide no role for the EP. The ECJ, however, rejects this idea and sends a clear message to the Commission that might herald what is coming up in the decision on the data retention directive. The Court emphasises that accepting the interpretation of Articles 60 and 301 TEC proposed by the Commission would give these provisions an excessively broad meaning. The choice of legal basis for a Community measure must rest on objective factors that are amenable to judicial review, including, in particular, the aim and content of the measure. A Community measure falls within competence in the field of the common commercial policy only if it relates specifically to international trade in that it is essentially intended to promote, facilitate, or govern trade and has direct and immediate effects on trade relating to the products concerned, which the challenged Regulation, with regard to its purpose and object, does not. The ECJ could therefore easily unmask the Commission's manoeuvre as a case in point in terms of legal basis litigation. The much more difficult issue left to be resolved by the Court was the standard of review.

#### IV. Scope and Standards of Review

In determining the scope of review, the ECJ had to grapple with the potential long-term implications of its decision. As the CFI previously was, the Court found itself faced with an intricate choice between championing effective legal review to the detriment of the normative authority of the UN legal order and vice versa. Whereas the CFI acquiesced to the UN's claim of primacy and refrained from testing the compliance of the challenged Regulation with EC law, the ECJ dismisses the idea that Community courts could be barred from ensuring the full review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law. This bold move commands respect. The judgment is carefully crafted und politically sensitive, paired with strong commitment to the rule of law. Unlike AG Maduro, the ECJ prudently chose to use language less emotive and bristling; most likely to avoid further exacer-

bation of the looming conflict with the UN. Compared to the deferential stance taken by the CFI, the ECJ does not blink but fortifies a review process that is deeply at odds with the control regime deemed appropriate by the UN Security Council. This appraisal is not meant as a reproach directed against the CFI though. Unlike the CFI, the ECJ enjoyed the privilege of time. The Court had ample opportunity to carefully monitor developments in the aftermath of the lower court's ruling. Despite the harsh criticism its judgment drew, it must be acknowledged that the CFI had scrupulously attempted to harmonise the conflicting legal orders and to at least exert slight pressure on the Security Council. In the end, it considered accepting the supremacy and autonomy of UN law, in particular measures taken under Chapter VII, and resorting to a *ius cogens* safety valve rooted in public international law as being the best way to achieve this goal. By borrowing its review standard from a different legal order, the CFI had managed to circumvent open conflict with the Security Council as it only activated legal limits derived from universal human rights that are essential parts of the UN legal order and, hence, binding on the Security Council.<sup>9</sup> Although universal human rights and Community rights are of a different nature and origin, the former guarantees seemed to arm the CFI with the necessary instrument to carry out a meaningful review and to put the Security Council under pressure.<sup>10</sup> The vague hope, however, that such a curtailed control mechanism might trigger a reform process at the UN level did not materialise.

This was the moment for the ECJ to intervene. Three years after the CFI's rulings, the Court was forced to acknowledge that nothing substantial had changed on the international level. Individuals and entities included on the list were still exposed to heavy sanctions without any form of meaningful legal protection. The international constitutionalisation process as regards the rule of law and due process rights had been stalled by the Security Council and its permanent members. Despite harsh criticism, the Security Council settled for a focal point of an administrative nature that allowed individuals to lodge their delisting motion directly with the UN Sanctions Committee without substantially changing the essence of the review process itself.<sup>11</sup> Moreover, the *Ayadi* remedy invented by the CFI shortly after the *Kadi* judgment did not bring about significant progress either because it was merely designed to effectuate diplomatic protection.<sup>12</sup> Finally, the ECJ had to recognise that important Member States of the EC, namely the United Kingdom and France, showed readiness to sabotage even the modest *ius cogens* threshold. As permanent members of the Security Council, both states apparently felt a stronger allegiance to this institution than to the values and ideals Europe has come to stand for. Their intolerable behavior in the *OMPI* case in recent months which, however, concerned the EU list also might have contributed to a pessimistic overall

impression and led the Court to the conclusion that the current state of legal protection afforded by the diplomatic delisting procedure and ancillary measures was insufficient.<sup>13</sup>

Against this background, the ECJ opted for a far-reaching intervention. Following up on the clear message sent in the *Segi* case, expressing the Court's willingness not to wait for the ECtHR to fix things but to afford procedural protection itself<sup>14</sup> the ECJ overrules the CFI and corrects the scope and standard of review. The Court finds that, in a community based on the rule of law, courts cannot waive their responsibility for the protection of common values and principles. As an autonomous legal system, the Community legal order may not be prejudiced by an international agreement in this regard. Rather, the Court concludes that the Community courts must ensure the full review of the lawfulness of all Community acts, including review of Community measures, which, like the contested Regulation, are designed to give effect to Resolutions adopted by the Security Council.<sup>15</sup> Given its autonomy, the legal effects of such a ruling by the Court remain confined to the municipal legal order of the Community and cannot be deemed to be tantamount to an implicit judicial control of Security Council activities that potentially would have been barred under international law. To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council Resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law. Possible negative side-effects could not impact EC law in such a way as to preclude judicial review by Community courts.

Emphasising the formal character of the impugned acts as Community instruments, the ECJ thus extends first pillar standards Community courts have been applying to challenges against the autonomous EU list, to legal instruments strictly implementing UN sanctions under Chapter VII. Since both listing procedures had been introduced in the EU legal order through EC Regulations, the precarious tilt between the standards applying to the UN list, on the one hand, and the EU list, on the other, appeared impossible to maintain. However, equating the listing regimes and deriving full authority to scrutinise such measures from their being established by EC legal instruments conceals their distinctness. In the case at issue, the EC does not determine the targets of smart sanctions autonomously. In the same vein, affording procedural protection was not left to the discretion of the Member States but concentrated in a central uniform procedure at the UN level. In fact, the regime of sanctions established pursuant to Resolutions 1267 (1999), 1333 (2000), 1390 (2002) leaves only marginal latitude to bring in line conflicting requirements stemming from EC law and the UN charter. To pretend that the autonomy to review EC instruments due to their formal nature as an EC

legal act is a matter of course; hence, it cannot obscure the affront this judgment means to the Security Council. Although the ECJ formally stays within the perimeter of the Community legal order, its judgment suggests that UN Resolutions under Chapter VII are not transposable and EC instruments unavailable as far as their substantive content is irreconcilable with the basic tenets of EC law. Indeed, the EC is not a member of the United Nations and, as a rule, the lawfulness of a Community instrument cannot depend on its conformity with an international agreement to which the Community is not a party.<sup>16</sup> The Community is nevertheless tied to a complex system of multi-level-governance in the fields of economic and security policy. In particular, in the present scenario, clear-cut separations of the various levels of this system ignore the mutual dependencies inherent to the system. The challenged Regulation serves as a vehicle for the execution of Security Council orders because the UN is not empowered to take measures directly in the supranational order of the EC. With this constraint in mind, Articles 301 and 60 TEC have been designed to ensure effective implementation in the EC and, ultimately, the accessoriness of pertinent EC instruments to UN Resolutions. The laws and interests of the EC and the UN are inextricably intertwined in this respect.

The true motivation driving the Court's reasoning is the protection of the integrity of the EC legal order. In terms of due process rights, international law lags behind the development in the supranational EC considerably.<sup>17</sup> The gap has become so wide that subservient acquiescence would have affected the collective identity of the EC dramatically<sup>18</sup> and risked derogating fundamental norms that Europeans have come to understand as indispensable elements of the rule of law. Access to courts is one of them. That the UN refused to grant comparable safeguards left the Court with almost no choice. Echoing AG Maduro's concerns, the ECJ concludes that the pertinent provisions of the TEC, namely Articles 60, 301, 307, 308 TEC, cannot be understood as authorising any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union in the sphere of the maintenance of international peace and security.

The ECJ is, however, politically sensitive enough to downplay the actual effects of its judgment and reach out to the Security Council. It deploys a three-step strategy: appeasement, limitation, rectification of defects. Firstly, the Court emphasises that the review of lawfulness is limited to Community acts and does not apply to the international agreements these acts intended to give effect to. What is more, a judgment given by the Community courts, concluding that such a Community measure is contrary to a higher rule of law in the Community legal order, would not entail an implicit review or any other chal-

lenge to the primacy of an SC Resolution in international law. To underscore this conception, the ECJ, secondly, abolishes the CFI's *ius cogens* test for want of jurisdiction. Community courts are merely in charge of policing the application and interpretation of EC law. A review based on mandatory universal human rights is, by contrast, foreign to the EC legal order.<sup>19</sup> The ECJ makes clear that Community courts must not appoint themselves as standby international human rights courts. Enforcing compliance of international organisations with universal human rights is not their business. This limitation lifts the pressure on the Security Council to be subjected to judicial scrutiny by regional or national courts. That universal human rights thus remain largely unflanked by effective due process rights remains a problem for the UN to solve. Thirdly, the Court leaves the door open for a "quick fix". It offers an opportunity to remedy deficits by submitting statements of reasons in line with the contemporary practice in cases concerning the EU list. Since the Court could not exclude that, on the merits of the case, the imposition of preventive measures on the appellants may prove to be justified, the effects of the contested Regulation are, by virtue of Article 231 EC, to be maintained for a period that may not exceed three months, starting from the date of delivery of this judgment, in order to allow the Council to remedy the infringements found. In particular, due process requires that the Community authority in question communicates to the person or entity concerned the grounds on which the measure at issue is based, in order to enable these persons or entities to exercise their right to bring an action.

Admittedly, this condition is harder to satisfy than one might think at first sight. Compared to the process started after the judgment of the CFI in the *OMPI* case, which obliged the Council to provide every person or entity on the EU list with a statement of reasons,<sup>20</sup> the situation is different as far as the UN list is concerned. Most inclusions in the list have been supported by intelligence information predominantly stemming from services of the United States, which also happens to be the main reason for the informational asymmetry that petitioners confront during the UN delisting procedure. It strikes the author as quite unlikely that the Security Council will submit allegedly vital intelligence information to the Council, acting as its EC relay station in charge of forwarding reasons to blacklisted individuals, in order to meet the standards of the TEC. Presumably, only in rare cases will European law enforcement and intelligence agencies themselves have the data needed at their disposal. It thus remains to be seen whether this backdoor turns out to be a viable option or whether the Security Council now feels compelled to institute judicial review mechanisms on its own, which could ultimately convince the ECJ to defer to such a procedure following the "Solange" or "Bosphorus" rationale of the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the ECtHR respec-

tively. For the time being, attention shall be shifted back to the appraisal undertaken by the ECJ in the case at issue. The appellants had alleged several breaches of fundamental rights, namely the right to be heard and the right to effective judicial review as well as the right to respect for property and the principle of proportionality.

## V. Grounds of Annulment

Having assured itself of its unfettered jurisdiction, the ECJ found that essential rights of the defence, in particular the right to be heard, the right to respect for property and the right to effective judicial review of these rights were patently disregarded, but it confirms the legality and proportionality of the freezing of assets, in general, as long as individualised statements of reasons are furnished.

### 1. Right to be Heard and Right to Effective Judicial Review

The ECJ acknowledges that prior communication of the grounds would be likely to jeopardise the effectiveness of the measures freezing funds and economic resources, which must, by their very nature, have a surprise effect and take immediate effect. For this reason, Community authorities are not required to hear the persons concerned before their names are included on the list. This necessity does not, however, justify the situation that the challenged Regulation provides no procedure for communicating evidence justifying the inclusion of the names of the persons concerned on the list, either at the same time as, or after, their inclusion. Because the Council at no time either communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them or afforded them the right to be informed of this evidence within a reasonable period after enactment of these measures, the appellants were not in a position to make their point of view in this respect known. Therefore, the appellants' rights of defence, in particular the right to be heard, had not been respected. Furthermore, the Court held that the corresponding effectiveness of judicial review in this instance means that the Community authority in question is bound to reveal the reasons for sanction to those persons in order to enable them to exercise their right to bring an action. Without such information, Community courts will remain impotent to effect meaningful review. In consequence, an omission to communicate the grounds for an inclusion as swiftly as possible after this decision not only infringes on *Kadi's* and *Al Barakaat's* rights of defence but also gives rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights under satisfactory conditions before the Community courts.

## 2. The Right to Respect for Property and the Principle of Proportionality

As regards the right to respect for property, the ECJ vindicates the smart sanctions regime. It holds the view that the restrictive measures imposed by the challenged Regulation constitute restrictions of the right to property which could, in principle, be justified.<sup>21</sup> The freezing of assets constitutes a temporary precautionary measure which is not supposed to deprive persons of their property. It does, however, undeniably entail a restriction of the exercise of the right to property that must be classified as considerable. Yet, the importance of the aims pursued by the Regulation in the fight against terrorism as a major threat to international peace and security is high enough to justify negative consequences of even a substantial nature. The subsequent integration of humanitarian exceptions into the sanctions regime has helped to reduce their impact in view of the principle of proportionality. In this regard, the ECJ explicitly highlights the necessity that competent national authorities may unfreeze the funds necessary to cover basic expenses.<sup>22</sup> In the present case, the Court nonetheless found an infringement of the right to respect for property that stems from its interconnection with the right to effective legal protection. The imposition of restrictive measures constitutes an unjustified restriction of the right to property because the applicable procedures laid down in the challenged Regulation did not afford the person concerned a reasonable opportunity of putting his case to the competent authorities. Such a guarantee is, however, necessary in order to ensure respect for the right to property.

Overall, the solution offered by the ECJ is convincing in this particular case. The Court has not resolved all doubt though as to whether it fits the complex exigencies of international relations and the judicial architecture of European courts as a concept beyond *Kadi*. A closer look at its repercussions on the trilateral network of European courts and the juridification of international relations will help us find a tentative answer to this question.

## VI. Triangle of Courts<sup>23</sup>

In the run-up to the *Kadi* judgment, the ECJ received serious warning signals from the ECtHR and national (constitutional) courts suggesting that an endorsement of the CFI's ruling would not have settled the matter but shifted the conflict to a different institutional level. Such potential recourse to non-Community courts threatened the Court's monopoly to interpret and annul EC law, one that has been established and defended since the *Foto-Frost* case. Bearing this risk in mind, the ECJ's decision in *Kadi* must be read as clarification

of the exclusivity of the Community court's responsibility and as an attempt to strengthen its position vis-à-vis the ECtHR and national constitutional courts. The Court achieves this intended preservation of its institutional authority and privileged position by consolidating the *Bosphorus* rationale of the ECtHR and emphasising transnational European rights as integral parts of a European collective identity over national civil liberties.

After the concerned criticism voiced by the ECtHR, the ECJ had to assume that a standard limited to *ius cogens* and rooted in universal human rights would not pass the ECtHR's "manifestly deficient" test set out in the *Bosphorus* decision. In view of its statement in the cases of *Segi* and *Gestoras Pro Amnistia*,<sup>24</sup> it had already become predictable that the Court did not intend to take this risk. In these cases, the ECJ pointed out that legal protection would be afforded to every individual directly adversely affected by an EU legal instrument. The pressure to extend this rationale to EC Regulations implementing UN resolutions has not been alleviated in the meantime either, as scholars, EC institutions, and Member States alike insinuated after the ECtHR declined jurisdiction to review the compatibility of certain measures taken in the implementing of Resolutions adopted by the Security Council under Chapter VII of the UN Charter in several recent decisions.<sup>25</sup> In the context of UNMIK and KFOR operations, the ECtHR had argued that, since operations under Chapter VII are fundamental to the mission of the UN to secure international peace and security, the European Convention on Human Rights cannot be interpreted in a manner that would subject the acts and omissions of Contracting Parties carrying out these operations to the scrutiny of the Court.<sup>26</sup> To do so would be to interfere with the fulfilment of the UN's key mission and also be tantamount to imposing conditions on the implementation of a SC Resolution, which were not provided for in the Resolution itself. To read this statement as simply implying that the ECtHR might no longer review Chapter VII measures and, consequently, not object to the ECJ doing the same misconstrues the controlling *Behrami* judgment though. The *Behrami* case centers on an exceptional chain of events directly attributable to the UN and does not create a new rule as AG Maduro and the ECJ clarified.<sup>27</sup> It is clearly distinguishable from the *Bosphorus* case in terms of both the responsibility of the respondent States under Article 1 ECHR and the Court's competence *ratione personae*.<sup>28</sup>

As regards national (constitutional) courts, the ECJ was haunted by a specter embodied by AG Mengozzi's opinion delivered in *Segi*. He proposed that national courts substitute the ECJ as guardians of EU law if individuals are adversely affected by EU legal acts and the ECJ lacks jurisdiction by virtue of the founding treaties.<sup>29</sup> Had the ECJ allowed such recourse to national courts, its claim of primacy, which the Court currently seeks to implant in the third pillar, would have been



threatened. Instead, the Court assumed jurisdiction itself. It has now resorted to the same maneuver in the *Kadi* case. Moreover, the ECJ must have been aware that affording protection of the kind the CFI had devised probably would not have been accepted as a sufficient remedy by certain constitutional courts. Although national courts today largely cooperate with the Community courts and acquiesce to their supremacy in matters of EC law, some of them retain a judicial emergency brake in case EC law denies essential contents of fundamental civil liberties.<sup>30</sup> By throwing out the CFI's reluctant *ius cogens* test, the ECJ prevents such unwelcome interferences.

The Court's strong effort to accentuate the notion of indispensable transnational due process rights as a corollary of intensified cooperation and integration in Europe sustains a development that began with *Stauder* and *Nold* and sets it apart from other high courts in the realm of the European Union. The ECJ has established itself as the predominant guarantor and creator of transnational rights in Europe. However, the intra-union perspective that guided the Court might entail undesirable side-effects in the field of international relations.

## VII. Juridification of International Relations

The ECJ's decision exhibits an intriguing policy dimension. Since the fall of the Iron Curtain, international relations scholars have observed an ongoing juridification of international relations.<sup>31</sup> The contemporary law suits targeting the UN's smart sanctions regime have been monitored closely to keep track of indications of the emergence of international elements of the rule of law.<sup>32</sup> In this regard, the judgment in question does not represent a step ahead in the juridification process. The ECJ has formulated a claim to regional hegemony. However, by solidifying the autonomy of the EC legal order and putting the protection of the European collective identity first, the Court is turning its back on the remainder of the UN community. Whereas the judgment strengthens the Community legal order and underscores its political and civic foundations, it limits enforcement of transnational human rights standards and the rule of law to the European Union. The effective juridification of foreign affairs and security policy, which the cases of *OMPI* and *Segi* started and *Kadi* strengthens, only affects its Member States. Unlike the CFI, which apparently had the international dimension of its ruling in mind, the Court was unwilling to transgress these boundaries. The abolishment of the *ius cogens* test with universal human rights as its controlling yardstick amounts to a retreat from the international level. The frank recognition of its lacking jurisdiction to protect universal human rights therefore even results in a step backwards in terms of juridification. The United Kingdom and France, being wanderers between different political worlds, namely between the

Security Council and EC Council, have thus achieved at least a partial success. They managed to contain effective legal protection to the EU sphere. The ECJ seconded by severing the ties with the outside world. Whereas this domain still seems dominated by brutish realism, Europeans may savor the fruits of idealism. Indeed, the EU follows different parameters. As a community that centers on the individual and a strong commitment to the rule of law, it has advanced to a much higher degree of integration and juridification compared to other international organisations where the individual is still largely mediated. All in all, however, the entire debate and legal battles nevertheless illuminate first and foremost the inability of the involved international actors to bring their international obligations and political incentives in conformity with the necessity to ensure fundamental legal protection for all individuals and entities affected.

## VIII. What Lies Ahead?

The most striking characteristic of the *Kadi* judgment is the integrative dimension it reveals. In precarious times, with the future European integration process at a crossroads, it aims at the European citizenry as its main addressee. Across national borders, the citizens of the Union shall understand that the rule of law is the defining and unifying core of the European identity and constitutionalisation. How far this commitment will go is yet unclear. For the moment, access to courts and a minimum of rights is ensured. However, a substantial panoply of controversial questions awaits being addressed in future cases reviewing the merits of particular decisions to blacklist persons or entities. The ECJ has already indicated that it would inquire as to the factual accusations underlying their inclusion. Yet, the procedural particulars of such a trial have not been spelled out. The ECJ has only indicated that it is willing to make inroads to satisfy legitimate security concerns. Seeking to balance security and liberty, the Court has signalled that it recognises the task of the Community judicature to apply, in the course of the judicial review, techniques which accommodate, on the one hand, overriding secrecy and security considerations pertaining to the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.<sup>33</sup> Grounding the decision on the Council's failure to furnish statements of reasons helped the Court avoid these intricate problems in *Kadi*. It is easy to predict, however, that terrorism trials will enter a new stage soon. This next phase will be dictated by a struggle for efficacy of review. A new wave of litigation dealing with evidentiary issues, ranging from standards of proof to *in camera* hearings and review of classified information, or the admissibility of foreign intelligence information, will surge and hit Community courts. *Kadi's* progeny will lead to greater clarity in this respect and reveal which ideal of the rule of law Europe is heading towards.



**Dr. Frank Meyer, LL.M. (Yale)**

Senior Research Fellow, University of Hamburg,  
Germany

<http://www.jura.uni-hamburg.de/personen/meyer>

- 1 ECJ, Joined Cases C-402/05 P and C-415/05 P, Judgment of September 3, 2008 – Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission.
- 2 For further detail on the smart sanctions regime, see Meyer, *eucri* 3-4/2006, p. 66.
- 3 CFI, Cases T-315/01 – Yassin Abdullah Kadi v Council and Commission, T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission. See Meyer, *eucri* 3-4/2006, p. 66.
- 4 See Meyer, *eucri* 3-4/2007, pp. 106-107.
- 5 ECJ, Fn. 1, paras 225-27, 229-30. In respect of the constitutional (pillar) architecture, the Court adds that Union and Community are integrated but separate legal orders. In particular, Article 3 TEU, referred to by the CFI, cannot supply a basis for any widening of Community powers beyond the objects of the Community. An extension of Community competences by reference to the principle of coherence enshrined in the TEU would go beyond the general framework created by the provisions of the EC Treaty as a whole and the principle of conferred powers in particular, and would constitute an implicit amendment of the TEC. The judgment indicates that the third pillar might be approximated to the first. However, a reverse operation of expanding the first pillar by referring to provisions of the third will not work.
- 6 Kämmerer, *EuR* – Beiheft 1 – 2008, 65, 72.
- 7 Compare ECJ, Case C-167/04 P, *JCB Service v Commission* [2006] ECR I-8935, para 186.
- 8 Cullen/Charlesworth, *Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States*, *Common Market Law Review* 36 (1999), pp. 1243-1270.
- 9 Kämmerer, *EuR* – Beiheft 1 – 2008, 65, 67-8; Kotzur, *EuGRZ* 2006, 19, 23.
- 10 Haltern, *Europarecht*, 2. Auf. 2007, paras 1213-4.
- 11 Feinäugle, *ZRP* 2007, 75 f.
- 12 Ohler, *EuR* 2006, 848, 859 f.; Meyer, *ZEuS* 2007, 1, 31 f.
- 13 ECJ, Fn. 1, paras 319, 322.
- 14 See Haltern, *JZ* 2007, 772, 773.
- 15 ECJ, Fn. 1, paras 285-86, 288.
- 16 AG, Opinion of November 20, 2007, Case C-308/06, *The International Association of Independent Tanker Owners and Others*, para 38. Also, it cannot be validly

argued that the Community is bound by an agreement on the grounds that it has assumed powers of the Member States in this area, para 45.

- 17 Kämmerer, *EuR* – Beiheft 1 – 2008, 65, 76.
- 18 Haltern, *Europarecht*, 2. Auf. 2007, Rn. 1198.
- 19 For an instructive elaboration of this problem, see Kämmerer, *EuR* – Beiheft 1 – 2008, 65, 73-4.
- 20 Cf. Meyer, *eucri* 3-4/2006, p. 67 and *eucri* 3-4/2007, p. 105.
- 21 ECJ, Fn. 1, para 358, 363.
- 22 ECJ, Fn. 1, para 364; on humanitarian exceptions Meyer/Macke, *HRRS* 2007, 445, 455 f.
- 23 Compare Dederer, *ZaöRV* 66 (2006), pp. 575 f.; Schmahl, *EuR* – Beiheft 1 – 2008, 7, 8 f.; Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen*, 2008; Gebauer, *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?*, 2007.
- 24 ECJ, Case C-354/04 P, [2007] ECR, I-1579 – *Gestoras Pro Amnistia v. Council*; Case C-355/04 P, [2007] ECR I-1657 – *Segi and others v. Council*.
- 25 Compare ECtHR, Application no. 71412/01 – *Behrami and Behrami v. France*; Application no. 78166/01 – *Saramati v. France, Germany and Norway*; Application no. 36357/04 – *Beric v. Bosnia*; Application no. 31446/02 – *Gajic v. Germany*; Application no. 6974/05 – *Kasumaj v. Greece*; for a critical assessment see Milanovic/Papic, *International and Comparative Law Quarterly* 57 (2008), available at SSRN: <http://ssrn.com/abstract=1216243> (last visited: November 8, 2008).
- 26 ECtHR, Application no. 71412/01 – *Behrami and Behrami v. France*; Application no. 78166/01 – *Saramati v. France, Germany and Norway*, paras 149, 151.
- 27 Opinion of Advocate General Poiras *Maduro*, delivered on 16 January 2008, Case C-402/05 P, *Yassin; Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, footnote 42; available at <http://curia.europa.eu> (last visited: November 8, 2008).
- 28 As measured by the ECtHR's case law, *Kadi* lies in between *Behrami* and *Bosphorus*. The transposition of the SC Resolution into the European realm requires an EC legal act but the enforcement of the specific sanction does not require further involvement of national authorities in the Member States. This subtle distinction did not attract much attention by the ECJ though.
- 29 Opinion of Advocate General Mengozzi, delivered on 26 October 2006, Case C-355/04 P, *Segi and others v. Council of the European Union* [2007] ECR I-01657, paras 104, 133.
- 30 Compare decisions of the German Bundesverfassungsgericht BVerfGE 89, 155, 188; 102, 147, 164; Schmahl, *EuR* – Beiheft 1 – 2008, 7, 14, 33. Violations of such indispensable constitutional guarantees could have provoked, for instance, the German Bundesverfassungsgericht to seize the matter, Kämmerer, *EuR* – Beiheft 1 – 2008, 65, 84-5.
- 31 Locus classicus: *Abbott/Keohane/Moravcsik/Slaughter/Snidal*, *International Organization* 54 (2000), pp. 401-419; see also Zangl/Zürn, *Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance*, in: Zangl/Zürn (eds.), *Verrechtlichung – Baustein für Global Governance*, 2004, pp. 12, 13 f.; von Schorlemer, *Verrechtlichung contra Entrechtlichung: die internationalen Sicherheitsbeziehungen*, in: *ibid.*, pp. 76, 88 f.
- 32 Zangl, *Das Entstehen internationaler Rechtsstaatlichkeit?*, in: Leibfried/Zürn (eds.), *Transformationen des Staates?*, 2006, pp. 123-150.
- 33 ECJ, Fn 1, paras 342, 343.

# Imprint

## Impressum

Published by:

**Max Planck Society for the Advancement of Science  
c/o Max Planck Institute for Foreign and International  
Criminal Law**

represented by Director Prof. Dr. Dr. h.c. Ulrich Sieber  
Guenterstalstrasse 73, 79100 Freiburg i.Br./Germany

Tel: +49 (0)761 7081-1,  
Fax: +49 (0)761 7081-294  
Email: [u.sieber@mpicc.de](mailto:u.sieber@mpicc.de)  
Internet: <http://www.mpicc.de>



Official Registration Number:  
VR 13378 Nz (Amtsgericht  
Berlin Charlottenburg)  
VAT Number: DE 129517720  
ISSN: 1862-6947

**Editor in Chief:** Prof. Dr. Dr. h.c. Ulrich Sieber

**Editorial Board:** Francesco De Angelis, Directeur Général Honoraire Commission Européenne Belgique; Luc Bihain, Université de Liège, Belgique; Julian Owen, Office for Criminal Justice Reform, United Kingdom; Dr. Tuomas Pöysti, Ministry of Finance, Finland; Lorenzo Salazar, Ministero della Giustizia, Italia; Prof. Rosaria Sicurella, Università degli Studi di Catania, Italia

**Managing Editor:** Thomas Wahl, Max Planck Institute for Foreign and International Criminal Law, Freiburg

**Editorial Assistants:** Julia Macke, Sabrina Staats, Johannes Schäuble, Leonard Ghione, all Max Planck Institute for Foreign and International Criminal Law, Freiburg

**Language Consultant:** Indira Tie, Certified Translator, Max Planck Institute for Foreign and International Criminal Law, Freiburg

**Typeset:** Ines Hofmann, Max Planck Institute for Foreign and International Criminal Law, Freiburg

**Produced in Cooperation with:** Vereinigung für Europäisches Strafrecht e.V.

**Layout:** JUSTMEDIA DESIGN, Cologne

**Printed by:** Stückerle Druck und Verlag, Ettenheim/Germany

The publication is co-financed by the  
European Commission, European  
Anti-Fraud Office (OLAF), Brussels



© Max Planck Institute for Foreign and International Criminal Law 2008. All rights reserved: no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical photocopying, recording, or otherwise without the prior written permission of the publishers.

The views expressed in the material contained in eucrim are not necessarily those of the editors, the editorial board, the publisher, the Commission or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the Commission are not responsible for any use that may be made of the information contained therein.

### Subscription:

eucrim is published two to four times per year and distributed electronically for free.

In order to receive issues of the periodical on a regular basis, please write an e-mail to:

[eucrim-subscribe@mpicc.de](mailto:eucrim-subscribe@mpicc.de).

For cancellations of the subscription, please write an e-mail to:  
[eucrim-unsubscribe@mpicc.de](mailto:eucrim-unsubscribe@mpicc.de).

For further information, please contact:

### Thomas Wahl

**Max Planck Institute for Foreign and International Criminal Law**  
Guenterstalstrasse 73,  
79100 Freiburg i.Br./Germany

Tel: +49(0)761-7081-227 or +49(0)761-7081-1 (central unit)

Fax: +49(0)761-7081-294

E-mail: [t.wahl@mpicc.de](mailto:t.wahl@mpicc.de)

