eucrim

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

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SUCCESSOR TO AGON

Focus: The Development of European Criminal Procedure Law
Dossier particulier: Le développement du droit de la procédure pénale européen
Schwerpunktthema: Die Entwicklung des europäischen Strafprozessrechts

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Editorial

Dear Readers,

I am delighted to contribute the editorial to this new issue of eucrim, which covers different aspects of European criminal procedural law and judicial cooperation within the European Union. Cooperation in criminal matters among the Member States tackles various questions of a different nature, spanning legal, political, theoretical, and practical issues. In contrary to the practice in civil matters, cooperation in criminal matters proves to be more difficult, mainly due to the "traditional" approach linked with the sovereignty of each State in respect of its criminal legislation. However, ideas that have been adopted and put into practice in the European Communities and European Union over the past few decades force us to look at the issue of sovereignty in criminal law in a new way.

Although unintended, the free movement of persons and goods in the European Community unfortunately also allows criminals to move more easily and freely across the borders of the European Union Member States and to set up or move their criminal enterprises wherever and whenever it proves most effective. Efforts must be undertaken on the part of each Member State, not only individually but also collectively, in order to effectively safeguard the underlying policies of the EU and fight cross-border crime.

The process of achieving these aims can be divided into three levels: European legislation, national legislation, and practical cooperation. The first two levels assume political good will. The third one rests on good faith and mutual trust among the Member States. Each level is as important as the other, although the efficacy of enacted laws will always be measured in practice. For this reason, despite its legislative origins, the level and standard of cooperation among EU Member States in criminal matters will always rest with judges, prosecutors, the police, and other law enforcement officers.

In this context, the implications of the EU approach to the interpretation of national legislation can never be underestimated. I would like to draw your attention to two cases relating to the European Arrest Warrant that were heard by the Polish Supreme Court. The first case in 2006 concerned a Polish national sought by Belgian authorities under a charge of murder. He was still a juvenile according to Belgian law and, although the Belgian legislation on juveniles allowed a category of juveniles to be tried as adults under the criminal law, in respect of this youth, such a decision was not taken when the European Arrest Warrant was issued. The Polish Supreme Court held that, despite the lack of any instigated criminal proceedings, the warrant could be executed, provided that the surrender of the accused is for the purpose of conducting criminal non-juvenile proceedings.

Prof. Lech K. Paprzycki

The second case in 2009 was even more difficult, in particular due to different approaches adopted by different EU Member States. It concerned the procedure of returning a sentenced offender to the executing Member State for the purpose of serving the sentence passed in the issuing Member State, as set forth in Article 5.3 of the Framework Decision on the European Arrest Warrant. The Supreme Court held that Article 607s § 4 of the Polish Code of Criminal Procedure excludes *exequatur* procedures, as set forth in the 1983 Council of Europe Convention on the transfer of sentenced persons and in Polish legislation.

The decisions in these two cases exemplify how Poland gave the idea of mutual recognition of judicial decisions in criminal matters its widest possible meaning. The fundamental pillars of both decisions are based on the belief and trust that Polish or any other EU Member State's cases abroad will be treated with the same broad approach to the idea of mutual recognition.

On balance, the philosophy of the traditional approach to sovereignty in criminal law must be reviewed in order to effectively fight the increasing number of EU-wide crimes. Maintaining and developing the EU as an area of freedom, security and justice depends on good faith among the Member States. The phrase "area of freedom, security and justice" means nothing if not supplemented with "mutual trust". This applies equally to all aspects of judicial cooperation in criminal matters.

Professor Lech K. Paprzycki
President of the Supreme Court of the Republic of Poland, Criminal Law Chamber

European Union

Reported by Sabrina Staats and Thomas Wahl***

Foundations

Community Powers in Criminal Matters – Data Retention

ECJ: Data Retention Directive Complies With EC Law

On 10 February 2009, the ECJ decided on the Irish action seeking the annulment of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or that of public communications networks.

Ireland claimed that the Court should annul Directive 2006/24/EC on the grounds that it was not adopted on an appropriate legal basis.

In this long-awaited decision (see eucrim 1-2/2006, p. 4), the Court ordered dismissal of the Irish action and decided that Directive 2006/24/EC relates predominantly to the functioning of the internal market and therefore had to be adopted on the basis of Art. 95 EC. The Court herewith followed the opinion of the Advocate General (see eucrim 1-2/2008, p. 2).

During the proceedings, Ireland had argued that neither Art. 95 TEC nor any other provision of the EC Treaty would have been capable of providing an appropriate legal basis for the Directive since the predominant objective of the Directive is to facilitate the investigation, detection, and prosecution of crime, including terrorism. The provisions of Directive 2006/24/EC would not address defects in the internal market. Therefore, the only legal basis, on which the measures contained in Directive 2006/24/EC could validly be based, would be Title VI of the EU Treaty, in particular Arts. 30 TEU, 31(1) TEU and 34(2)(b) TEU. The obligations designed to ensure that data are available for the investigation, detection, and prosecution of criminal offences would fall within an area that may only be the subject of a measure based on Title VI of the EU Treaty and cannot be adopted under Community competence.

Slovakia, which was granted the right to intervene in support of Ireland during the proceedings, added that the retention of personal data to the extent required by Directive 2006/24/EC amounts to an extensive interference in the rights of individuals to privacy as provided for by Art. 8 of the European Convention on Human Rights (ECHR) and that it would be questionable whether such far-reaching interference may be justified on economic grounds.

In its findings, the Court first of all noted that the action brought by Ireland relates solely to the choice of legal basis and not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24/EC. As a result, requests from the European Parliament and NGOs to the Court to clear up violations of human rights by the data retention Directive were thwarted (cf. eucrim 1-2/2008, pp. 2-3).

Regarding the Irish arguments on the legal basis, the Court found that the evidence submitted to the Court showed that the national measures regarding data retention differed substantially, particularly in respect of the nature of the data retained and the periods of data retention. Also, the Court found that the obligations relating to data retention have significant economic implications for service providers in so far as they may involve substantial investment and operating costs. Thus, the differences between the national rules adopted on data retention were liable to have a direct impact on the functioning of the internal market. In the Court's opinion, this situation justified the Community legislature in safeguarding the proper

* If not stated otherwise, the news in the following sections were reported by Sabrina Staats: Foundations; Institutions; Specific Areas of Crime (Environmental Crime, Illegal Employment); Procedural Criminal Law (Procedural Safeguards, Data Protection).

** If not stated otherwise, the news in the following sections were reported by Thomas Wahl: Specific Areas of Crime (Counterfeiting & Piracy, Organised Crime); Procedural Criminal Law (Ne bis in idem, Victim Protection, Freezing of Assets); Cooperation.

functioning of the internal market by adopting harmonised rules.

As to the substantive content of the Directive's measures, the Court found that the provisions are limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States.

Directive 2006/24/EC therefore regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law enforcement authorities nor that relating to the use and exchange of such data between those authorities. These matters, which principally fall within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of the Directive, as is stated, in particular, in recital 25 and Art. 4 of the Directive.

It will be interesting to see how this decision will influence the pending cases before the constitutional courts of the Member States (see eucrim 1-2/2008, p. 3).

Background Information: On 28 April 2004, France, Ireland, Sweden and the United Kingdom submitted to the Council of the European Union a proposal for a framework decision to be adopted on the basis of Arts. 31(1)(c) and 34(2)(b) TEU. The subject of this proposal was the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data in public communication networks for the purpose of the prevention, investigation, detection, and prosecution of criminal offences, including terrorism.

The Commission then stated that Art. 47 TEU did not allow an instrument based on the EU Treaty to affect the *acquis communautaire*, in this case Directives 95/46/EC and 2002/58/EC. Taking the view that the determination of the categories of data to be retained and the relevant retention period fell within the competence of the Community legislature, the Commission reserved the right to submit an own proposal for a directive on data retention based on Art. 95 TEC. The Commission did this on 21 September 2005 (COM(2005) 438 final).

On 14 December 2005, the European Parliament delivered its opinion, overall approving the Commission's proposal for the directive whereas the MEPs have strongly opposed the proposed framework decision earlier (see eucrim 1-2/2006, p. 4). The Council finally adopted Directive 2006/24/EC by qualified majority voting at its session on 21 February 2006. Ireland and Slovakia voted against the adoption of the Directive.

➤eucrim ID=0901001

Community Powers in Criminal Matters – Data Bases

UK's Action against Access of Law Enforcement Authorities to the Visa Information System

On 10 November 2008, the United Kingdom brought an action against the Council regarding the annulment of Council Decision 2008/633/JHA regarding access for consultation of the Visa Information System (VIS) by designated authorities of Member States and Europol for the purpose of the prevention, detection, and investigation of terrorist offences and other serious criminal offences (Case C-482/08). The UK has been denied the right to take part in the adoption of this VIS Police Access Decision because the Council considered the measure to be a development of provisions on the common visa policy of the Schengen acquis, in which the UK does not take part. The UK, however, argues that the VIS Police Access Decision is a police cooperation measure rather than a development of the common visa policy, since neither aim nor content of the VIS Police Access Decision relate to the common visa policy.

The UK considers the measure entirely concerned with the sharing of information for the purpose of the prevention, detection, and investigation of terrorist offences and other serious offences, which is also reflected by the Council's choice of legal basis, namely Arts. 30 (1)(b) and 34 (2)(c) TEU. The UK is therefore seeking the annulment of those provisions of the measure that have the effect of excluding the UK from participating in the application of the VIS Police Access Decision. The Commission has been granted leave to intervene in support of the Council by the Court in April 2009.

➤eucrim ID=0901002

Schengen

SIS II Still Up in the Air

At the JHA meeting from 4 to 5 June 2009, the Council held a debate on further steps in the future of the Schengen Information System "SIS II". The JHA Council adopted an exit clause which, in case two tests ("milestones") demonstrate malfunction of SIS II, allows the Commission to stop the current SIS II and continue with other options to develop SIS II (unless the Council decides otherwise within a period of two months). Although, for now, the development of SIS II will continue with the current SIS II project, the Council stressed the ability of the alternative advanced SIS I plus scenario to realise the objectives of SIS II (for the development of SIS II and SIS I, see also eucrim 1-2/2008, p. 8 for further references).

➤eucrim ID=0901003

The Council's Struggle with SIS II

The discussions about the future of the SIS II project have been going on for some time now. At the JHA meeting on 26 and 27 February 2009, the Council adopted a set of conclusions regarding the modernisation of SIS II. The Council took note of the problems that per-

sist in the current SIS II project and the Commission's view that all outstanding issues could be resolved with a major redesign of the SIS II application. As to the adopted conclusions, the Council demanded, inter alia, the implementation of a SIS II analysis and repair plan as well as the implementation of a comprehensive SIS II programme management approach. It has also already stated that the date for migration from SIS I to SIS II, which was set for September 2009, is no longer realistic.

➤eucrim ID=0901004

On 20 March 2009, the Czech Presidency introduced a paper on the implementation of the February JHA conclusions. Basically, the paper describes the state of play of the ongoing measures to improve SIS II and gives a line of approach for the months to come, e.g., carrying out a revised testing approach and developing alternative technical scenarios, such as the advancement and adjustment of SIS I.

➤eucrim ID=0901005

Barrot: Comments on the Modernisation of SIS II

Before the JHA meeting in February 2009, Jacques Barrot, the Commissioner responsible for Justice, Freedom and Security, spoke at the 12th European Police Congress on 10 and 11 February 2009 in Berlin and signalised a modernisation of SIS II. Barrot especially requested an extension of Europol investigators' competences, e.g., the authority to work at the crime scene with mobile offices or to operate more closely together with national police authorities. He would also like the Member States' police authorities to have full access to EURODAC, the database for fingerprints of asylum-seekers.

➤eucrim ID=0901006

Commission Proposes Agency for Operational Management of SIS II and Other Databases in the AFSJ

Following the above-mentioned Council debate held in early June 2009, the Commission adopted a legislative package proposing the setting up of an Agency for the long term operational management of the Schengen Information System (SIS II), the Visa Information System (VIS), EURODAC and other large-scale IT systems in the Area of Freedom, Security and Justice (AFSJ) on 24 June 2009. The legislative package is composed of a first pillar Regulation establishing the Agency, a third pillar Decision and a horizontal Communication providing a quick overview of the legislative proposals.

The main tasks of the Agency will be to fulfil the operational management tasks for SIS II, VIS and EURODAC and to adopt the necessary security measures, to report and to publish statistics as well as to initiate and monitor SIS II and VIS related training. The Agency is to become operational as of 2012.

➤eucrim ID=0901007

Commission Proposes New Schengen Evaluation System

On 4 March 2009, the Commission adopted a proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the *Schengen acquis*. The main objective of the proposed Regulation is to establish a legal framework for evaluating the correct application of those elements of the *Schengen acquis* that form part of Community law (COM (2009)102 final).

It goes together with the proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of those elements of the *Schengen acquis* that are part of third pillar EU law (COM (2009)105 final).

This double evaluation mechanism is designed to maintain mutual trust between Member States in their capacity to effectively and efficiently apply the accompanying measures allowing the creation of an area without internal borders.

The proposals introduce a clear programming, providing for multi-annual and annual programmes of both unannounced and announced on-site visits in the various Member States. The evaluations themselves can be based on replies to questionnaires, on-site visits or a combination of both. On-site visits shall be carried out by teams of 8 national experts appointed by the Commission. Experts of Europol or Eurojust may also participate in the evaluation as observers. In the context of on-site visits, the Commission considers on-the-spot evaluations particularly necessary regarding judicial cooperation in criminal matters and data protection issues.

Following each evaluation, the Commission shall draw up a report on the Member State concerned, based on the findings of the on-site visit and the questionnaire as relevant. The Member State concerned then has a certain period of time to develop an action plan on how to remedy the identified weaknesses. Finally, the Commission shall present a yearly report to the Council and the European Parliament on the evaluations carried out.

➤eucrim ID=0901008

Legislation

Progress Report on Better Regulation in the EU

On 28 January 2009, the Commission adopted a Commission Working Document providing information on the progress achieved regarding the strategy for simplifying the regulatory environment. The aim of the Commission's simplification programme is to review the EU's acquis in view of the relevance, effectiveness, and proportionality of the legislation in place.

The simplification programme now contains a total of 185 initiatives, of which 132 have already been adopted by the Commission. Up to now, the legislative process has been finalised for 75 of the 132 initiatives. Since 2005, approx. 1300 legal acts, representing almost

10% of the acquis, have been proposed for removal.

The report not only describes the previous initiatives; it also gives an outlook on initiatives in the pipeline for 2009, e.g., the modernisation of Regulation (EC) No. 44/2001 (on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters) in order to facilitate the recognition and enforcement of judicial decisions. For the programme on better regulation in the EU, see also eucrim 3-4/2007, pp. 81-82.

➤eucrim ID=0901009

Institutions

OLAF

OLAF's 10th Anniversary Web Page

On the occasion of the 10th anniversary of the European Anti-Fraud Office (OLAF), it has set up a web page containing information on OLAF and its 10th anniversary events. For the 10th anniversary of OLAF in 2009, see also the special anniversary edition of eucrim 3-4/2008. This special edition is also available together with other communication material via the web page.

OLAF was founded in 1999 as an independent service for the EU in charge of the fight against fraud and corruption affecting the EU's financial interests.

➤eucrim ID=0901010

Cooperation Agreement between OLAF and the World Bank

On 30 June 2009, OLAF and the World Bank's Integrity Vice-Presidency signed a cooperation agreement regarding the joint fight against fraud affecting development aid. The World Bank is the trustee of significant funds from the EU. The signed agreement will enable investigators from both sides to carry out joint investigations where common interests of both the EU and the World Bank are involved and to exchange, within the legal framework of institutions, information and intelligence.

➤eucrim ID=0901011

CFI Backs OLAF Investigation

On 1 July 2009, the Court of First Instance (CFI) delivered a judgement in Case T-259/05, confirming a Commission decision to make Spain reimburse more than 110 million Euros wrongly paid out to companies in the flax sector – a part of the EC's common agricultural policy. The Commission's decision was based upon an OLAF investigation carried out from May 2000 until March 2001 which revealed widespread irregularities in the Spanish flax sector with a significant amount of EU subsidies for flax production being wrongly disbursed. The Commission then decided to claim back 113.4 million Euros, an amount which represents 100 % of all EU subsidies paid out by Spain to its flax sector in 1998/99 and 1999/2000. The CFI particularly backed OLAF's investigations by rejecting counter-arguments from Spain. OLAF undertook a series of on-the-spot checks in Spain and discovered widespread irregularities in the Spanish flax sector. For the regular Commission's decisions to reclaim expenditure under the Common Agricultural Policy (CAP), cf. eucrim 1-2/2008, pp. 19-20 for further references. For the legal framework of the Commission's power to investigate irregularities in specific sectors, cf. the article by *Wahl*, eucrim 3-4/2008, pp. 120-127 (in German).

➤eucrim ID=0901012

OLAF Publishes Annual Activity Report

On 9 July 2009, OLAF presented its new Annual Activity Report which illustrates its work inside and outside the EU in the form of case studies and statistical tables. The 2008 report puts a particular focus on the judicial follow-up of OLAF's investigations. While 204 new cases have been opened during 2008, OLAF has opened more than 3000 cases since its creation in 1999 and over 300 persons have been sentenced by criminal courts as a result of OLAF's investigations. Regarding the financial benefit of its work, OLAF comes off extremely well in 2008 with a sum exceeding 460 million euros being recorded as recovered in connection with OLAF cases and only spending about 53 million euros on operational costs over the same period of time.

➤eucrim ID=0901013

Europol

Europol's 10th Anniversary

On 1 July 2009, Europol celebrated its 10th anniversary. Rob Wainwright, the new Director of Europol, highlighted Europol's close cooperation with its partners and the Europol information system with extensive data sets. In the future, Europol will continue to place emphasis on the exchange of information and intelligence among law enforcement agencies.

On the occasion of the anniversary, Europol provides additional information on its activities during the past 10 years on the Europol web page, including an anniversary book and an anniversary poster.

➤eucrim ID=0901014

Establishment of Europol as an EU Agency

On 6 April 2009, the JHA Council adopted the decision establishing Europol as a Community agency as from 1 January 2010 (see eucrim 1-2/2008, p. 13). This change of status aims at improving the operative and administrative functioning of Europol. In addition, Europol's mandate will be extended to serious crime, which is not strictly related to organised crime. Furthermore, the role of the Parliament regarding the control of Europol will increase and an enhancement of democratic control over Europol at the European level is intended.

➤eucrim ID=0901015

Appointment of New Director

On 6 April 2009, the Council adopted at the JHA meeting a decision appointing Mr. Rob Wainwright (UK) as the new director of Europol for a four-year period.

Mr. Wainwright replaces Mr. Max-Peter Ratzel (Germany), whose mandate as the director of Europol expired on 15 April 2009. Before he was appointed as the new director of Europol, Mr. Wainwright was the Chief of the International Department of the UK Serious Organised Crime Agency (SOCA).

➤eucrim ID=0901016

Europol – Russia

The new Europol leader, Rob Wainwright, announced that one of his first aims is to reach a new agreement with Russia that would allow for a better exchange of information on joint anti-crime operations, including the exchange of personal data. The possible new Europol-Russia cooperation agreement on information exchange was also on the agenda of the JHA Council meeting of 6 April 2009 and the EU-Russia troika meeting in Khabarovsk, Russia, from 21 to 22 May 2009. Currently, relations between Europol and Russia are based on an agreement of 2003, which does not, however, include the exchange of personal data.

➤eucrim ID=0901017

Europol – Israel

At the JHA meeting on 6 April 2009, the council adopted a decision authorising the director of Europol to enter into negotiations with Israel with a view to concluding an operational cooperation agreement.

➤eucrim ID=0901018

Europol – India

At the JHA meeting on 26 February 2009, the Council adopted a decision to add India to the list of countries with which the director of Europol is authorised to start negotiations on cooperation agreements. In its decision, the Council has not explicitly excluded the exchange of personal data from the authorisation to enter into negotiations, so it will be interesting to see the outcome of the future negotiations.

➤eucrim ID=0901019

Europol: Dispute on Access to Documents Settled

On 21 November 2008, the European Ombudsman, P. Nikiforos Diamandouros, delivered a decision closing his inquiry into complaint 111/2008/TS against Europol. The complainant, a Danish journalist, had been refused access to documents, particularly documents referred to in the document entitled "The Strategy for Europol". The complainant had filed his application for access on 6 September 2007 and Europol replied over 3 months later, on 20 December 2007. The complainant then submitted a confirmatory application to Europol on 8 January 2008 to which Europol did not reply. In mid-February 2008, an official from Europol called the complainant and apologised for the fact that it had not replied to his confirmatory application within the stipulated time frame. On 8 January 2008, the complainant turned to the Ombudsman, claiming that Europol should first of all review its administrative practice regarding its handling of (initial and confirmatory) applications for access to documents since Europol's rules on access to documents provide that it shall reply to both initial and confirmatory access applications within 30 working days following registration. Furthermore, he claimed that Europol should grant access to the requested documents.

On 8 May 2008, Europol provided the complainant with the documents and information he had requested and regretted the delay in answering his request for access to documents.

In the course of the Ombudsman's inquiry, Europol had expressly apologised to the complainant for the delays and the complainant accepted the apology. Europol has furthermore assured that it will take measures to avoid similar shortcomings in the future.

The Ombudsman found that Europol had settled the matter and satisfied the complainant. The Ombudsman therefore closed the case.

➤eucrim ID=0901020

Eurojust

Eurojust – Europol Cooperation Agreement

The Council has adopted a revised cooperation agreement between Eurojust and Europol. The agreement has been approved by the College of Eurojust as well as by the Joint Supervisory Body.

The agreement is aimed at establishing and maintaining close cooperation between Eurojust and Europol in order to increase their effectiveness in combating serious forms of international crime. In particular, this will be achieved through the exchange of operational, strategic, and technical information as well as the coordination of activities. The cooperation will take place with due regard to transparency, complementarity of tasks, and coordination of efforts.

➤eucrim ID=0901021

Eurojust Attached to FATF as Observer

In June 2009, the Financial Action Task Force (FATF) granted Eurojust observer status to the FATF. Eurojust is now part of other international organisations, including Europol, which are attached to the FATF as observers. The FATF and Eurojust underscored that closer cooperation between the two bodies will build on existing synergies in enforcement action directed at those who launder funds and finance terrorism.

Mr. Carlos Zeyen, member of the Counter-Terrorism and Financial and Economic Crime teams at Eurojust, and National Member for Luxembourg, commented: "Obtaining FATF observer status is a milestone in Eurojust's development. We will now benefit directly from the new policies and initiatives promoted by FATF. Its mutual evaluations

and peer reviews will help us to detect emerging vulnerabilities, new threats and possible gaps and problems in our common field of competence. Eurojust fully supports the implementation of the FATF 40+9 Recommendations and in particular those dealing with criminal justice and international cooperation. Eurojust offers FATF its accumulated experience and knowledge acquired through its dealings with operational cases in money laundering for purposes of terrorist financing and can contribute to FATF the identification of new trends and threats in those areas."

For more background information on the FATF, see eucrim 1-2/2007, p. 44. For other important decisions of the FATF regarding the protection of the international financial system from abuse by criminals, see the following ID.

➤eucrim ID=0901022

Specific Areas of Crime / Substantive Criminal Law

Counterfeiting & Piracy

European Observatory on Counterfeiting and Piracy Launched

By means of a new European Observatory on Counterfeiting and Piracy, the European Commission aims at improving the fight against fake goods. Against the background of the dramatic increase in and economic losses from counterfeiting and piracy over the past ten years, the specialised Observatory is designed to counter this phenomenon. The overall goal of the Observatory is to produce continuous, objective assessments and up-to-date research that lead to the exchange of best practices and knowledge among policymakers, industry experts, and enforcement bodies. The Observatory will have a flexible and light structure. Its main tasks will be:

- Obtaining better information, including figures on the scope of the problem;
- Better cooperation between law enforcement authorities;
- Exploring and sharing successful private sector strategies;
- Raising public awareness.

The European Observatory on Counterfeiting and Piracy was officially launched on 2 April 2009 at the second High Level Conference on Counterfeiting and Piracy. Internal Market and Services Commissioner Charlie McCreevy noted: "In the fight against IPR crime our challenge is to complement the legal framework with strategies designed to make an impact on the ground. I am deeply convinced that the European Observatory on Counterfeiting and Piracy gives us this start."

➤eucrim ID=0901023

Cheaper and Easier EU-Wide Trademark Protection

The European Commission and EU Member States decided to lower further the fees payable to the Community agency responsible for granting EU-wide trademark rights, OHIM (Office for Harmonisation in the Internal Market, located in Alicante, Spain). Moreover, the registration procedure has been simplified. This measure, which follows a first decrease in 2005, will make trademark protection much more inexpensive and easier to obtain for businesses operating in the EU single market, saving them some 60 million euros a year. The measure came into force on 1 May 2009.

➤eucrim ID=0901024

Practice: Counterfeiters Nabbed by Joint Investigation Team

On 2 July 2009, Europol and Eurojust were able to announce the successful disbanding of a criminal group of 17 persons who were behind the distribution of more than 82,000 counterfeit euro notes. The value of the counterfeits is estimated at 16 million euros. The group was dismantled in Bulgaria. This successful blow was the result of a Joint Investigation Team involving the Bulgarian police, Spanish law enforcement authorities, Europol, and Eurojust.

➤eucrim ID=0901025

Fighting Financial Crime in Europe: Practical Aspects of a Pan-European Criminal Law

21–22 September 2009, Cambridge

A two-day conference from 21 to 22 September 2009 will examine the legal aspects of co-operation between OLAF and national anti fraud agencies and between national anti fraud agencies within the EU. Furthermore, the conference will consider the law and administrative practices and procedural guarantees relating to OLAF investigations and the effectiveness of EU instruments, formal and informal co-operative arrangements, partnerships and networks currently available to combat economic crime, particularly fraud affecting the EU's financial interests.

The objective of the conference is to stimulate debate on the practical working relationships between OLAF and national investigation agencies; the range and effectiveness of strategies for combating economic crime collectively and in partnership with third countries; addressing the international nature of criminal finance and profit and the hitherto untapped resources of the private sector.

The conference is organised by the Centre for European Legal Studies, University of Cambridge and the United Kingdom Association to Combat Fraud in Europe. The conference is co-financed by the Hercule-Programme. More information about the conference is available via the following Internet site:

➤eucrim ID=0901026

Organised Crime

Council Sets Priorities for Combating Organised Crime

On 4 June 2009, the Justice and Home Affairs Council adopted conclusions on the setting of the EU's priorities for the fight against organised crime. The con-

Fraud Prosecution & Asset Recovery

15–16 September 2009, Central London

A two-day conference from 15 to 16 September 2009 at the Holiday Inn Bloomsbury, London WC 1, will provide for an update on fraud prosecution and deliver expert advice on recovering client assets.

The Lawyer's Fraud Prosecution & Asset Recovery conference will show how the increased power and appetite of UK regulators and statutory bodies will affect how they pursue and punish fraudsters. Participants can hear how they can best navigate through the current regulatory environment to tackle and prosecute serious and complex frauds with cross-border effects.

Highlights include:

- An update from Richard Alderman, Director, SFO on the changing approach of the Serious Fraud Office;
- A strategic view of anti-fraud regulations in the US – recent developments and international reach with Joan McKown, Chief Counsel, Division of Enforcement, SEC;
- Mike Bowron, Commissioner, City of London Police will address how UK initiatives are coordinated on the ground to combat fraud;
- A mock trial based on a S25 Civil Jurisdiction and Judgments Act continuation/discharge application – prepared by Philip Jones QC and Andrew Moran of Serle Court and judged by the Honourable Mr. Justice Briggs.

Participation is subject to a participation fee. eucrim subscribers may be offered a discount by the organisers. For a full speaker line up, the agenda and participation conditions, please refer to the following website:
➤eucrim ID=0901030

clusions are based on the Europol 2009 Organised Threat Assessment (OCTA) and the Europol 2008 Russian Organised Threat Assessment report (ROCTA). The Council considers the OCTA, ROCTA, and present conclusions to be important input that should be incorporated into priorities set by the Member States.

The conclusions, however, do not only address the Member States, but also provide for a detailed list of tasks for all relevant EU bodies, agencies, and working groups, such as the Commission, the Council itself, Europol, Eurojust, and the working groups of customs authorities. They must take account the priorities set by the Council in its conclusions and incorporate them in their strategic and available operational planning, working programmes, budgets, annual reporting, and external relations.

Besides the Council conclusions, the following ID also makes reference to the web site of Europol where the OCTA report has been published. For OCTA and ROCTA, see also eucrim 1-2/2008, pp. 23-24.
➤eucrim ID=0901027

Environmental Crime

Ship-Source Pollution – State of Play

The Council and the European Parliament (EP) have reached a political agreement to amend Directive 2005/35/EC on ship-source pollution and the introduction of penalties for infringements (COM (2008) 134; see eucrim 3-4/2007, p. 77 and eucrim 1-2/2008, p. 25) which has been announced at the JHA meeting on 4 and 5 June 2009. The Council intends to formally adopt the instrument at a later stage.
➤eucrim ID=0901028

The political agreement is based upon a legislative resolution published on 5 May 2009 by the EP. The EP made several amendments to the proposed Directive, inter alia:

- Illicit ship source discharges of polluting substances will be considered a criminal offence if they have been emptied with intent, recklessly, or as a result of serious negligence and if they result in a deterioration of the water quality. Discharges that do not cause deterioration in the quality of water will be referred to as minor cases. If repeated minor cases in conjunction result in a deterioration of water, the sum of the discharges may be considered a criminal offence;
- The inciting, aiding, and abetting of an offence committed with intent shall be made punishable as a criminal offence by the Member States;
- A new article was incorporated, stipulating that the Member States shall take the necessary measures to ensure that legal persons can be held liable for criminal offences committed for their benefit by any natural person acting either individually or as part of the legal person. The natural person must have a "leading position" within the legal person, which may result from the power of representation of the legal person *or* the authority to take decisions on behalf of the legal person *or* an authority to exercise control within the legal person. Legal persons can also be held liable where lack of supervision or control has made the commission of an offence for the benefit of that legal person possible.

➤eucrim ID=0901029

Illegal Employment

Sanctions against Employers of Illegally Staying Third-Country Nationals

The European Parliament and the Council finally adopted the directive aimed at fighting illegal immigration by prohibiting the employment of illegally staying third-country nationals, laying down minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition (Directive 2009/52/EC). The new rules seek to fight abuses by employers making contracts with illegally-staying third-country nationals, providing them in the labour market with low salaries and poor labour conditions.

The Directive contains minimum sanctions against illegal employment of third-country nationals to be imposed on the employers. These companies shall be

obliged to ensure themselves that their employees are legally staying in the EU, e.g., by having them present valid residence permits. If these companies do not fulfil their obligation or purposely employ illegally staying third-nationals, they may be excluded from being entitled to public benefits, aid, or subsidies for up to five years or from participating in a public contract for the same amount of time. The Member States are to ensure that severe infringements of the prohibition to employ illegally staying third-state nationals are made punishable as a criminal offence.

➤eucrim ID=0901031

The adopted Directive results from a political compromise by the Council and the Parliament. Concerning this matter, the EP had published a legislative resolution on 19 February 2009 amending the proposed directive (COM (2007)0249). For the Commission's proposal and the development of the Directive, see also eucrim 1-2/2008, p. 26 and eucrim 1-2/2007, pp. 29-30).

➤eucrim ID=0901032

Procedural Criminal Law

Procedural Safeguards

Commission Makes New Attempt to Set Minimum Procedural Rights Standards

On 8 July 2009, the European Commission tabled a proposal for a Council Framework Decision that aims at establishing common minimum standards as regards the right to interpretation and translation in criminal proceedings throughout the European Union (COM(2009) 338). With this proposal, the Commission has revamped work in the field of minimum rules on procedural rights for defendants in criminal proceedings across the EU, after Member States ultimately failed in 2007 to agree on a proposal put forward by the Commission to the same effect in 2004. Unlike the 2004 proposal that intended to simultaneously set out six procedural rights, this proposal only focuses on one set of rights, namely those relating to interpretation and translation. These rights were widely undisputed in 2007. The Commission announced that other sets of suspects' rights may follow in the context of the next multi-annual programme regarding Justice and Home Affairs. The essential items of the proposal on the rights to interpretation and translation are as follows:

- Member States must ensure that any person suspected or accused of a criminal offence who does not speak or understand the language used in this context must be provided with interpretation throughout the entire proceedings.
- Member States must further ensure that, where necessary, legal advice received throughout the criminal proceedings is interpreted for the suspect.
- Member States must ensure that a procedure is in place to ascertain whether the suspect understands and speaks the language of the criminal proceedings.
- In addition, translations of essential procedural documents will have to be provided.
- The suspect or the lawyer may request the translation of further documents, including written legal advice from the suspect's lawyer.
- Both interpretation and translation must be of a sufficient quality and be provided free of charge.
- Member States must provide for a right of appeal against a decision finding that there is no need for interpretation or translation.

The scope of the proposed FD covers all persons suspected or accused in respect of a criminal offence, from the moment the person is informed of this and until final disposal of the case, including any appeal.

The FD explicitly also applies to European Arrest Warrant cases. As a result, the person wanted has a right to be provided with interpretation during the extradition proceedings, and the translation of the EAW should be made obligatory if the person does not understand or speak the language of the proceedings.

Furthermore, the draft FD features an obligation for Member States to offer training to judges, lawyers, and other court staff to make sure that the defendant understands the proceedings.

It will be interesting to see whether Member States that previously obstructed the framework decision on procedural safeguards in 2007 will say no to this draft FD, too. One main argument of the dissenting Member States at the time was the missing legal basis for an EU instrument to provide for procedural safeguards (Art. 31 (1c) TEU). The Commission is trying to counter these arguments by accompanying its proposal with a detailed impact assessment including an extensive explanation of the different options.

By Thomas Wahl

➤eucrim ID=0901033

Framework Decision on Trials in Absentia Adopted

The Council finally adopted the Framework Decision (FD) on enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition in respect of decisions rendered in the absence of the person at the trial.

The FD alters various other framework decisions implementing the principle of mutual recognition of final judicial decisions. As a consequence, the FD now consistently governs the issue of decisions rendered following a trial at which the person concerned did not appear in person. The FD sets conditions under which the recognition and execution of a decision rendered (following a trial at which the person concerned did not appear in person) should not be refused.

The establishment of certain procedural guarantees – in particular, the right to retrial or appeal if the defendant was not properly informed about the original

trial and therefore had not appointed a lawyer – aims to allow the Member States to enforce each others' judgments with greater confidence that the person's rights of defense have been respected and thus expedites the proceedings.

Member States shall take the necessary measures to comply with the provisions of the FD on trials in absentia by 28 March 2011. For the FD, see also eucrim 1-2/2008, p. 27 and eucrim 3-4/2007, p. 100.

➤eucrim ID=0901034

European Lawyers Publish Manifesto for the Right Kind of Justice for Europe

On 3 March 2009, the Council of Bars and Law Societies of Europe (CCBE) published a four-point manifesto for "the right kind of justice" for Europe. The CCBE calls on EU decision-makers to:

- Establish a Directorate-General for "Justice" at the European Commission;
- Guarantee the right of a defendant to consult a lawyer in full confidence;
- Protect the procedural rights of suspects and defendants in criminal proceedings in all Member States;
- Strike the balance between liberty and security in legislation against terrorism and organised crime.

The CCBE will especially promote the manifesto throughout the Swedish presidency as well as the establishment of the new Commission in the second half of 2009. The CCBE represents through its members the Bars and Law Societies of Europe, totalling over 700,000 lawyers from all over the EU.

➤eucrim ID=0901035

Data Protection

ECJ Sets Limits on the Processing and Storage of Personal Data

On 16 December 2008, the European Court of Justice (ECJ) delivered a judgement on centralised registers for foreign nationals (Case C-524/06 *Huber*). The Higher Administrative Court of the federal state *North-Rhine Westphalia,* Germany had made the reference for a preliminary ruling in proceedings between Mr. Huber, an Austrian national who is a resident in Germany, and the Federal Republic of Germany, represented by the Federal Office for Migration and Refugees.

Germany has established a centralised register that contains certain personal data on foreign nationals who are residents of Germany for more than three months. The register is used for statistical purposes as well as by the police and judicial authorities in exercising their powers. Mr. Huber moved to Germany in 1996 for business reasons and felt discriminated against by the centralised register because a database of this kind does not exist for German nationals. Mr. Huber therefore requested to become deleted of the register. The Higher Administrative Court, before which proceedings were brought, asked the ECJ whether the German centralised register is compatible with Community law.

The ECJ decided that, in general, a system for processing personal data complies with Community law if it contains only the data necessary for the application of legislation relating to the right of residence and its centralised nature enables legislation to be more effectively applied as regards the right of residence of EU citizens who are not nationals of the state of residence. However, such a register may not contain any information other than what is necessary for that purpose. The ECJ states that it is for the national courts to ascertain whether these conditions have been satisfied and whether the requirement of necessity, laid down by the Data Protection Directive (95/46/EC), met.

As regards the present case, the processing and storage of personal data for statistical purposes did not meet the requirement of necessity. The ECJ furthermore found that, since the data of the nationals of the Member State concerned are not contained in the register whilst the situation of nationals cannot be different from that of Union citizens when it comes to the objective of fighting crime, the use of the data in the register for the purpose of fighting crime is contrary to the principle of non-discrimination and hence contrary to Community law.

➤eucrim ID=0901036

ECJ on Balance between Access to and Storage of Personal Data

On 7 May 2009, the ECJ rendered its judgement in Case C-553/07 regarding the reference for a preliminary ruling related to the interpretation of Art. 12(a) of the Data Protection Directive (95/46/EC). The reference was based on the following facts:

In the context of proceedings between Mr. Rijkeboer and the College "van burgemeester en wethouders van Rotterdam" the College partially refused to grant Mr. Rijkeboer access to information on the disclosure of his personal data to third parties during the two years preceding his request for that information. In a letter of 26 October 2005, Mr. Rijkeboer requested that the College notifies him of all instances in which data relating to him from the local-authority personal records had, in the two years preceding the request, been disclosed to third parties. He wished to know the identity of those persons and the content of the data disclosed to them. Mr. Rijkeboer, who had moved to another municipality, particularly wanted to know to whom his former address had been disclosed. In decisions of 27 October and 29 November 2005, the College only complied with that request in part by notifying him only of the data relating to the period one year prior to his request. The data requested by Mr. Rijkeboer dating from more than one year prior to his request had been automatically erased in accordance with national law.

The ECJ now had to decide on whether, pursuant to the Directive and, in particular, to Art. 12(a) thereof, an individual's right of access to information on the recipients or categories of recipients of personal data and on the content of the

data communicated may be limited to a period of one year preceding a request for access.

The Court found that, with regard to the right to access to information on the recipients or categories of recipients of personal data and on the content of the data disclosed, the Directive itself does not make clear whether that right concerns the past and, if so, precisely what period in the past. However, if the right did not concern the past, the data subject would not be in a position to effectively exercise his right to have data presumed unlawful or incorrect data rectified, erased, or blocked or even to bring about legal proceedings and obtain compensation for the damage suffered. As to the scope of this right in the past, the Court decided that it is for the Member States to fix a time-limit for the storage of information on the recipients or categories of recipients of personal data and on the content of the data disclosed and to provide for access to that information. The time-limit must constitute a fair balance between the interest of the data subject in protecting his privacy – particularly by means of his rights to rectification, erasure, and blocking of the data, in the event that the processing of the data does not comply with the Directive, as well as rights to object to and initiate legal proceedings – and the effort that the obligation to store such information represents for the controller of the particular database.

With regard to the present case, the ECJ found that rules limiting the storage of information (on the recipients or categories of recipients of personal data and on the content of the data disclosed to a period of one year) and correspondingly limiting access to that information, while basic personal data is stored for a much longer period, do not constitute a fair balance of the interests and obligations at issue, unless it can be shown that longer storage of that information would constitute an excessive effort on the part of the controller.

➤eucrim ID=0901037

Ne bis in idem

ECJ: Art. 54 CISA Does Not Protect Persons from Double Investigations

The European Court of Justice (ECJ) had the opportunity to rule on the application *ratione temporis* and the interpretation of the concept of "finally disposed of" of Art. 54 of the Convention Implementing the Schengen Agreement (CISA). Art. 54 hinders Member States from prosecuting the same cases twice or more in the Schengen area (for the wording, cf. eucrim 1-2/2007, p. 33).

In the case at issue (Case C-491/07), a Slovak national, Mr. Turanský, was accused by the Austrian authorities of having carried out, along with others, a serious robbery on an Austrian national in Vienna, Austria. The offence was carried out in 2000. In 2003, the Austrian authorities found that Mr. Turanský had been staying in his country of origin and requested the Slovak authorities to initiate criminal proceedings against him. On 26 July 2004, a Slovak police officer in charge of the investigation opened criminal proceedings into the reported acts without, however, charging a specific person. In 2006, the Slovak police officer ordered the suspension of the criminal proceedings under Art. 215 of the Slovak Code of Criminal Procedure, arguing that the investigation had proven that the act in question does not constitute a crime. The criminal court in Vienna asked the ECJ whether the order of the Slovak police officer would trigger the ne bis in idem rule of Art. 54 CISA.

First, the ECJ confirmed its case law that Art. 54 CISA applies *ratione temporis,* although the crime was committed at the time Slovakia was not part of the Schengen agreement. In view of the ECJ, it is sufficient that the CISA is in force between the two countries concerned at the time the conditions governing the applicability of the ne bis in idem principle were assessed (here, in October 2007 by the referring court).

As to the question referred for a preliminary ruling, the ECJ emphasised that a decision must, in order to be considered a final disposal for the purposes of Art. 54 CISA, bring the criminal proceedings to an end and definitively bar further prosecution. The suspension order by the police authority such as that in question, by contrast, does not definitively bring a prosecution to an end according to the ECJ, as a result of which the condition of "finally disposed of" within the meaning of Art. 54 CISA has not been fulfilled.

In this context, the ECJ argues as follows: "It should be added that, while the goal of Art. 54 of the CISA is to ensure that a person, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, may travel within the Schengen territory without fear of being prosecuted for the same acts in another contracting State (see, to that effect, Case C-436/04 Van Esbroeck [2006] ECR I-2333, paragraph 34), it is not intended to protect the suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several Contracting States."

For the case law of the ECJ regarding Art. 54 CISA, see also the article of *Ligeti* in this issue.

➤eucrim ID=0901038

Proposal on Solving Conflicts of Jurisdiction

In January 2009, the Czech Republic, Poland, Slovenia, Slovakia, and Sweden put forward a joint initiative that seeks to establish EU rules on the prevention and settlement of conflicts of jurisdiction in criminal proceedings. The proposed Framework Decision establishes:

■ The procedural framework under which national authorities *must exchange information about ongoing criminal proceedings* for specific facts in order to find out whether there are parallel ongoing proceedings for the same facts in other Member State(s) and under which their national authorities will enter into direct consultations in order to reach an agreement on the best placed jurisdic-

tion to conduct criminal proceedings for specific facts that fall within the jurisdiction of two or more Member States;

- Rules and common criteria that must be taken into account by the national authorities of two or more Member States whenever they seek agreement on the *best placed jurisdiction* to conduct criminal proceedings for specific facts.

It is proposed that the Framework Decision will *apply* to the following situations:

- Where the competent authorities of one Member State conduct criminal proceedings and discover that facts that are the subject of these proceedings demonstrate a significant link to one or more other Member States and it is possible that the competent authorities of such other Member State(s) are conducting criminal proceedings for the same facts;
- Where the competent authorities of one Member State conduct criminal proceedings and, by whatever means, become aware that the competent authorities of one or more other Member States are conducting criminal proceedings for the same facts.

The Framework Decision will *not apply* to situations where no Member State has established its jurisdiction over the committed criminal offence (*negative conflicts of jurisdiction*). It will not apply to any proceedings brought against undertakings if such proceedings have as their object the application of *European Community competition law*. The Framework Decision *does not confer any rights* on a person that can be invoked before the national authorities.

The main features of the proposal are:

- Establishment of an obligation for a competent authority to notify the authorities of other Member State(s) if a significant link to ongoing criminal proceedings in one or more Member States is discovered.
- Definition of the "significant link" which shall, inter alia, always be considered where the conduct or its substantial part giving rise to the criminal offence took place in the territory of another Member State.
- Establishment of an obligation for the responding authority to respond to the notification by submitting certain pieces of information.
- Obligation to enter into direct consultation in order to agree on the best placed jurisdiction to conduct criminal proceedings for specific facts that may fall within the jurisdiction of both places.
- Establishment of rules under which the best placed jurisdiction must be chosen. Here, there is a rebuttable presumption in favour of conducting proceedings in the territory of the State where most of the criminality occurred, which shall be the place where most of the factual conduct performed by the persons involved occurred.
- Generally, facultative cooperation with Eurojust and its mechanisms in solving conflicts of jurisdiction.
- Maintenance of a flexible approach by which other bilateral and multilateral agreements continue to prevail if they better achieve the objectives of the Framework Decision.

Background: The joint initiative leverages the discussion on the problem of positive conflicts of jurisdiction, discussions which date back to 2000. It also resumes the initiative of the Hellenic Republic of February 2003 (proposal for a Framework Decision on ne bis in idem) and the considerations of the Commission in its Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem of 2005. However, the current proposal does not follow proposals included in the Green Paper, such as the establishment of a body that would give binding decisions. Beyond this, the proposal takes up a central demand of the 2004 Hague Programme for strengthening freedom, security and justice in the EU, by which particular attention should be given to exploring possibilities to concentrate the prosecution in cross-border multilateral cases in one Member State, including proposals on conflicts of jurisdiction. The initiative at issue can also be regarded as complementing the principle of mutual recognition, both in the pre-trial and post-trial stages.

➤eucrim ID=0901039

Debate in Council on Conflicts of Jurisdiction

The above-mentioned proposal of the five Member States on the prevention and settlement of conflicts of jurisdiction in criminal proceedings was already the subject of debate in the Council working groups and the Council of the Justice and Home Affairs Ministers.

At its meeting on 26-27 February 2009, the Ministers held an orientation debate on the key elements of the draft. The debate focused, in particular, on the objectives and scope of the future instrument, the nature of the competent authorities which would be able to act under the Framework Decision, and the communication procedures. A consensus was reached on restricting the scope of the instrument to situations where the same person(s) is (are) subject to parallel criminal proceedings in different Member States, which might lead to the double final disposal of those proceedings (the "ne bis in idem" legal principle).

➤eucrim ID=0901040

At its second formal meeting under the Czech Presidency on 6 April 2009, the JHA Ministers even reached agreement on a general approach to the draft framework decision. The focuses of the debate this time were the role of Eurojust in dealing with cases where competent authorities could not find consensus, the interaction with rules of European Community competition law, and the implementation period for the new legislation. The agreed text of the Framework Decision was transferred to the European Parliament for its opinion.

➤eucrim ID=0901041

During the negotiations in the Council Working Party on Cooperation in Criminal Matters, some delegations pointed out that the above-mentioned proposal on conflicts of jurisdiction may conflict with the principle of legality,

which governs criminal procedure in many EU Member States. According to this view, an agreement on the concentration of criminal proceedings in one EU Member State can only work if the involved Member States' authorities are entitled to suspend or terminate their proceedings. The German delegation put forward a proposal for a new provision of the FD which would ensure that the Member States are entitled to suspend their proceedings when a consensus on concentration of the proceedings in the other Member State has been reached.
➤eucrim ID=0901042

Conflicts of Jurisdiction: Critical First Viewpoint by Parliament

The European Parliament's Committee on Civil Liberties (LIBE) held a first exchange of views on the new proposal for solving conflicts of jurisdiction at the end of January 2009 already. The Committee assessed the proposal critically. In particular, the Members of Parliament's Committee stressed that consultations should not be carried out in an informal manner. They argued in favour of more elements of transparency in the proposal, which were deemed necessary to guarantee the procedural rights of the defendant. As a result, various actors in criminal proceedings, such as defence lawyers, prosecutors, and judges, should be involved in the course of the consultations. The competent EP rapporteur, MEP Renate Weber, tabled a draft report on the legislative proposal for the Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings on 26 February 2009. However, the report was not discussed in plenary before the elections of the EP.
➤eucrim ID=0901043

Law Society: Individual's Rights Not Considered Sufficiently in Planned FD on Conflicts of Jurisdiction

The above-mentioned proposal of the Czech Republic and other Member States on the prevention and settlement of conflicts of jurisdiction in criminal proceedings was critically reviewed by the Law Society of England and Wales. The Law Society is the professional association that represents over 120,000 solicitors in England and Wales.

The Law Society published a statement in February 2009 that proposes several amendments to the draft Council Framework Decision on conflicts of jurisdiction in criminal proceedings.
The amendments made by the Law Society mainly aim at further strengthening the procedural rights of the suspect or defendant that, according to the Law Society, are not considered sufficient in the drafts. The Law Society thinks that the proposal notably:

- Does not provide for the suspect or defendant to be involved in, or even informed of, the process of the choice of criminal jurisdiction;
- Does not provide for the suspect or defendant to challenge this process or the outcome of this process;
- Does not provide for judicial oversight of this process.

➤eucrim ID=0901044

Victim Protection

More Needs to Be Done on Implementation of the FD on the Standing of Victims in Criminal Proceedings

For the second time, the Commission assessed the implementation of the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. Overall, the Commission stated that the implementation has not been satisfactory. The main shortcomings listed in the report presented in April 2009 (COM(2009) 166) are as follows:

- Generally, Member States informed the Commission that national measures complying with the European requirements were already in place before the adoption of the Framework Decision. The Commission takes the view that this legal situation impairs the harmonisation of the treatment of victims in the EU, which is the main objective of the Framework Decision.
- Some Member States have not completed the transposition of the Framework Decision.
- A number of Member States stated that they have fulfilled their obligations through non-binding acts, such as guidelines on best practices, charters, and instructions to public prosecutors. The Commission questions this approach since non-binding measures are not always complied with in full.
- Victim support organisations are satisfied with the content of the Framework Decision and consider it to be a good start, but they believe that the work must be continued, particularly by granting them the funds needed to carry out their tasks.

The 2001 Framework Decision on the standing of victims in criminal proceedings implements one of the central demands of the Tampere European Council of 1999. Victims should enjoy a comparable high level of protection throughout the European Union, irrespective of the Member State in which they are present. To this end, the Member States must align their legislation on criminal proceedings so as to guarantee to victims:

- The right to be heard in the proceedings and the right to furnish evidence;
- Access to information of relevance for the protection of their interests from the outset;
- Access to appropriate interpreting and communication facilities;
- The opportunity to participate in the proceedings as a victim and to have access to legal advice and, where warranted, legal aid free of charge;
- The right to have legal costs refunded;
- A suitable level of protection for crime victims and their families, particularly as regards their safety and the protection of their privacy;
- The right to compensation;
- The possibility for victims residing

in another Member State to participate properly in the criminal proceedings (teleconferencing or video conferencing, etc.).

Furthermore, respect for the individual's dignity is to be safeguarded throughout the proceedings and Member States are to make special arrangements to cater for certain vulnerable categories of victim. Member States are also to ensure that staff dealing with victims receive appropriate training.

The first Commission's implementation report dates back to 2004 (COM(2004) 54). Already in this first report, the Commission concluded that Member States should make more efforts to give effect to the provisions of the Framework Decision.

➤eucrim ID=0901045

Freezing of Assets

Council's Blacklisting Again Censored

Once again, an individual was successful before the European Courts in that a Council Regulation freezing his funds was annulled. As in the *Kadi* case, the case at issue refers to the blacklisting of persons associated with Usama Bin Laden, Al-Qaeda or the Taliban by the UN Security Council (for the different UN Resolutions and blacklisting schemes, cf. *Meyer*, eucrim 3-4/2006, p. 66). The person concerned is a Jordan national (Mr. Othman) who has been present in the United Kingdom. Mr. Othman challenged the freezing of his funds by Council Regulation (EC) No. 881/2002 of 27 May 2002 before the Court of First Instance (CFI).

In its judgment of 11 June 2009, the CFI referred to the landmark judgment of the European Court of Justice (ECJ) of 3 September 2008 (Case *Kadi*, cf. eucrim 1-2/2008, p. 33) and notes that – both in respect of the procedure leading to the adoption of the contested regulation and in respect of the extent, effects, and justification, if any, of the restriction of the use of his right to property arising from that regulation – Mr. Othman finds himself in a factual and legal situation in every way comparable to that of Mr. Kadi. Taking up the arguments of the ECJ in the *Kadi* case, the CFI held that the applicant's right to be informed of the evidence adduced against him and his right to effective judicial review had not been observed by the Council during the blacklisting proceedings. Furthermore, the CFI remarks that the restrictive measure imposed against Mr. Othman constituted an unjustified restriction of his right to property.

However, the judgment of the CFI (T-318/01) might only be a partial victory for Mr. Othman since, according to the Statute of the Court of Justice, the CFI's decision declaring a regulation to be void takes effect only from the date of expiry of the period in which an appeal may be brought before the Court of Justice – that is to say, two months and ten days from notification of the judgment or, if an appeal has been brought within that period, as from the date of dismissal of the appeal. Thus, ample time remains for the Council to remedy the infringements found by adopting, if appropriate, a new restrictive measure directed against Mr. Othman.

➤eucrim ID=0901046

Appeal in the OMPI Case

France appealed to the European Court of Justice against the judgment of the Court of First Instance (CFI) of 4 December 2008 (Case T-284/08), which forced the Council to remove the Iranian opposition movement OMPI (abbreviated "PMOI" in English) from the EU's terrorist blacklist. The Council carried out the delisting in January 2009. The French government still takes the view that OMPI is a terrorist organisation meriting inclusion on the list and that the procedure was in accordance with the law. The CFI mainly argued that the procedure used to adopt the list had disregarded the organisation's rights to defence and that the Council had not provided sufficient evidence that OMPI's terrorist label was justified (see eucrim 1-2/2008, pp. 34-35).

➤eucrim ID=0901047

OMPI itself initially appealed against an earlier decision of the CFI dated 23 October 2008 (Case T-256/07), but now withdrew its application. In this case, the CFI examined two decisions of the Council maintaining OMPI on the EU's terrorist list. The CFI annulled the second decision (2007/868/EC), arguing that the Council had not sufficiently taken into account new exculpatory material, but upheld the first decision (2007/445/EC) approving the Council's modus operandi of listing. OMPI argued in its application for appeal that the CFI was legally wrong in concluding that the Council had not committed a manifest error of assessment in reaching its first decision.

➤eucrim ID=0901048

Cooperation

Customs Cooperation

Council Decision Planned to Replace CIS Convention

In November 2008, France tabled an initiative to reinforce, modernise, and expand the EU's joint automated information system for customs purposes, known as the Customs Information System (in short: CIS).

CIS enables national customs services to exchange and disseminate information on smuggling activities and requests for action. It assists in preventing, investigating, and prosecuting serious contraventions of national laws by increasing the effectiveness of cooperation and control procedures of the customs administrations of the Member States. The information system offers all Member States immediate access to relevant customs information, without communication barriers.

It is worth mentioning that – due to the division of the European Union's legal bases according to the pillars (Community law v. cooperation in criminal matters) – CIS consists of two databases: one within the framework of European Community actions allowing the prevention, detection, and prosecution of contraventions of Community customs and agriculture legislation (first pillar database – Council Regulation (EC) No. 515/97 of 13 March 1997, OJ 1997 L 82, 1) and the other in the context of intergovernmental action geared towards the prevention and detection of illegally smuggled goods (third-pillar database – Convention on the use of the information technology for customs purposes, OJ 1995 C 316, 33.) The legal basis for the intergovernmental database is the CIS Convention, which is indicated in the following ID.

➤eucrim ID=0901049

The CIS Convention sets out the procedures to be adopted in the use of information technology for customs purposes. It outlines the broad parameters of information that may be stored, the manner in which information can be amended, security systems, and data-protection provisions. The draft from France addresses this third-pillar legislation and aims at replacing the CIS Convention by a Council Decision in line with Art. 30(1) lit. a) and Art. 34(2) lit. c) TEU. The draft Decision takes into account similar provisions on CIS and the customs files identification database ("FIDE") in Regulation (EC) No. 766/2008 of the European Parliament and the Council of 9 July 2008, amending Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission in order to ensure the correct application of the law on customs and agricultural matters. The Regulation (see following ID) further develops the first-pillar CIS database.

➤eucrim ID=0901050

The French initiative has two purposes: First, cooperation between customs authorities should be reinforced. In the future, the CIS mechanism will expand the use of CIS data, including searches in the systems and the possibility for strategic or operational analyses. A *strategic analysis* should help those responsible at the highest level to determine projects, objectives, and policies for combating fraud, to plan activities, and to deploy the resources needed to achieve the operational objectives laid down. An *operational analysis* of the activities, resources, and intentions of certain persons or businesses that do not comply or do not appear to comply with national laws should help customs authorities take the appropriate measures in specific cases in order to achieve the objectives established in the fight against fraud.

Secondly, the draft Decision intends to grant Europol and Eurojust access to CIS, thus achieving complementarity with actions of these agencies.

In addition, the draft Decision increases the categories of the data to be processed and introduces the possibility to copy data from CIS, direct national customs controls, and coordinate actions.

➤eucrim ID=0901051

Opinion of Customs Joint Supervisory Body

The Customs Joint Supervisory Authority (JSA), which is responsible for supervising the Customs Information System (CIS) with regard to data protection, submitted an opinion in which it analysed the effects of the above-mentioned French proposal on the protection of personal data.

In a general remark, the JSA points out that the yardsticks as set out in the Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters must apply and no longer the standards of the Council of Europe Convention on data protection (ETS No. 108).

Specific remarks of the JSA on each article include, inter alia:

- The legislator should deliver more information and arguments on the need to broaden the use of CIS in view of the new possibilities for searches in systems and strategic or operational analyses, especially taking into account possible effects on the protection of the rights of individuals with regard to their personal data.
- The JSA criticises that the proposal does not contain a sufficient assessment regarding the impact on the protection of personal data and the added value if Europol and Eurojust are granted access to the database.
- The communication of CIS data to third countries or third bodies by Europol must be aligned with the standards of the said Framework Decision 2008/977/JHA and cannot only be based on the consent of the Member State that entered the data into the system.
- In addition, the new legislation must specify the conditions for entering data by Europol.
- The new Council Decision should also specify the conditions regarding permission to copy CIS data into national data files.
- The Customs JSA suggests bringing into line the (exercise of the) rights of the data subjects with Framework Decision 2008/977/JHA. This especially concerns the terms of the general grounds for restricting these rights.
- The JSA would like to see more appropriate control mechanisms to be established.

➤eucrim ID=0901052

Judicial Cooperation

New Proposal on Transfer of Proceedings in Criminal Matters

At the beginning of its Presidency on 1 July 2009, Sweden, together with several other EU Member States, tabled another proposal to strengthen judicial cooperation and contribute to the creation of a real "European judicial area".

Conferences and Seminars Organised by the Academy of European Law (ERA) from September 2009 to October 2009

The editors of eucrim would like to draw the attention to the following conferences and seminars of ERA which will take place in the second half of 2009:

Using EU Criminal Justice Instruments – Mutual Legal Assistance and Mutual Recognition of Judicial Decisions in the EU

ERA is organising a series of ten decentralised seminars that aim to raise awareness of and offer practical training in the use of EU instruments on mutual legal assistance and mutual recognition of judicial decisions in criminal matters. One specific aim of the project is to train groups from selected EU Member States which are geographically close to each other and therefore connected in terms of cross-border cooperation. An introductory seminar will take place in Vienna, Austria from 21 to 22 September 2009. The seminar is addressed at judges and prosecutors from Austria, Bulgaria, Hungary, Italy, and Slovenia without practical experience in cross-border judicial cooperation and in applying EU mutual recognition instruments. In all seminars, the exchange of best practices and networking will play a central role. Discussion and practical exercises in each group will be coordinated by national and European experts. An introductory e-learning course is offered.

The European Evidence Warrant – The Acquisition and Admissibility of Foreign Evidence

Dublin, 9–10 October 2009

The conference will address problems and questions arising in the context of the implementation of the Framework Decision on the European Evidence Warrant which was adopted in December 2008 (see eucrim 1-2/2008, pp. 40-42) and is a further major EU instrument of mutual recognition. The problems and questions arising will be presented and discussed in the form of presentations, panel discussions and case scenarios by leading EU and national experts at this conference: The conference will also consider the second stage proposal planned to cover evidence currently excluded from the EEW.

Towards a more effective control of financial crimes and better protection of the financial interests of the EU

Stockholm, 13–14 October 2009

In cooperation with the Swedish EU Presidency, the conference is to debate and exchange ideas on combating financial crimes in the EU, including the protection of the financial interests of the EU, from a strictly practical perspective. The conference will focus on the operative challenges in investigations for police and judicial authorities. It will also seek to provide up-to-date information on new institutional tools and to inform on the work of other national law enforcement organisations in the EU. The partnership between the private and the public sector will also be discussed. Workshop sessions will be organised and practical experiences with existing tools will be compared in plenary discussions.

Mutual Recognition of Judicial Decisions in Criminal Matters – The Role of the National Judge

4th Annual Forum, Trier, 28–30 October 2009

This three-day forum is the fourth annual event aimed at national judges and prosecutors on the subject of mutual recognition. This Europe-wide platform should enable judges and prosecutors to exchange experiences, discuss common problems and promote cooperation and best practice in the field of judicial cooperation in criminal matters.

Please find more about the mentioned events on criminal law and further conferences/seminars at ERA at the following website:
➤eucrim ID=0901053

The draft concerns a possible Council Framework Decision (FD) on the transfer of proceedings in criminal matters. The objective of the initiative reads as follows in Art. 1 of the draft FD:

"The purpose of this Framework Decision is to increase efficiency in criminal proceedings and to improve the proper administration of justice within the area of freedom, security and justice by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States, taking into account the legitimate interests of suspects and victims."

The FD would replace, among the EU Member States, the European Convention on the Transfer of Proceedings in Criminal Matters that had been adopted within the framework of the Council of Europe and dates back to 1972. The European Convention was only ratified by 13 of the current EU Member States and its success has been rather mild so far.

The presented FD would further supplement the EU instruments that had been adopted under the label of mutual recognition, such as the FDs on the enforcement of sentences in other Member States, on financial penalties, or on probation decisions. It was also designed to prevent infringements of the *ne bis in idem* principle.

The draft lists the criteria for requesting the transfer of proceedings in criminal matters. These criteria include, for instance, that:

- The offence has been committed wholly or partly in the territory of the other Member State, or most of the effects or a substantial part of the damage caused by the offence was sustained in the territory of the other Member State;
- Substantial parts of the most important evidence are located in the other Member State;
- Enforcement of the sentence in the other Member State is likely to improve the prospects for social rehabilitation of the person sentenced;
- The victim is ordinarily resident in the other Member State or the victim has

another significant interest in having the proceedings transferred.

According to the draft, it would be sufficient for a transfer if at least one of the listed criteria is met. Both the suspected person and the victim must be informed about the intended transfer.

Furthermore, the FD provides limited grounds for refusing transfer by the receiving authority of a Member State. One condition is that the act underlying the request for transfer constitutes an offence under the law of the Member State of the receiving authority (double criminality). The draft further provides rules on the effects of the transfer and seeks to establish a consultation mechanism among the competent authorities of the Member States involved *before* a transfer of proceedings is requested. The Council estimates that the FD may reduce the costs of criminal prosecutions in the long term.

➤eucrim ID=0901054

Mutual Recognition of Confiscation Orders: Germany's Implementation

Before the summer break, the German parliament finalised the legislative implementation of the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. The new law will facilitate and streamline judicial cooperation among the EU Member States in order to confiscate crime-related proceeds throughout the EU.

The Framework Decision, in principle, obliges each EU Member States to recognise, without much formality, and to execute in its territory a confiscation order issued by a court competent in criminal matters of another Member State. In parallel to other instruments on mutual recognition of judicial decisions, the executing Member State is not entitled to invoke except for a few grounds of non-recognition or non-execution of the request: e.g., if the execution of the confiscation order would be contrary to the principle of ne bis in idem; if the rights of an interested party under the law of the executing State make it impossible to execute the confiscation order; or if the confiscation was ordered for a procedure *in absentia*. As in other instruments of mutual recognition, double criminality may not be an obstacle for a list of specific, more or less serious, criminal offences.

Furthermore, it is foreseen that the executing State keep the confiscated amount if it is under € 10,000. In case of amounts exceeding € 10,000, the executing and issuing States split the amount equally.

On the occasion of the implementation of the Framework Decision, Germany will alter its national mutual legal assistance law by simplifying the rules under which the injured party may receive public compensation from Germany's rate for the confiscated amount.

The Framework Decision on confiscation orders was actually to be implemented by 24 November 2008.

➤eucrim ID=0901055

EU-Japan: Mutual Assistance in Criminal Matters

The EU and Japan have entered into negotiations for an agreement on mutual legal assistance in criminal matters. At the 18th EU-Japan Summit on 4 May 2009 in Prague, Czech Republic, summit leaders expressed their hope that negotiations will be constructive and concluded early. Currently, none of the EU Member States has a bilateral agreement of this kind with Japan.

➤eucrim ID=0901056

Training of Judicial Staff: Implementation Report

At its meeting on 4-5 June 2009, the JHA Council endorsed a report that took stock of the follow-up to the resolution on the training of judges, prosecutors, and judicial staff in the EU, adopted in October 2008 (see eucrim 1-2/2008, p. 36). The follow-up mainly reviews the activities of European Judicial Training Network (EJTN).

The EJTN and its members play a pivotal role in the practical implementation of the Council's guidelines and determine the content of common European training programmes.

Beyond the implementation of the guidelines, the Czech Presidency provided information on the creation of a Euro-Arab network for judicial training.

➤eucrim ID=0901057

European Arrest Warrant

Advocate General Details Interpretation of Art. 4 No. 6 FD in *Wolzenburg* Case

On 24 March 2009, Advocate General Bot tabled his conclusions in the *Wolzenburg* case (C-123/08), which will again offer the European Court of Justice (ECJ) the occasion to interpret Art. 4 No. 6 of the Framework Decision on the European Arrest Warrant. It allows the executing Member State to refuse the execution of an EAW issued for the purpose 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."

The Rechtbank Amsterdam would like to know to which extent this ground for refusal applies to a German citizen against whom Germany issued a European Arrest Warrant for the purpose of executing a criminal sentence in Germany, but who has been working in the Netherlands, where he also lives with his wife, since 2005. The Dutch court faces the problem that the person wanted is not in possession of a permanent residence permit for the Netherlands and that the application of the ground for refusal seems to be excluded because Dutch legal practice does apply the refusal of the surrender for purposes of executing a sentence to citizens from other EU Member States only if they are in the possession of a permanent residence permit.

The Rechtbank Amsterdam referred mainly the following questions to the Court: (1) How long must a person against whom a EAW has been issued have been staying in the executing Member State in order to assume a stay or lawful residence in the meaning of Art. 4 No. 6?; (2) May the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a permanent residence permit?; and (3) Does Dutch extradition law result in discrimination prohibited by Art. 12 TEC because the surrender of Netherlands nationals is inadmissible *per se* if the surrender is requested for the execution of an irreversible custodial sentence, whereas the surrender of other EU residents in the Netherlands is only refused if they are in the possession of a permanent residence permit?

The Advocate General points out that the first and second questions, in essence, have already been answered by the ECJ's judgment of 12 July 2008 in the *Kozlowski* case (see eucrim 1-2/2008, pp. 36-37). However, the Advocate General also attempts to refine the statements made by the ECJ in the case *Kozlowski*. He proposes that the chances of the person's rehabilitation in the executing state is the crucial criterion for the assessment of whether a person affected by an EAW is "staying" or "resident" in the meaning of Art. 4 No. 6, while the duration of (lawful) residence is only an important indication. As to the second question, he advocates that the executing Member State is not allowed to add supplementary administrative requirements, such as the possession of a permanent residence permit, for the application of Art. 4 No. 6 of the FD.

Detailed explanations are given by the Advocate General regarding the third question as to whether the Dutch implementation of Art. 4 No. 6 contradicts the principle of non-discrimination as enshrined in Art. 12 TEC – an issue which the ECJ did not decide on in the *Kozlowski* case. He answers the question in the affirmative. He argues that Art. 12 TEC is also applicable to the Framework Decision on the European Arrest Warrant – i.e., a criminal law measure taken in the third pillar. He ultimately rejects arguments of Member States that extraditions of own nationals and those of residents are not comparable situations. He mainly argues that the special status of own nationals in extradition law has been given up by the European Arrest Warrant scheme, which is based on the mutual recognition principle. According to Mr. Bot, a systematic exemption of surrender in favour of own nationals would deprive the Framework Decision of its practical effectiveness ("effet utile").

➤eucrim ID=0901058

German Court Asks ECJ for an Interpretation of *ne bis in idem* Rule in the FD EAW

The Oberlandesgericht Stuttgart (Higher Regional Court of Stuttgart, Germany) referred two questions for a preliminary ruling to the European Court of Justice (ECJ) concerning the interpretation of Art. 3 No. 2 of the Framework Decision on the European Arrest Warrant (FD EAW).

Pursuant to Art. 3 No. 2 of the FD, the executing judicial authority shall refuse the execution of a European arrest warrant "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State".

In the case at issue (Case C-261/09, *Mantello*), Italy is requesting from Germany the surrender of an Italian national for membership in a criminal group whose purpose was illegal drug trade. However, the defendant had already been sentenced by an Italian court for a specific drug offence (drug smuggling), which falls within the same period as the alleged membership in the criminal group. The Higher Regional Court of Stuttgart notes that the case does not concern the transnational ne bis in idem rule as it is stipulated, for instance, in Art. 54 CISA (see above). Notwithstanding, the Court is considering the application of Art. 3 No. 2 of the FD EAW and first asks whether the ne bis in idem provision in the FD EAW must be based on an autonomous interpretation (EU law) or whether the law of the executing or issuing Member State is decisive for its interpretation.

Second, the Court is asking for the definition of "the same act" in order to be able to decide in the present case whether the act underlying the EAW had already been sentenced by the first Italian judgment against the defendant. The peculiarity of the case is that Italian law enforcement authorities already knew about the defendant's membership in the organisation but withheld this information in the first proceedings in which the defendant had been sentenced for a specific drugs offence.

➤eucrim ID=0901059

Council: Snag List on EAW

At its meeting on 4-5 June 2009, the Council for Justice and Home Affairs grappled with the report on the application of the European Arrest Warrant after the fourth round of mutual evaluations. Like the national authorities, the Ministers stressed that "the EAW is working well and that can be considered a symbol for the practical legal cooperation among EU member states. In the fight against crime, it has proved to be a useful tool and a model worldwide."

Nevertheless, the report (Council doc. 8302/09) reveals that flaws remain in the practical application of the instrument. In some Member States, for example, administrative authorities still play a large role in the extradition and surrender procedure. The report recommends to these Member States that they strengthen the control function of the courts. Furthermore, not all Member

States examine a request for surrender in view of its proportionality; some authorities even completely renounce the principle of proportionality. Another deficiency is the training of defence lawyers on matters of the EAW. The report points out, however, that this is not a matter of responsibility of national public authorities.

➤eucrim ID=0901060

European Supervision Order

EP Opinion on Council Draft

After the revision of the initial Commission proposal by the Council, the European Parliament (EP), on 2 April 2009, tabled its opinion on the draft Council Framework Decision on the application, among Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (see for the revision and the Commission's original proposal, eucrim 1-2/2008, p. 44; 3-4/2007, p. 110, and 3-4/2006, pp. 74-75). It is the second consultation of the European Parliament; the EP already gave an opinion on the initiative of the Commission in November 2007 (see eucrim 3-4/2007, p. 110). The instrument is also treated under the short name "European Supervision Order".

MEPs overwhelmingly voted for a report from MEP Ioannis Varvitsiotis. MEPs reiterated that they strongly support the adoption of this piece of legislation, which will be applied in favour of criminal suspects in order to avoid detention in the pre-trial stage because the new EU instrument will allow the mutual recognition of pre-trial supervision orders. In the pre-trial stage, the instrument offers the possibility to let non-residents of the prosecuting State return to the Member State of their current lawful and ordinary residence. In this context, it was welcomed that the Council widened the scope of the instrument to include the possibility for the suspect to request the issuing competent authority to forward the supervision order to a Member State other than the one in which he/she is ordinarily and lawfully a resident.

However, the EP would like the Council to consider further amendments to the present text. Overall, the EP aims at further strengthening the procedural safeguards of suspects. One proposal in this regard is, for example, that decisions on supervision measures involving personal freedoms can only be issued, executed, and monitored by judicial authorities. Another proposal is the establishment of minimum procedural safeguards concerning the execution of supervision measures and, notably, the right for the suspect to be accurately informed in a language he/she understands.

As regards the types of supervision measures, the Parliament calls on the Member States to recognize the deposit of money as a supervision measure.

The EP further strongly suggests deleting Arts. 14 and 15 (1) lit. d) that take over the scheme of other framework decisions applying the mutual recognition principle as regards the verification of double criminality. In the view of the EP, it makes no sense to make the recognition and execution of the decision on supervision measures subject to the verification of dual criminality. Arts. 14, 15 would exclude the verification of dual criminality only for the categories of offences listed, thus still allowing grounds for refusal based on the lack of dual criminality for all offences not included in the list. The EP argues that this is contradictory to the instrument's objective of avoiding a prison pre-trial measure to the widest possible extent and that the maintenance of the present rule would affect the equal treatment of persons.

Ultimately, the EP is still not in line with the Council as regards the relationship between the European Supervision Order and the European Arrest Warrant. First, the EP believes that the competent issuing authority should decide on a case-by-case basis if, in the case of breach of a supervision measure, the suspect needs to be arrested and surrendered to the issuing Member State. Second, the EP argues that the EAW should apply, in such cases, to all offences without setting a threshold.

➤eucrim ID=0901061

Criminal Records

FD on Criminal Records in Force: Speedier Circulation of Information on Convictions in the Future

After more than three years of negotiations, the Council finally adopted the Framework Decision (FD) 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States. The FD entered into force on 27 April 2009.

According to the FD, convictions contained in criminal records will be exchanged EU-wide according to a common procedure. The FD first obliges each EU Member State to ensure that all convictions handed down within its territory are accompanied, when provided to a criminal record, by information on the nationality or nationalities of the convicted person if he/she is a national of another Member State. Second, the convicting Member State must inform the Member State of the convicted person's nationality ex officio and as soon as possible of such a conviction. This obligation of the convicting Member State covers, on the one hand, the convictions handed down and entered into the criminal records and, on the other hand, subsequent alterations or deletions of information contained in the criminal record. The Member State of the person's nationality must store the information received. The Member States must designate central authorities for the purpose of the FD.

Requests for information on convictions will be carried out quickly and in a uniform format according to the mecha-

nism established by the FD. Replies to requests shall take no longer than 10 working days. A request can already be made at the pre-trial stage.

The FD also sets out the conditions for the use of personal data. In principle, these data can be used by the requesting Member State only for the purposes of the criminal proceedings for which they had been requested. The use of information other than that of criminal proceedings can be limited in accordance with the national law of the requested Member State and the requesting Member State. However, an exception is made for cases involving the prevention of an immediate and serious threat to public safety. Transmission of personal data to countries outside the EU must be made subject to the usage limitations applicable in a requesting Member State, i.e., in case of transmission for the purposes of criminal proceedings, for instance, the third country may not use the information other than for purposes of criminal proceedings.

A declared aim of the FD is also the capture of convictions and disqualifications of persons convicted of a sexual offence against children, thus integrating the main objective of a Belgian initiative of 2004. The FD ultimately supplements Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the EU in the course of new criminal proceedings (for this FD, cf. eucrim 1-2/2008, p. 44). Member States have till 27 April 2012 for implementation of the FD. The Commission is called upon to provide an implementation report by 27 April 2015. For the relationship of the FD to other instruments on mutual legal assistance in criminal matters, see Art. 12 of the FD.

For the preliminary stages of the present FD on the organisation and content of the exchange of information extracted from criminal records among the Member States, please refer to eucrim 3-4/2006, pp. 76-78 and 1-2/2007, pp. 40-41.

➤eucrim ID=0901062

The European Criminal Records Information System (ECRIS)

The aforementioned Framework Decision on the exchange of information extracted from criminal records is closely connected with a facilitated computerised system for the exchange of information at the European Union level. To this end, the Council launched a Decision enabling the buildup and further development of a computerised system to exchange information on convictions between the EU Member States – the European Criminal Records Information System (in short: ECRIS – cf. eucrim 1-2/2008, pp. 44-45). The Decision (2009/316/JHA) was adopted on 6 April 2008 and published together with the Framework Decision in the Official Journal L 93 of 7 April 2009.

The Decision also establishes the elements of a standardised format that will allow information to be exchanged in a uniform, electronic, and easily computer-translatable way. The standardised format particularly comprises information on the offence that gives rise to the conviction as well as information on the content of the conviction.

The ECRIS is a decentralised information technology system, i.e., criminal records data are solely stored in databases operated by individual Member States, and it is not possible to have direct online access to the criminal records databases of other Member States. ECRIS is composed of two elements: (1) an interconnection software enabling the exchange of information among the Member States' criminal record databases and (2) a common communication infrastructure that provides an encrypted network.

The automatic translation and mutual understanding of information is ensured by reference tables for categories of offences and categories of penalties and measures.

The Member States and the Commission are currently working on drawing up a non-binding manual for practitioners that will address, inter alia, the procedures governing the exchange of information and the common understanding of the categories of offences, penalties, and measures listed in the annexes of the Decision. To this end, an interesting feature in terms of comparative criminal law has been foreseen, since each Member State is encouraged to submit lists and descriptions of national offences, penalties, and measures in each category referred to in the respective table. However, the Decision clarifies that this exercise does not lead to legal equivalences between the offences, penalties, and measures existing at the national level.

In addition, the Decision as well as the said Framework Decision, make clear that the established EU system for a facilitated exchange of information extracted from criminal records does not harmonise national systems of criminal records, i.e., there is no obligation for Member States to change their internal systems of criminal records as regards the use of information for domestic purposes.

It is worth mentioning that the ECRIS is building upon the experience of a pilot project that aims at electronically interconnecting national registers of criminal records and is part of the e-Justice project (cf. eucrim 1-2/2007, p. 40). A good short description of this project is delivered by the German Federal Office of Justice (in German). The Internet site is indicated in the following ID alongside the Council Decision on ECRIS as published in the Official Journal.

➤eucrim ID=0901063

E-Justice

Headway Made Concerning e-Justice

The European Union has undertaken further steps in the implementation of the e-Justice project. The e-Justice project involves developing an electronic system at the EU level by taking advantage of modern information and communica-

tions technology in criminal matters as well as civil, commercial, and administrative matters. The aim is to promote access to justice and improve cross-border judicial procedures. "e-Justice" is one of the elements in the creation of a European judicial area. The e-Justice project has also been one of the priorities of recent Council Presidencies. As regards the criminal law field, the interconnection of criminal records has been high on the agenda of e-Justice work. The Czech Council Presidency in the first half of 2009 has mainly promoted the use of videoconferencing in cross-border proceedings.

At the end of their respective terms, the Slovenian and French Presidencies each reported to the Justice and Home Affairs Ministers of the governments of the EU Member States on the work completed. The reports also outline priorities for future work.

➤eucrim ID=0901064

The following news describe the major recent developments in the field of e-Justice. For past developments, see also eucrim 3-4/2007, p. 111 and eucrim 1-2/2007, p. 40.

European Council: Impetus on e-Justice

At its meeting on 19-20 June 2008, the European Council – the meeting of the heads of state or government and the president of the Commission – welcomed the initiative to progressively establish a uniform EU e-justice portal by the end of 2009 (for details on the portal, see the following news).

➤eucrim ID=0901065

Council: Adoption of e-Justice Action Plan

On 28 November 2008, the JHA Council adopted a multi-annual European e-justice action plan that determines the projects and main tasks to be carried out, allocates the tasks among the Council, the Member States, and the Commission, and sets a timetable for each project. The action plan takes into account the communication mentioned below on a European e-justice strategy of the Commission.

The action plan also describes the context for the development of e-Justice at the European level. The main functions of European e-Justice are defined as follows:

- Providing access to information in the field of justice, especially information on European legislation and case law;
- Dematerialisation of cross-border judicial and extrajudicial proceedings, involving e-mediation or electronic communication between a court and the legal parties;
- Simplifying and encouraging communication between the judicial authorities.

At the top of the agenda is the realisation of the so-called *European e-Justice portal* which should be established by the end of 2009 according to the aforementioned demand by the European Council. However, the final shape and content of the portal does not yet seem to be clear, since it is defined rather vaguely in the Council document. The portal shall provide access to the entire European e-Justice system, i.e., to European and national information websites and services. It should also be able to provide access to different functionalities on the basis of different access rights of legal professions as well as a uniform authentication procedure. The idea is that the portal will ultimately provide information for citizens and companies, including information on the rights of defendants in criminal proceedings in the various EU Member States and on the competent authorities and possibilities to contact them. It is also envisaged that, in the future, entire proceedings will be carried out electronically by means of the portal. A pilot project concerning the portal was carried out by a group of Member States. The Commission is now entrusted with the task of setting up the portal.

The action plan also discusses the technical, linguistic, and financial aspects of e-Justice, the main items of which are as follows: In the technical sense, one of the essential conditions for effective use of e-Justice across Europe is the development of uniform standards or interfaces for the use of authentication technologies as well as the components of electronic signatures. As regards the language issue, the paper proposes the use of automated translation systems to overcome the language barrier; this will be flanked with a working method (still to be devised) that will ensure faithful translation. As to financing the European e-Justice projects, the Council allows for recourse to already existing civil and criminal justice financial programmes, next to drawing up a single horizontal programme covering both civil and criminal law matters as proposed by the Commission; in general, the amount of money spent for e-Justice projects will be increased in the coming years.

Because of its impact on the development of European e-Justice in the years to come, the Action Plan was published in the Official Journal C 75 of 31 March 2009.

➤eucrim ID=0901066

Council: Czech Presidency – Focus on Video Conferencing

As mentioned above the Czech Council Presidency has undertaken further efforts in the promotion and development of the e-Justice projects. An important conference in this regard took place on 17-18 February 2009 in Prague. More than 300 experts shared their experiences by presenting national solutions in the area of digitising the judicial system. The conference, held under the motto "e-Justice without Barriers", dedicated the first day to the development of the European e-Justice portal. In this context, experts presented pilot projects already running among the Member States that are expected to continue under the auspices of the European portal.

Besides data protection issues for the portal, the second day focused on the second priority topic of the Czech Presidency, i.e., the support and facilitation of an efficient use of video conferencing

in cross-border legal proceedings. The project on video conferencing should culminate in the creation of electronic order applications for cross-border video conferences.
➤eucrim ID=0901067

Council: Monitoring the State of Play of e-Justice

Since the beginning of 2009, the e-Justice project has regularly been on the agenda at ministerial meetings in the Council.

On 16 January 2009, the Ministers for Justice and Home Affairs discussed the topic of video conferencing at their informal meeting in Prague. The Ministers agreed that video conferencing is an efficient tool by which to accelerate cross-border judicial proceedings while lowering their costs. Following this meeting, the Czech Presidency drew up an information booklet and a manual on cross-border video conferencing in the EU.
➤eucrim ID=0901068

At its meeting on 26-27 February 2009, the JHA Council reiterated the important work on the promotion and facilitation of the use of video conferencing. It agreed that further work will also include the examination of a booking system for arranging video conferences and interpretation via video conferencing.
➤eucrim ID=0901069

At its meeting on 4-5 June 2009, the Ministers for Justice and Home Affairs fixed the date for the launch of the European e-Justice portal: 15 December 2009. The portal will be developed further by the Swedish Council Presidency during the second half of the year 2009.
➤eucrim ID=0901070

The Council Presidency and the competent Council working group both report regularly on their progress as to the implementation of the e-Justice Action Plan. In the first half of the year 2009, the Czech Council Presidency mainly concentrated on two aspects:

- First, bringing on track the said European e-Justice portal by December 2009, as initially planned;
- Second, intensifying the work on video conferencing.

As far as the portal is concerned, the Member States and the Commission reached a common understanding on the content of the first release of the portal, recorded in the draft terms of reference for the Commission's IT contractor. Furthermore, several significant documents were drawn up, including a detailed roadmap.

As far as video conferencing is concerned, the working group agreed that video-conferencing functionalities should already be part of the first release of the European e-Justice portal in December 2009. Under the Czech Presidency the following documents were finalised:

- Policy document, with a long-term vision for the development of videoconferencing in the period 2009-2013 and beyond;
- Comprehensive manual for practitioners, covering legal, technical and practical aspects of cross-border video conferencing in civil, commercial, and criminal matters;
- User-friendly booklet to raise general awareness of and provide general information on cross-border video conferencing as a first reference.

In addition, work has been started to include into the portal updated information on all courts with video conferencing equipment in the Member States.
➤eucrim ID=0901071

Commission: Communication on a European e-Justice Strategy

The European Commission already gave an impetus to the discussion on European e-Justice in its communication of 30 May 2008 to the Council, the European Parliament, and the European Economic and Social Committee (EESC) concerning a European e-Justice strategy (COM (2008) 329 final).

Currently, the term "e-Justice" stands for various initiatives at the European and national levels to put information and communication technologies in the service of judicial systems in order to streamline procedures and reduce costs. The Commission's communication proposes an overall strategy to reconcile all efforts related to e-Justice. In the long run, an efficient e-Justice system may improve access to justice, the cooperation among legal authorities, and the effectiveness of the justice system.

The communication presents the Commission's main priorities for action in the e-Justice area within the next 5 years:

- Creating a European e-Justice portal (see above). According to the Communication, the portal will have the following three functions: (1) providing European citizens with information, in their language, on the respective Member States' judicial systems and procedures, including relevant and updated information on the rights of defendants and victims in criminal proceedings as well as on the remedies available before the courts of other Member States in the event of cross-border disputes; (2) referring visitors to existing sites (Eur-lex, Pre-lex, SCAD-Plus, Eurovoc and IATE), to European legal institutions and to the various existing legal networks and their tools, and (3) in the long term, enabling direct access to certain European procedures (e.g., using the portal to pay court fees).
- Continuing the interconnection of criminal records;
- Creating a network of secure exchanges by which to share information among judicial authorities;
- Facilitating the use of video conferencing during judicial proceedings, since the existing instruments adopted at the European level remain underused;
- Developing automated translation tools, which make it possible to identify those elements useful for another case;
- Setting up a database of legal translators and interpreters.

In general, the Commission is to coordinate the e-Justice initiatives by encouraging the exchange of best practices. Furthermore, the Commission is to design and set up the European e-Justice portal (see above).
➤eucrim ID=0901072

European Parliament: Reaction to the e-Justice Strategy

On 18 December 2008, the European Parliament adopted a resolution with recommendations to the Commission on e-Justice. Overall, the Parliament endorsed the Commission's plans and made some amendments to the presented communication. First of all, the Parliament proposed the use of specified terms, such as "EU e-Justice" or "EU-Justice", in order to clearly define the matters covered by EU action. The Council agreed in its above-mentioned action plan to rename the e-Justice programme "European e-Justice".

The Parliament also recommended further development of the potential of new technologies to prevent and fight transnational crime. Furthermore, the Parliament strongly supported video conferencing to improve the taking of evidence in other Member States and suggested a broad use of new technologies within the European judicial area.

The resolution is a reminder to make fundamental rights, procedural safeguards in criminal proceedings, and data protection integral parts of the drafting and implementation of the Action Plan on e-Justice. The Parliament also warns the Commission against the possible fragmentation that may result from all the different national initiatives related to e-Justice. Ultimately, the resolution requests the Commission to develop e-learning tools for the judiciary in the context of e-Justice.

➤eucrim ID=0901073

EDPS: Opinion on the e-Justice Strategy

On 19 December 2008, the European Data Protection Supervisor, Peter Hustinx, delivered his opinion on the Commission's communication towards a European e-Justice strategy. The EDPS's opinion comments on the communication as far as it relates to the processing of personal data, the protection of privacy in the electronic communications sector, and the free movement of data.

First of all, the EDPS emphasises his support for a comprehensive approach to e-Justice. He recommends that the future portal should not only provide information on criminal proceedings and on civil and commercial judicial systems, but also on administrative judicial systems, i.e., administrative law and complaint procedures, accompanied by information on data protection rules and national data protection authorities. The EDPS also issues a reminder to ensure that the processing of personal data for purposes other than those for which they were collected should respect the specific conditions laid down by applicable data protection legislation. He suggests the allocation of clear responsibilities to all actors processing personal data within the envisaged systems as well as clarification of the Commission's responsibility for common infrastructures.

➤eucrim ID=0901074

CCBE The View of European Lawyers on e-Justice

In March 2009, the Council of Bars and Law Societies of Europe (CCBE) presented an opinion regarding the EU's developments in e-Justice. The CCBE represents the national bar associations with more than 700,000 European lawyers throughout Europe, including non-EU Member States. The opinion of the CCBE focused on two issues: first, the e-justice portal and, second, human rights concerns in the context of e-Justice.

As regards the European e-Justice portal, the association made the following remarks:

- Citizens should have a single access point when finding a lawyer in Europe. In this context, the CCBE recommends interlinking existing lawyers' directories in the different Member States and allocating means to remove different languages, different navigation systems, etc., which currently hamper citizens' access to lawyers in other EU Member States.
- The portal should offer e-identity management, thus enabling lawyers to undertake cross-border transactions with official registries in the Member States on, e.g., recorded insolvencies, company registrations, land registrations, etc., and to secure communication with judicial authorities in other Member States.

As for human rights aspects, the CCBE put forward the following statements:

- When using video conferencing, in particular in cross-border criminal proceedings, it should be born in mind that this technique has a considerable impact on the fundamental rights of defendants. Its usage may, for instance, deprive the defendant of the possibility to gain personal access to lawyers or build up trust and confidence with the lawyer during the proceedings. Moreover, judges may not be able to assess the defendant's appearance and responses by means of a video-link, a situation that is already problematic in legal practice at present.
- Many fundamental rights issues are at stake if projects come to light that link criminal databases, involving such questions as the definitions of criminal offences, access rights to the databases, purposes of data usage, rectification of misinformation, etc.

➤eucrim ID=0901075

Law Enforcement Cooperation

Financial Support of JITs Secured

On 15 July 2009, Eurojust announced that Joint Investigation Teams (JITs) continue to be eligible for direct and targeted financial support from Eurojust. The money is granted by the European Commission as part of the programme "Prevention and Fight against Crime". The project is supported by a 95% co-financed grant of approximately € 300,000 and runs until December 2010. The objective of the grant is to allow for the financial and logistical support of JITs. With the grant, Eurojust intends to counter potential difficulties with JITs, particularly travel and accommodation and interpretation/translation costs. Also gaps

in infrastructure and facilities could be remedied by the grant. However, it has been clarified that the funding is not intended to finance the entirety of a JIT.
➤eucrim ID=0901076

Prosecution of Traffic Offences – Commission Proposal under Scrutiny

The European legislative institutions are further working on bringing on track a proposal of the Commission for a Directive facilitating cross-border prosecution of traffic offences (for the proposal, see eucrim 1-2/2008, p. 45). Studies commissioned by the Commission show that non-residents account for a disproportionately high number of road traffic accidents, particularly as regards speeding, yet sanctions imposed for offences committed on the territory of Member States other than the driver's country of residence are most frequently not enforced. To this end, the proposal of March 2008 provides for facilitating the enforcement of penalties on drivers who have committed an offence in a Member State other than that in which their vehicle is registered.

The core element of the proposal is the establishment of 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 – offences that are the leading causes of accidents and road deaths.

The following news items summarise the different opinions put forward after the proposal was tabled.

Council: EU Governments Divided on How to Proceed with Road Safety Proposal

Although the EU Member States expressed their agreement on the objectives of the Commission proposal facilitating cross-border enforcement of legislation in the field of road safety, there seems to be a deadlock in the procedure within the Council. The dispute concerns the recurring issue of the search for the correct legal basis, due to the pillar's division of the European Union. The question is whether the action can be based on the first pillar (transport policy) and thus adopted under the co-decision procedure or not. Some governments of EU Member States are blocking the measure because they are of the opinion that a third-pillar instrument (cooperation in criminal matters) should be the appropriate legal basis. They are headed for confrontation with other EU Member States, the Commission, and the European Parliament, which strongly support the solution via a Directive, i.e., the first pillar.

The French government sought a way out of the dilemma during its Presidency in the second half of 2008. However, the progress report of December 2008 does not offer a clear solution on how the work should continue. The French government ultimately considered the following three options on how to proceed:

- Continue negotiations for a first-pillar legal instrument on the basis of the technical work initiated;
- Establish a third-pillar instrument that could usefully incorporate measures to increase efficiency in the enforcement of cross-border road safety sanctions;
- Combine the first two options, making a clear distinction between those elements falling under the first and third pillars.

In the first half of 2009, the Czech Presidency has not pursued the matter with priority. The adoption of the legislation may be left open until the Lisbon Treaty enters into force. Under the Lisbon Treaty, criminal justice legislation would be adopted under co-decision rules.
➤eucrim ID=0901077

EP in General Favour of Better Enforcement of Traffic Offences

The European Parliament (EP) largely backed the Commission proposal in a legislative resolution of 17 December 2009. In general, the EP shares the Commission's approach and supports the concentration of the proposal on those four offences responsible for most fatalities. However, the EP addresses several issues with a view to improving the proposal, including the following:

- The EP details guidelines for EU-wide road safety concerning the four offences; by fixing certain principles, the guidelines should ensure minimum comparable criteria regarding checking operations or automatic checking equipment.
- The EP introduces a time limit for prosecution, i.e., no financial penalty shall be issued in respect of an offence committed before the date of entry into force of the Directive.
- Although the EP agrees that the Framework Decision 2005/214/JHA on the application of the mutual recognition principle to financial penalties applies to the follow-up of the offences, the EP is in favour of other enforcement safeguards if the FD is not applicable.
- Several amendments concern improvements in the protection of personal data, taking into account the concerns voiced by the European Data Protection Supervisor (see below).
- Special attention is paid in the EP's resolution on informing European drivers about the implementation of the Directive.
- Last but not least, the EP proposes an obligation for an evaluation of the Directive based on a report by the Commission.

➤eucrim ID=0901078

EDPS: Positive Reaction on Proposed System of Cross-Border Exchange of Information on Traffic Offenders

In May 2008 already, the European Data Protection Supervisor (EDPS), Peter Hustinx, presented his official opinion on the Commission proposal for a Directive facilitating cross-border enforcement in the field of road safety. The EDPS was already involved in the preparatory work

of the Commission's draft. The presented opinion analyses the legitimacy and necessity of the measures; the quality of data collected in relation to the purpose; the rights of the data subjects and the conditions to exercise them; and, finally, the conditions for the transfer of data through an electronic network as well as its security aspects.

In conclusion, the EDPS considers that "the proposal provides for sufficient justification for the establishment of the system for the cross-border exchange of information, and that it limits in an adequate way the quality of data to be collected and transferred."

He also welcomes the redress procedure foreseen in the proposal and, in particular, the fact that access to personal data will be possible in the country of residence of the data subject.

However, the EDPS is not fully satisfied with the information available to data subjects and for which he recommends some improvements, in particular as to offence notification – an issue which was also taken up by the European Parliament in its above-mentioned legislative resolution of 17 December 2008.

Finally, the EDPS cautions that the proposed electronic network may not lead to interoperability with other databanks or even to the creation of a central database of traffic offences.

➤eucrim ID=0901079

EESC: Broad Backing of Commission's Idea for Better Law Enforcement of Traffic Offences

In September 2008, the European Economic and Social Committee (EESC) commented on the said Commission's proposal for better enforcement and supervision of traffic offences committed in another Member State. The opinion of the EESC was published in the Official Journal C 77 of 31 March 2009.

The EESC appreciates the proposal as a sound approach to dealing effectively with traffic offences committed abroad. However, the EESC suggests expanding the scope of the planned Directive beyond what was proposed by the Commission. First, the legal framework should include all offences that have a bearing on improving road safety. Second, the EESC would like the Directive to not only apply to sanctions imposing financial penalties, but also to other tools, such as a penalty-points driving licence, vehicle impoundment, and the temporary withdrawal of an offender's driving licence, which may or may not be imposed alongside fines.

Furthermore, the EESC recommends that the Commission express more clearly which system for the exchange of information is being considered, while the EESC prefers expanding existing electronic networks (e.g. the EUCARIS system) for the data exchange for the purposes of the Directive.

➤eucrim ID=0901080

Council of Europe

*Reported by Dr. András Csúri**

Foundations

60th Anniversary of Council of Europe

The Council of Europe celebrates its 60th anniversary in 2009. The Council of Europe was founded on 5 May 1949 by 10 countries that signed the Treaty of London. The following eucrim ID contains the special web site of the Council of Europe on its 60th anniversary. It includes diary dates and an interactive map, a photo gallery, videos, and further background information on the organisation's history.

➤eucrim ID=0901081

Declaration to Mark 60th Anniversary of Council of Europe

The 60th anniversary was commemorated in a declaration by the Committee of Ministers – which comprises the Ministers of Foreign Affairs of the Member States of the Council of Europe or their permanent diplomatic representatives in Strasbourg. The declaration was issued on 12 May 2009 on the occasion of the Committee's 119th meeting in Madrid, Spain. The declaration states that, since 1949, the organisation has been working to achieve a greater unity among its members for the purpose of safeguarding and realising the ideals and principles that are their common heritage.

The key issues of the declaration are as follows:

- Human rights are universal and indivisible. They are the inalienable right of each and every individual.
- Observance of the engagements undertaken by CoE Member States under the European Convention on Human Rights (ECHR) is ensured by the European Court of Human Rights, which represents the judicial dimension of this action (for the foundation of the European Court of Human Rights 50 years ago, see below). In this context, the declaration reaffirms the importance of the rapid

* If not stated otherwise, the following news items on the Council of Europe were reported by *Dr. András Csúri.*

implementation of the measures aimed at improving the ECHR system and, in particular, those contained in Protocol No. 14, and it points out the provisional application of certain procedural reforms foreseen in Protocol No. 14.

- The outstanding work of the Council of Europe's Commissioner for Human Rights, both in the field of human rights and by sustained dialogue with the Member States.
- Determination to combat terrorism, paying due attention and giving support to victims, with strict respect for human rights and the rule of law.
- Commitment to strengthening the rule of law throughout the continent, building on the standard-setting of the Council of Europe and its contribution to the development of European and international law. In this context, the CoE's work through legally binding conventions and other instruments is stressed, and it is underscored that the work will be continued, particularly in response to the serious threats represented by corruption, money laundering, organised crime, and cybercrime.
- The future focus on action to make gender equality a reality as well as promotion of the rights of children, including the need for efforts to fight human trafficking as well as the prevention and combating of violence against women and children.
- Intensification of the CoE's cooperation with other international organisations. In this context, the drafters of the declaration welcomed the progress already made with respect to the European Union, and they expressed their appreciation of the new impetus from the Memorandum of Understanding between the two organisations (for the MoU, see eucrim 1-2/2008, pp. 46-47 with further references).

➤eucrim ID=0901082

Joint Statement on 60th Anniversary by CoE's Key Institutions

On 5 May 2009, the CoE's Secretary General Terry Davis, PACE President Lluís Maria de Puig, and the Committee of Ministers' Chairman Miguel Angel Moratinos expressed their appreciation of the 60-year existence of the organisation in a joint statement.

"In the first sixty years of its existence, the Council of Europe has helped to reconcile a continent after decades of ideological divide, created a Europe-wide court in which individuals can seek protection of their human rights, outlawed the death penalty in Europe, and produced an arsenal of more than 200 international treaties to defend and extend the Council of Europe values of democracy, human rights and the rule of law," the three persons representing the main CoE institutions say. Furthermore, they underscore that "[t]he mandate of the Council of Europe has not changed, but the circumstances in which we operate have changed dramatically. Technological, scientific, political, social and economic developments have brought about new opportunities, but also new threats to democracy, human rights and the rule of law."

➤eucrim ID=0901083

Relations between the Council of Europe and the European Union

JHA Council Gives Statements on Relationship between EU and CoE in the Area of Criminal Justice

Despite extensive collaboration within the EU in the fields of judicial cooperation and the approximation of criminal legislation, their development in the EU cannot be regarded without looking at the legislative work of the Council of Europe in the area of criminal justice. This was one of the conclusions of the Council of the EU Member States' Justice and Home Affairs Ministers, who addressed the relationship between the EU and the Council of Europe in the criminal law field at their meeting in February 2009.

The Council first reiterates its respect for the legislative activities of the Council of Europe in the area of criminal justice. In this context, the Council stresses that the Conventions of the Council of Europe "form part and parcel of the bedrock of cooperation in criminal matters" and that the Council of Europe has developed several fundamental Conventions in view of the approximation of criminal legislation in Europe, such as the Conventions on Corruption, Money Laundering and Terrorist Financing, Action against Trafficking in Human Beings, and the Protection of Children against Sexual Exploitation and Sexual Abuse, etc.

Second, the Council reaffirms its intention to continue the close cooperation between the EU and the CoE in the area of criminal justice.

Third, the Council calls upon EU Member States to sign, ratify, and implement the CoE Conventions in the fields of cooperation in criminal matters and approximation of criminal legislation "when appropriate, in particular when the provisions of these conventions are integrated in the acquis of the EU."

By Thomas Wahl

➤eucrim ID=0901084

Report on Cooperation between the Council of Europe and the European Union

At its 119th meeting in Madrid on 12 May 2009, the Committee of Ministers assessed the cooperation between the Council of Europe and the European Union in a report and took stock of the implementation of the Memorandum of Understanding (MoU) in 2008. The MoU between the two organisations was signed on May 2007 (for the MoU, see eucrim 1-2/2007, pp. 41-42 and eucrim 1-2/2008, pp. 46-47). Among the key issues of the progress report are:

- Cooperation nowadays covers most fields of competence of the Council of Europe, in particular human rights, democracy, and the rule of law.
- Cooperation takes various forms, from the exchange of information, us-

ing the Council of Europe's monitoring mechanisms, to joint activities.

- The two organisations have strengthened coherence between their respective legal standards in the fields of human rights and the rule of law.
- The year 2008 was marked by a quantitative and qualitative increase in co-operation between the Council of Europe and the European Union. Results and achievements, as well as areas for possible improvement, have become more visible.
- Legal co-operation between the Council of Europe and the European Commission covers a wide variety of fields, among them criminal justice, the improvement of judicial co-operation, as well as the fight against terrorism, money laundering, and trafficking in human beings.
- The Council of Europe's standard-setting capacity is a valuable asset when further developing EU strategies in the field of judicial co-operation in criminal matters. In the face of growing threats to privacy and data protection, co-operation in this field could be intensified, in particular with respect to the relevant standards of both organisations.
- The European Committee for the Efficiency of Justice (CEPEJ), the European Commission for Democracy through Law (Venice Commission), and the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) have established very good working relations with EU institutions. Certain specific policy areas, such as the fight against terrorism or the protection of victims of violent crimes, could provide the opportunity to enhance co-operation by means of joint activities.
- Coherence between the standards of the Council of Europe and EC/EU law is of primary importance. The co-ordination of relevant legislative initiatives, through consultations at an early stage of the legislative process, is particularly important to avoid inconsistencies. The practice of consultations has already been established in a number of areas where Council of Europe monitoring mechanisms constitute a unique source of information (e.g., the Committee for the Prevention of Torture) or where the Council of Europe can make other relevant contributions (e.g., in the revision of the EU Council Framework Decisions on combating terrorism, on combating sexual exploitation of children and child pornography, and on combating trafficking in human beings, in accordance with relevant Council of Europe Conventions).
- On the basis of the common understanding that certain Council of Europe Conventions and certain EU legislative instruments are complementary, the accession of EU Member States and, where appropriate, the European Union/European Community to certain Council of Europe Conventions is to be further encouraged. In this context, the initiative of the French Presidency of the EU Council for an EU Council conclusion encouraging the EU Member States to ratify relevant Council of Europe Conventions in the criminal justice field in order to reinforce coherence among their standards is worth noting.

The following ID refers (1) to the report of the Committee of Ministers regarding the cooperation between the CoE and the EU, (2) a report on the stocktaking of the implementation of the Memorandum of Understanding between the Council of Europe and the European Union (1 January-31 December 2008), and (3) a paper on joint programmes between the Council of Europe and the European Commission as of 1 January 2009.

➤eucrim ID=0901085

European Court of Human Rights

ECHR Launches Special Website on 50th Anniversary

The fiftieth anniversary of the European Court of Human Rights is being celebrated in 2009 with a series of initiatives, including the launch of a special event-oriented website that will be enhanced and updated throughout the year. The website was launched on 20 April 2009 to celebrate the fiftieth anniversary of the inauguration in 1959. The Court held its first hearing from 23 to 28 February 1959 and was solemnly installed on 20 April 1959 on the occasion of the celebrations marking the tenth anniversary of the Council of Europe.

The website mentioned presents all the events of the anniversary year, such as the Open Day on 20 September 2009 and a large number of documents on the Court's history and future and on the Member States of the Council of Europe. By means of an interactive map of the 47 Member States, basic information can be found on each State, such as the date it ratified the Convention, the judges elected, major cases brought against the State, and the main statistics.

Original historical documents have also been scanned and can be consulted on-line, including texts on the first case judged by the Court in 1960 (Lawless v. Ireland). Certain documents, such as the "Recommendation on the establishment of the Court" (1958), have been declassified so that they could be added to the site.

An overview of 50 years of activity and developments can be gleaned from various reference documents including: preparatory work of the Convention, simplified version of the Convention, annual report on execution of judgments, case-law information, amendments to the Convention and Rules of Court, as well as reports on future reforms of the Court.

➤eucrim ID=0901086

Protocol No.14bis to Improve the Effectiveness of the European Court of Human Rights

Because of the persistent refusal by Russia to ratify Protocol No. 14 to the European Convention on Human Rights, the European Court of Human Rights (ECtHR) and the CoE Member States seek ways out in order to maintain the effectiveness of the ECtHR due to the

ever-accelerating influx of new applications and a constantly growing backlog of cases (see also previous eucrim issues under "Council of Europe – Reform of the European Court of Human Rights").

Protocol 14bis had been concluded rather quickly: A working group of the Committee of Ministers elaborated a draft text of the Protocol in April 2009. The Parliamentary Assembly gave its opinion to the Protocol on 30 April 2009. On 12 May 2009, the Ministers for Foreign Affairs and representatives of the 47 Council of Europe Member States finally endorsed Protocol No. 14bis to the European Convention on Human Rights (CETS No. 204). The Protocol will increase the European Court of Human Rights' short-term capacity to process applications, as it contains procedural provisions that would enable the Court to work more efficiently. The Protocol changes Arts. 25 (registry, legal secretaries, and rapporteurs), 27 (single-judge formation, committees, Chambers and Grand Chamber), and 28 (competences of single judges and of committees) of the Convention.

This new protocol will allow the immediate and provisional application of *two* procedural elements of Protocol No. 14 with respect to those states that express their consent. According to the Protocol, a single judge will be able to reject plainly inadmissible applications, whereas now this requires a decision by a committee of three judges. Furthermore, the competence of three-judge committees will be extended to declare applications admissible and decide on their merits in well-founded and similar cases, where a well-established case law of the Court already exists. Currently, these cases are handled by chambers of seven judges.

Protocol No. 14bis was opened for signature on 27 May 2009 and needs the ratification by three States to enter into force. Its provisions shall apply to applications pending before the Court against each of the States for which the Protocol has entered into force. Member States may provisionally apply the provisions before entry into force, if they so wish.

Protocol No. 14bis is estimated to increase the efficiency of the Court by 20-25%. In the margins of the Ministerial Session, a Conference of the High Contracting Parties to the Convention adopted a consensual agreement by virtue of which States may individually consent, on a provisional basis, to the direct application of the two above-mentioned procedural elements of Protocol No. 14 to the complaints filed against them. This agreement is complementary to Protocol No. 14bis, since it opens a second legal path towards achieving the same result. Protocol 14bis is considered to be only a temporary measure until the final entry into force of Protocol No. 14.

Denmark, Ireland, and Norway were the first CoE Member States to ratifiy Protocol No. 14bis, meaning that it will enter into force for these countries on 1 October 2009. Iceland, Monaco, and Sloevnia have also ratified the Protocol so far. It will enter into force for these states on 1 November 2009. For the acception of the provisional application of Protocol No. 14, see table below under "Legislation".

➤eucrim ID=0901087

ECHR Tests New On-line Application Form

On 23 February 2009, the European Court of Human Rights launched a new service on a trial basis – to enable applicants to fill out the Court's application form on-line via its Internet site. At first, it will only be available for applicants using Swedish or Dutch application forms. Depending on the outcome of the trial, it may subsequently be extended to the other official languages of the Member States of the Council of Europe.

When filling out the form, applicants can save their changes at any stage and return to complete the form at any time. Once the form has been fully completed, the applicant can submit it. This will trigger a service that will automatically send the completed version of the form via email to the applicant who must then print it, sign it, and forward it to the Court with any relevant annexes and within the time-limit indicated.

➤eucrim ID=0901088

Second Report on Execution of Judgments of European Court of Human Rights

The Committee of Ministers of the Council of Europe published, on 22 April 2009, its second annual report on supervision of the execution of the judgements of the European Court of Human Rights (for the first report, see eucrim 1-2/2008, p. 48).

In 2008, 1,384 new judgments on violations of the Convention on Human Rights were brought before the Committee for supervision of their execution, thus bringing the number of pending cases to 6,614. The compensation awarded to the victims in these new judgments amounted to some 55,5 million euros. 400 cases were closed by final resolutions in 2008.

The introduction of the report stressed the close relationship between good execution, the proper implementation of the European Convention on Human Rights in the Council of Europe's Member States, and the case-load of the European Court of Human Rights.

It underlined the importance of ensuring, after the finding of a violation of the Convention, not only necessary legislative and other changes, but also effective domestic remedies, so that other victims may obtain reparation rapidly without having to go before the European Court of Human Rights.

The Director General of Human Rights and Legal Affairs of the Council of Europe stated that the report demonstrates the importance of rapid execution and the complexity of many execution issues as well as the need for constructive interaction between all parties involved in order to arrive at good solutions.

Major developments of the execution process in 2008 were noted in the report. Appendices present detailed sta-

tistical information, both in general and by State, and also a thematic overview of major developments in the execution of pending cases. The report also presented the Committee of Ministers' new Recommendation (2008)2, in which the Committee provides recommendations to improve the Member States' capacity to implement the judgements of the European Court of Human Rights, e.g., to designate a co-ordinator for the execution process or to keep, as appropriate, national parliaments informed.
➤eucrim ID=0901089

Committee of Ministers' Resolution Concerning Excessive Length of Judicial Proceedings in Italy

In the context of the execution of judgements, the Committee of Ministers adopted, on 26 March 2009, a new Interim Resolution concerning the excessive length of judicial proceedings in Italy. This new resolution is the follow-up to Interim Resolutions CM/ResDH(2007)2 concerning the problem of excessive length of judicial proceedings in Italy and CM/ResDH(2007)27 on Italian bankruptcy proceedings. The Committee noted the progress achieved through the measures adopted so far by the Italian authorities in the fields of civil, criminal, and administrative proceedings. It underlined, however, that, given the substantial backlog in the civil and criminal fields (approximately 5,5 million pending civil cases and 3,2 million pending criminal cases) as well as in the administrative field, a final solution to the structural problem of the length of proceedings still needs to be found.

Therefore, the Committee called upon the Italian authorities to actively pursue their efforts to ensure the swift adoption of the measures already envisaged for civil and criminal proceedings and to urgently adopt ad hoc measures to reduce the civil, criminal, and administrative backlog. It encouraged the authorities to consider amending Act No. 89/2001 (the Pinto Law) with a view to setting up a funding system in order to resolve the problem of delays in the payment of compensation awarded, to simplify the procedure, and to extend the scope of the remedy to include injunctions to expedite the proceedings.

The Committee noted that the 2006 reform on bankruptcy proceedings decreased the number of proceedings and expedited them by reducing the phase of auditing claims.
➤eucrim ID=0901090

Human Rights and Legal Affairs

In the following introductory note, an important institution of the Council of Europe is briefly introduced: The Commissioner for Human Rights. The outstanding work of the Commissioner in the past ten year was the occasion for a high amount of praise on the part of the above-mentioned Madrid Declaration of the Committee of Ministers of 12 May 2009. Recently, the Commissioner published two important statements promoting the respect for human rights throughout the CoE Member States. These statements are reported on below.

The Commissioner for Human Rights

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in the Member States. The office of the Commissioner was instituted in 1999 by Resolution (99) 50. The Commissioner is elected by the Parliamentary Assembly for a six-year non-renewable term of office. Current Commissioner, Mr. Thomas Hammarberg, assumed the position on 1 April 2006. The fundamental tasks of the Commissioner for Human Rights, according to the Resolution are:

- Fostering the effective observance of human rights and assisting Member States in the implementation of Council of Europe human rights standards;
- Promoting education in and awareness of human rights in Council of Europe Member States;
- Identifying possible shortcomings in law and practice concerning human rights;
- Facilitating the activities of national ombudsperson institutions and other human rights structures;
- Providing advice and information regarding the protection of human rights in the Coe Member States.

The activities of the Commissioner for Human Rights include ongoing dialogues with governments and country visits, thematic recommendations and awareness-raising as well as promoting the development of national human rights structures. The Commissioner also presents an annual report analysing the human rights situation in Europe. However, the Commissioner does not take up individual complaints.
➤eucrim ID=0901091

Police Misbehaviour to Be Investigated by Independent Bodies

On 12 March 2009, the Commissioner for Human Rights released an opinion on investigating complaints against the police. In it, he stated that an independent and effective police complaints system is of fundamental importance for a democratic and accountable police service. Further, he underlined that such complaints mechanisms could help enhance public trust and confidence in the police and ensure that there is no impunity for misconduct or ill-treatment. He also underlined the importance of complying with the five principles developed by the European Court of Human Rights, namely independence, adequacy, promptness, public scrutiny, and victim involvement.

The Commissioner highlighted that such independent bodies should have oversight of the police complaints system and share responsibility with law enforcement officials. He also stated that the expectation that criminal or disciplinary proceedings will be brought against police officers' misbehaviour is an im-

portant protection against impunity and essential for public confidence in the police complaints system.
➤eucrim ID=0901092

Recommendation on Systematic Human Rights Work in CoE Member States

On 18 February 2009, the Commissioner for Human Rights issued a recommendation on systematic work to implement human rights at the national level, which demonstrates how States can implement these rights effectively by using baseline studies, relevant action plans, and other indicators.

The Commissioner stressed that developing an action plan that presents problems and corresponding activities is a sign of commitment to human rights. It brings national, regional, and local authorities, national human rights structures, civil society representatives, and other stakeholders together in the effort to implement common human rights standards.
➤eucrim ID=0901093

Specific Areas of Crime

Corruption

Group of States against Corruption Publishes Report on Belgium

On 22 June 2009, GRECO published its Third Round Evaluation Report on Belgium., focusing on the criminalisation of corruption (Theme I) and the transparency of party funding (Theme II).

In the field of criminalisation of corruption, numerous aspects of Belgian law met the requirements of the Criminal Law Convention on Corruption and its Additional Protocol. Practice reflects the country's genuine capacity to bring various corrupt activities before the courts, especially following abandonment of the need to establish a prior agreement between the two parties or that the proposal of one had to be accepted by the other. Thanks to the broad jurisdiction, it is furthermore easy to prosecute in Belgian cross-border corruption offences, even though GRECO recommended clarification of certain aspects. The report invited Belgium to withdraw or not renew its reservations to the Convention, which particularly concern the incrimination of trading in influence and that of bribery in the private sector.

Finally, the effectiveness of the provisions were able to be strengthened by recalling that receiving an advantage – within the meaning of the Convention – is an offence.

In view of the transparency of political party funding, GRECO states that the legislation of 1989 on the financing of political activities, in conjunction with a significant level of public funding of political parties, has seemingly led parties to exercise financial moderation, so that the country is no longer suffering from the major political and financial scandals of the past.

GRECO remarked that the diverse activities and structures of the political parties should be better accounted for in the financial statements. The report also stated that there is still room for improvement on the rules governing donations, as well as the control mechanism, since the parliamentary control commissions have not been able to establish their authority over time and remain shackled by their political composition. Furthermore, a wide range of sanctions exist to help enforce the rules, but their proportionality and dissuasiveness could be questionable in certain cases.

The report addressed a total of 15 recommendations to Belgium (4 on incrimination and a further 11 on the transparency of party funding).
➤eucrim ID=0901094

GRECO: Third Round Evaluation Report on Spain

On 28 May 2009, GRECO published its Third Round Evaluation Report on Spain.

Regarding the criminalisation of corruption, the report states that, despite the fact that Spain has been a member of GRECO since 1999, it has not yet ratified the 1999 Criminal Law Convention on Corruption as well as its Additional Protocol of 2003. GRECO identified some important shortcomings, above all that the complex legal framework with respect to bribery in the public sector is particularly deficient as regards its international dimension. Moreover, bribery in the private sector is not criminalised at all. The latter is a serious gap, according to the report, since this form of corruption may cause significant damage to society at large given the value of the sums (and potential bribes) involved in business transactions. GRECO also found some of the penal sanctions to be too weak with regard to bribery and trading in influence.

In view of the assessment, GRECO addressed nine recommendations to Spain, among them swift ratification of the Criminal Law Convention on Corruption, the criminalisation of bribery in the private sector (Arts. 7 and 8 of the Convention), and clarification that immaterial advantages are covered by the relevant provisions of the Spanish Penal Code.

Concerning transparency of party funding, GRECO acknowledged the efforts made in this area through new legislation since 2007. GRECO advised improvements to the system by granting public access to meaningful and timely information on political party accounts, including financial information on local branches and political foundations. It noted that the existing sanctioning system needs further regulation and that the financial discipline of political parties should be strengthened, in particular by reinforcing their internal audit control.

Among the six recommendations in this area, GRECO stressed the need to clearly define infringements of political finance rules and to introduce effective, proportionate, and dissuasive sanctions for these infringements, particularly by extending the range of penalties avail-

able and enlarging the scope of the sanctioning provisions to cover all persons/entities.
➤eucrim ID=0901095

GRECO: Third Round Evaluation Report on Norway

GRECO published, on 5 May 2009, its Third Round Evaluation Report on Norway.

Regarding the criminalisation of corruption (Theme I), GRECO found that the provisions on corruption and trading in influence in the Norwegian Penal Code are of a high standard and fully in line with the Criminal Law Convention on Corruption and its Additional Protocol. Nevertheless, in order to fine-tune existing provisions, the report recommends the introduction of a provision on aggravated trading in influence and the reconsideration of the use of juries, instead of the current panel of only laymen, in appeal cases involving aggravated corruption.

Concerning transparency of party funding (Theme II), GRECO commends Norway for the changes that the legal framework for the funding of political parties underwent in 2006. However, the picture of the possible (financial) ties of political parties as well as the manner in which they spend public funding needs to be as comprehensive and easy to understand as possible. In addition to the current disclosure of income, parties should therefore also be required to provide additional information on their expenditure, as well as their debts and assets.

The report states furthermore that the current supervisory mechanism provides for a very limited and mainly formalistic supervision of party financing and relies too heavily on the media to detect and uncover possible dubious funding practices – a matter that needs to be addressed. Finally GRECO suggested that the current system would benefit from the introduction of more flexible sanctions for violations of the Political Parties Act.
➤eucrim ID=0901096

GRECO: Joint First and Second Round Evaluation Report on the Russian Federation

On 30 April 2009, GRECO published its Joint First and Second Round Evaluation Report on the Russian Federation, which had joined GRECO in 2007. Russia ratified the CoE Criminal Law Convention on Corruption in 2006 and signed the Additional Protocol to the Criminal Law Convention on 7 May 2009.

GRECO found corruption to be a widespread systemic phenomenon in the Russian Federation, one which affects the society as a whole, the public administration, including the institutions in place to counteract corruption (the police and the judiciary), and the business sector. The report focused on general anti-corruption policies, the independence of the judiciary, immunity from prosecution for corruption offences, the deprivation of benefits drawn from corrupt acts, measures to counter corruption in public administration as well as the prevention of legal persons being used as shields for corruption.

GRECO stressed the need to improve a proper distribution of cases among different law enforcement agencies and for the enhancement of their interdepartmental cooperation. GRECO also noted that further efforts are crucial towards strengthening the independence of the judiciary in order to combat the common view in Russia that the judiciary is affected by undue influence and corruption. Regarding the large number of officials who enjoy immunity from criminal proceedings, the report suggested a reduction in the number of immunity cases to a minimum as well as a thorough revision of the procedure for lifting such immunity. The report further states that, although reforms on modernising the public administration are underway, legislation concerning access to public information has not yet been adopted so that comprehensive and precise legal rules in this respect should be treated as a matter of priority.

In general, the report underscores that the vast reforms underway require determined implementation, including thorough staff training. It is hence to be welcomed that the fight against corruption is recognised as a priority at the highest political level in the Russian Federation. A Presidential Council and a National Anti-corruption Plan (NACP) have been established, but these efforts must be complemented with a clear and coherent strategy as well as a plan of implementation according to GRECO's report.

Among the 26 recommendations to Russia, the report primarily deals with the need to establish a comprehensive national anti-corruption strategy, on the basis of the NACP – covering the federal, regional, and local levels of the Russian Federation. In addition, the strategy should emphasise the need for corruption prevention and transparency in all sectors of public administration. It should also be ensured that civil society can make a significant input to the overall strategies against corruption.
➤eucrim ID=0901097

Money Laundering

MONEYVAL: Annual Activity Report for 2008

On 5 June 2009, the CoE's MONEYVAL Committee (Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) published its Annual Activity report for the year 2008. In 2008, MONEYVAL adopted nine Third Round mutual evaluation reports, seven first progress reports, two second progress reports, and it took action under the Compliance Enhancing Procedures in respect of two of its jurisdictions. The report underlines that, in 2008, the Rules of Procedure were amended to shorten the time between adoption of the mutual evaluation report and publication. The report stresses the importance of regular reporting for all MONEYVAL countries once their AML/CFT Laws have been

amended. For general information on MONEYVAL's work, see also eucrim 1-2/2007, p. 44.
➤eucrim ID=0901098

MONEYVAL: Third Round Evaluation Report on Ukraine

On 25 May 2009, MONEYVAL published its Third Round Evaluation Report on Ukraine. Like the other country reports in the framework of the third round of evaluations, the report analyses the implementation of international and European standards to combat money laundering and terrorist financing, assesses levels of compliance with the Financial Action Task Force (FATF) 40+9 Recommendations and includes recommendations designed to improve the country's anti-money laundering and combating the financing of terrorism (AML/CFT) system.

The report on Ukraine states that the country has made progress in developing its system for combating money laundering and terrorist financing, and it has achieved numerous convictions for money laundering and drug-related money laundering. However, its anti-terrorist financing legal framework does not meet international standards and needs to be reviewed, such as the framework in place for provisional measures and confiscation that still has deficiencies and needs to be modernised.

The report also states that the Ukraine has made efforts to ensure compliance with UN Security Council resolutions but that the legal framework for the implementation of UN sanctions remains incomplete. MONEYVAL welcomed the fact that the State Committee for Financial Monitoring (an administrative type of FIU) substantially meets international standards and appears to be generally effective.

However, the preventive system still shows a number of gaps, such as beneficial ownership for customers who are natural persons, the way ongoing and enhanced due diligence is conducted, measures dealing with politically exposed persons, correspondent banking, new technologies, and non face-to-face business. MONEYVAL criticised the low level of reporting by obliged entities other than banks and called for further efforts on the part of reporting entities as to how to detect suspicious transactions.

The extension of AML/CFT obligations to casinos was positive. However, significant gaps were identified in the report in respect of customer due diligence requirements, the supervision and sanctioning of casinos, all of which require action. Furthermore, AML/CFT requirements have not yet been extended to real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals, company service providers, and accountants. The report urged the creation of appropriate arrangements for their AML/CFT monitoring.

The report expressed appreciation that the Ukrainian authorities have established effective mechanisms to cooperate on operational matters to combat money laundering and the financing of terrorism at the policy level. Ukraine is also able to provide a wide range of international cooperation to foreign counterparts.
➤eucrim ID=0901099

MONEYVAL: Third Round Evaluation Report on Montenegro

On 7 May 2009, MONEYVAL published its Third Round Evaluation Report on Montenegro – the first since the declaration of independence in 2006. Overall, the Montenegrin authorities have made considerable progress in establishing a legal structure as well as law enforcement and regulatory systems to counter money laundering and the financing of terrorism, according to the report.

Although money laundering and terrorist financing are criminalised under the Criminal Code, the offences are not fully consistent with international standards. As regards the practical side, it is mentioned that there has been only one conviction for money laundering so far.

Furthermore, no special laws or procedures exist relating to the freezing of terrorist funds or other assets of persons designated by the United Nations Al-Qaida and Taliban Sanctions Committee. As regards the organisational side, lists of designated entities are distributed to reporting entities, but an effective mechanism to freeze such funds still needs to be created.

The financial intelligence unit (FIU) for the Administration for the Prevention of Money Laundering and Terrorist Financing as well as many of the law enforcement and supervisory bodies are relatively newly formed and were still in the process of recruiting at the time of the visit of the MONEYVAL evaluation committee, making it difficult to form a view of their effectiveness.

As regards the preventive system, the Law on the Prevention of Money Laundering and Terrorist Financing (entry into force in January 2008) cover the elements concerning customer due diligence well. MONEYVAL is concerned, however, about the actual implementation of the legal provisions, in particular regarding the beneficial owner identification and verification that a person has the relevant authority to act. Despite adequate legal provisions with regard to politically exposed persons, financial institutions did not appear to be fully aware of their obligations to institute proper procedures in order to address the risk. The effectiveness of the reporting requirements was called into question by the low number of suspicious transaction reports filed by a limited number of financial institutions and the absence of reports from designated non-financial businesses and professions. There were no reports on the financing of terrorism.
➤eucrim ID=0901100

MONEYVAL: Second Public Statement on Azerbaijan

At its 29th plenary meeting (Strasbourg, 16-20 March 2009), MONEYVAL issued a public statement on Azerbaijan

in which the body expressed that it has been concerned with deficiencies in the AML/CFT regime in Azerbaijan since 2006. MONEYVAL already published a first public statement on 12 December 2008, which remains in effect.

In its second statement, MONEYVAL, on the one hand, welcomed the progress that had been made with the adoption of an AML/CFT Law on 18 February 2009 and the steps that are now being taken to complete the legal framework for an AML/CFT regime. MONEYVAL also welcomed the progress that has been made in addressing many of MONEYVAL's previous concerns. On the other hand, Azerbaijan was requested to finalise the legal structure quickly and address other identified deficiencies and was, at the same time, encouraged to work closely with MONEYVAL to achieve this goal.

➤eucrim ID=0901101

Russia: MOLI-RU 2

Several activities took place within the MOLI-RU 2 project in Russia (see also eucrim 1-2/2007, p. 45). Like Ukraine, the MOLI-RU 2 is a follow-up project that aims at further developing Russia's AML/CTF system (in view of both practice and legislation).

A series of seminars for the interregional offices of Rosfinmonitoring (the Russian Federal Financial Monitoring Service), law enforcement bodies, and the private sector were organised. On 2 and 3 April 2009, for instance, the MOLI-RU2 project team held a seminar for the Rosfinmonitoring office in the Ural Federal District. The seminar focused on countering corruption as well as combating the laundering of corruption proceeds.

An International Conference on fighting crime in the Siberian region was held on 19 and 20 February 2009 in Krasnoyarsk. The conference focused on the criminal situation in the region, on legal, tactical, and procedural aspects of fighting crime and related issues. Particular attention was paid to countering corruption and terrorism financing.

Also worthy of mention is a study visit for 13 supervisors and analysts from the Russian Federal Financial Monitoring Service that took place in the Czech Financial Intelligence Unit (FIU) from 11 to 14 November 2008. The visit focused on supervision of the gambling industry in view of the upcoming reform in this sector in Russia. The participants discussed the issues related to reporting and inspection of companies in the industry and also visited several reporting institutions in the gambling sector.

For further developments, refer to the following Internet site.

By Thomas Wahl

➤eucrim ID=0901102

Ukraine: MOLI-UA 2

Within the framework of the MOLI-UA-2 project – a follow-up project against money laundering and terrorist financing in the Ukraine, to further develop the country's AML/CTF system – the closing conference took place in Kyiv, Ukraine on 29 and 30 April 2009. The event was also the final meeting of the Steering Group. On this occasion, the achievements and results of the project were presented. For recent activities, refer to the following project homepage. For the project, see also eucrim 1-2/2006, p. 22, eucrim 3-4/2006, p. 84, eucrim 1-2/2007, p. 45, and eucrim 1-2/2008, p. 56.

➤eucrim ID=0901103

Moldova: MOLICO

The MOLICO-Project against corruption, money laundering, and the financing of terrorism in Moldova was also closed. Like the projects in Ukraine and Russia, this project was the follow-up to a previous project that had been completed in 2005. The aims of the project were (1) to ensure the implementation of Moldova's anti-corruption strategy on the basis of annual action plans, and (2) to strengthen the anti-money laundering/counter-terrorist financing (AML/CTF) system in Moldova in accordance with international standards and good practices as well as MONEYVAL recommendations.

At the closing conference of the MOLICO-Project on 10 July 2009 in Chisinau, experts confirmed the findings of the evaluation report that the project had achieved excellent results with regard to anti-corruption measures (corruption-proofing of legislation, risk analyses, investigative capacities, anti-corruption policies) and the creation of an effective system against money laundering and the financing of terrorism that meets international standards. However, participants also pointed out that a number of follow-up measures are required, particularly in view of the remaining high perception of corruption in Moldova. The project was funded by the European Commission, the Swedish International Development Cooperation Agency, and the Council of Europe (see also eucrim 1-2/2006, p. 22 and eucrim 3-4/2006, p. 84).

By Thomas Wahl

➤eucrim ID=0901104

Cybercrime

Global Octopus Interface Conference

On the occasion of its 4th annual conference on cybercrime in Strasbourg, the CoE launched the second phase (March 2009-June 2011) of its Project on Cybercrime to help countries worldwide to implement the Cybercrime Convention and to adopt stricter standards on the protection of children and personal data.

Besides Microsoft and the Romanian Government, McAfee also announced that it will support the project financially in order to contribute to the development of police and judge training programmes. The first programmes should be operable in 2010. Some of the output expected in the second phase is as follows:

- Strengthening cybercrime policies and legislation in accordance with the Convention on Cybercrime;

- Strengthening the capacities of the so-called 24/7 points of contact as well as the prosecutors and authorities for mutual legal assistance within the framework of international cooperation;
- Financial investigations to follow money flows on the Internet;
- Training of judges and prosecutors.

The CoE continues to study the consequences of "cloud computing" and intends to ensure that its Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is in line with the technological progress that has taken place since its adoption in 1981. The conference was attended by approximately 280 cybercrime experts from 70 countries, including representatives of the private sector and international organisations.

It should be remarked that, on 9 March 2009, just before the conference, Germany became the 25th country to ratify the Convention.

➤eucrim ID=0901105

CoE and OAS Step Up Efforts to Counter Terrorism and Strengthen Cyber Security

On 16 and 17 April 2009, a conference on terrorism and cyber security took place in San Lorenzo de El Escorial (Spain). The conference focused on misuse of the Internet by terrorist organisations and their supporters as well as the risks posed by them. The event was co-organised by the Organisation of American States Inter-American Committee against Terrorism (OAS/CICTE) and the Council of Europe (CoE) within the framework of the Spanish Chairmanship in the Council of Europe Committee of Ministers.

Discussions focused on the presence of terrorist organisations in and their use of the Internet for various purposes, including the dissemination of propaganda related to racist ideology. To counteract these developments, experts proposed a range of innovative solutions that go beyond purely technical ones, such as deterring the production of extremist materials, promoting self-regulation of on-line communities, and seeking to advance a positive counter-narrative to extremist messages. Experts noted that, while terrorist organisations launch cyber attacks against their enemies, at the present time their ability to affect large-scale disruption or destruction via cyber means appears to be limited. However, their ability to perpetrate cyber attacks is likely to increase; hence, the international community must continue to develop protective measures as well as the capabilities and mechanisms to ensure resilience in the face of a cyber attack.

It has been recommended that States establish and develop a national Computer Security Incident Response Team (CSIRT). The team could serve as a focal point for the exchange of information regarding cyber incidents affecting critical information, infrastructure, and it could coordinate incident response and mitigation among affected stakeholders.

➤eucrim ID=0901106

Procedural Criminal Law

CCJE/CCPE: Draft Opinion on the Relationship between Judges and Prosecutors

The Working Party of the Consultative Council of European Judges (CCJE-GT) and the Consultative Council of European Prosecutors (CCPE) are currently working on a draft Opinion concerning "the relationship between judges and prosecutors".

The opinion raises such issues as the missions of judges and prosecutors in society, guarantees for the (internal and external) independence of the judge and the prosecutor, codes of ethics and deontology to be followed, the functions of the judge and the prosecutor before/during/after the court hearing as well as defence rights at all levels of the procedure.

The draft structure of the Opinion was agreed on in February 2009 and the Opinion was further elaborated between the CCJE and the CCPE at a joint conference in Bordeaux, France, on 30 June 2009. All members and observers of the CCJE have until 5 October 2009 to submit comments on the draft. The draft Opinion will be discussed at the plenary meeting of the CCJE in November 2009.

➤eucrim ID=0901107

CEPEJ: Plenary Meeting Discusses Evaluation of Judicial Systems with EU Bodies

The European Commission for the Efficiency of Justice (CEPEJ) held its 13th plenary meeting in Strasbourg from 10 to 11 June 2009. During that meeting, the CEPEJ discussed, together with representatives of the various EU bodies, possible cooperation to evaluate judicial systems. The cooperation is to take place as part of the Memorandum of Understanding between the Council of Europe and the European Union (cf. eucrim 1-2/2007, pp. 41-42). As part of the cooperation with the European Union, the meeting participants reiterated their full commitment to pursuing their cooperation with the Justice Forum of the European Union.

Furthermore, the CEPEJ adopted its 2008 Activity Report and the revised version of the scheme for evaluating judicial systems, which enables it to launch the new evaluation cycle.

By Thomas Wahl

➤eucrim ID=0901108

CEPEJ: Meeting of the Working Group on Quality of Justice

At its 5th meeting, held from 18 to 19 May 2009, the CEPEJ Working Group on Quality of Justice (CEPEJ-GT-Qual) discussed several ongoing studies and projects. For example, participants discussed the state of play of a study on quality systems in Europe. A first analysis has shown that States are experiencing difficulties in specifying quality and efficiency, and courts are rarely autonomous administrative entities. Therefore,

it is considered necessary to first define the relations between courts and central administration in order to determine who the first responsible instance for quality is. Most of the states – with some exceptions, such as Finland or Germany – set the quality of justice at the central administration's level, but experts have noticed that this stage is not necessarily the most appropriate one to analyse and make recommendations to improve the quality of justice.

Further items of the agenda were, inter alia:

- Presentation of a draft model of a quantitative satisfaction survey designed for the measurement of court users' satisfaction;
- Presentation of a preliminary questionnaire on the contractualisation of the relations between judges and parties;
- Preliminary discussion of the work on court organisation. This projects aims at bringing to light fundamental principles and procedures that are necessary to reform court organisation.

By Thomas Wahl

➤eucrim ID=0901109

CEPEJ: Meeting of the Working Group on Evaluating Judicial Systems

The 12th meeting of the Working Group on evaluating judicial systems was held in Strasbourg from 12 to 13 March 2009. The group decided on the topics of the next in-depth studies to be conducted as per the 2008 Evaluation Report. They include the single judge and panels of judges, the role of lawyers in judicial proceedings, organisation of the court clerk office, court organisation in terms of allocation of tasks and case categories among the courts, and the internal organisation of courts. In this context, experts of the Working Group recommended that CEPEJ's future studies should inter alia focus on promoting the approach of "one-stop" service counters in court entrances, where users could be advised and informed about procedures that concerned them.

➤eucrim ID=0901110

Ratifications and Signatures (Selection)

Council of Europe Treaty	State	Date of ratification (r) or signature (s)
European Convention on Extradition (ETS No. 24)	Monaco San Marino	30 January 2009 (r+s) 18 March 2009 (r)
European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)	San Marino	18 March 2009 (r)
Convention on the Transfer of Sentenced Persons (ETS No. 112)	Honduras	9 March 2009 (accession)
Convention on the Compensation of Victims of Violent Crimes (ETS No. 116)	Slovakia	12 March 2009 (r)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167).	UK	9 February 2009 (s)
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)	Montenegro Ireland	24 February 2009 (s) 5 May 2009 (r)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Belgium	9 March 2009 (r)
Convention on Cybercrime (ETS No. 185)	Germany Serbia Moldova	9 March 2009 (r) 14 April 2009 (r) 12 May 2009 (r)
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (ETS No. 187)	Italy	3 March 2009 (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)	Serbia	14 April 2009 (r)
Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190)	Serbia	14 April 2009 (r)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Belgium Russia Spain	26 February 2009 (r) 7 May 2009 (s) 27 May 2009 (s)
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194).	Germany Switzerland	29 May 2009 (acceptation of the provisional application), 1 June 2009 (date of effect) 12 May 2009 (acceptation), 1 June 2009 (effect)

Council of Europe Treaty	State	Date of ratification (r) or signature (s)
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194).	Luxembourg Netherlands UK Belgium Estonia	9 June 2009 (acceptation), 1 July 2009 (effect) 10 June 2009 (acceptation), 1 July (effect) 30 June 2009 (acceptation), 1 July 2009 (effect) 29 July 2009 (acceptation), 1 August 2009 (effect) 30 July 2009 (acceptation), 1 August 2009 (effect)
Convention on the Prevention of Terrorism (CETS No. 196)	Cyprus Latvia Spain Serbia Estonia	23 January 2009 (r) 2 February 2009 (r) 27 February 2009 (r) 14 April 2009 (r) 15 May 2009 (r)
Convention on Action against Trafficking in Human Beings (CETS No. 197)	Turkey Spain Luxembourg Serbia Belgium FYROM	19 March 2009 (s) 2 April 2009 (r) 9 April 2009 (r) 14 April 2009 (r) 27 April 2009 (r) 27 May 2009 (r)
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Russia Spain Cyprus European Community Serbia FYROM	26 January 2009 (s) 20 February 2009 (s) 27 March 2009 (r) 2 April 2009 (s) 14 April 2009 (r) 27 May 2009 (r)
Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Greece Spain Georgia Albania Montenegro	10 March 2009 (r) 12 March 2009 (s) 12 March 2009 (s) 14 April 2009 (r) 18 June 2009 (s)
Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 204).	France, Georgia, Spain Slovenia Denmark, Norway Luxembourg Ireland San Marino Monaco Austria Iceland	All 27 May 2009 (s) 27 May 2009 (s), 7 July 2009 (r) Both 27 May 2009 (s + r) 9 June 2009 (s) 17 June 2009 (s +r) 19 June 2009 (s) 1 July 2009 (s + r) 7 July 2009 (s) 7 July 2009 (s + r)

➤eucrim ID=0901112

Legislation

GRETA: New Monitoring Body for CoE's Trafficking in Human Beings Convention

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its first meeting at the Council of Europe in Strasbourg from 24 to 27 February 2009. This new monitoring body will control the implementation of the Convention on Action against Trafficking in Human Beings (hereinafter referred to as "The Convention"). In his opening speech, the Secretary General of the CoE qualified the Council of Europe Convention on Action against Trafficking in Human Beings as the most important human rights treaty of the past 10 years.

GRETA elected Ms Hanne Sophie Greve as President for a first term of office of two years. GRETA also adopted its internal rules of procedure.

GRETA urged the European Community and the Council of Europe member states, which had not already done so, to sign and ratify the Convention. In addition, GRETA called for non-member states to accede to the Convention. GRETA also welcomed the setting-up of the Trafficking Information Management System (TIMS) which it considers would constitute invaluable support for its work.

GRETA will regularly publish reports evaluating measures taken by states to implement the convention. The evaluation will be carried out by rounds similar to GRECO and MONEYVAL. The evaluation team will be composed of independent and highly qualified experts in human rights and the fight against human trafficking.

At its second meeting from 16 to 19 June 2009, GRETA prepared the first monitoring round of the Convention. As a result, GRETA adopted its rules of procedure for evaluating implementation of the Convention by the parties and also started preparing a questionnaire for the first evaluation.

➤eucrim ID=0901111

Rules on the Application of *ne bis in idem* in the EU

Is Further Legislative Action Required?

Dr. Katalin Ligeti

Within a relatively short period of time, the European Court of Justice (ECJ) has had the opportunity to address the issue of a transnational *ne bis in idem* principle in several cases in the EU, and a legislative proposal was also put forward on this matter.[1] The increased attention paid to the transnational application of the *ne bis in idem* principle shows that the judicial authorities of the EU Member States are facing a growing number of cases that simultaneously involve several jurisdictions.

The present article focuses on the *ne bis in idem* principle in the context of an Area of Freedom, Security and Justice.[2] Taking as a starting point the rationale and content of *ne bis in idem* as a principle of national criminal law, the rules for its transnational application shall be examined. The current legal framework for the transnational application of the *ne bis in idem* principle in the EU is provided by Art. 54–58 of the Convention on the Implementation of the Schengen Agreement (CISA). The latter subjects the application of the *ne bis in idem* principle to certain exemptions and thereby curtails its fundamental right character.

With a view to the present stage of integration, it is argued in the following that the wording of Art. 54–58 of the CISA and the respective case law of the ECJ provide incomplete rules for the application of *ne bis in idem* in the interstate relations of the EU Member States. In order to properly balance the values of legal certainty and material justice at the transnational level, further legislative action is required.

I. The Rationale and Content of the *ne bis in idem* Principle in the National Legal Systems

The rationale for the *ne bis in idem* principle is complex. It comprises aspects relating to the rule of law as well as economic factors. Emanating from the rule of law in criminal law, *ne bis in idem* is mainly regarded as a means of protecting the individual against possible abuses by the State of its *ius puniendi*.[3] The State should not be allowed to make repeated attempts to convict an individual for an alleged offence. At the same time, the principle of *ne bis in idem* is also strongly connected to the legitimacy of the legal system, especially to legal certainty and equity.[4] Based on the idea of "*aequitas*", the individual, once having been subjected to the distress of criminal proceedings, should remain secure from further embarrassment. From the point of view of legal certainty, all European States recognise that once ordinary appellate remedies have been exhausted, or the relevant time limit for appeal has expired, a conviction or acquittal is to be regarded as irrevocable, and it acquires the quality of *res judicata*.[5]

Besides the above-cited rationale embedded in the rule of law, the *ne bis in idem* principle may also be based on economic considerations in that it prevents costly multiple prosecutions and creates incentives for efficient coordination between prosecutors.[6] This rationale is also important at the transnational level, where efficient coordination between different jurisdictions must be secured.

The *ne bis in idem* principle contains two different prohibitions: (1) the prohibition of double punishment, i.e., that no one should be punished twice for the same act; and (2) the prohibition of double prosecution, i.e., that no one should have to face more than one prosecution for the same act.[7]

Based on the content described above, the *ne bis in idem* principle, as elaborated in the national legal systems, has three major characteristics. Firstly, it is a principle that is limited to criminal justice.[8] This means that the *ne bis in idem* principle does not, in general, exclude administrative or civil proceedings and sanctioning for an act which has already been dealt with in the criminal justice system. Similarly, previous disciplinary, civil, or administrative convictions usually do not bar criminal proceedings.[9]

Secondly, the *ne bis in idem* principle applies only when the criminal decision has become final and irrevocable, such that no appellate remedy is available.[10] Thus, provisional measures in criminal proceedings or in the pre-trial stage do not have a *ne bis in idem* effect. It is, therefore, generally accepted that final judgements on the merits of the charge (conviction or

acquittal) result in *ne bis in idem*. Meanwhile, it has also become widely recognised that out-of-court settlements common in the criminal procedural law of most national legal systems have the same status as final judgements and also have a *ne bis in idem* effect.[11]

Thirdly, the *ne bis in idem* principle applies in most national legal systems in respect of the same natural person. In those legal systems that recognise the criminal sanctioning of legal entities, it is therefore usually accepted that both the individual and the legal entity may be prosecuted and sanctioned for the same act.

II. The Transnational *ne bis in idem* Principle in the European Union

As European integration advanced and the creation of an Area of Freedom, Security and Justice became more and more tangible, the concurrence among national criminal jurisdictions of the Member States turned into a daily problem of law enforcement in the European Union. In order to avoid double prosecutions, Art. 54 of the CISA contained an explicit rule on the transnational application of *ne bis in idem*.

According to Art. 54 of the CISA: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

It follows from the wording of Art. 54 that it does not limit the *ne bis in idem* principle to the prohibition of double punishment, but also forbids double prosecution. Art. 55 of the CISA, however, waters down this general prohibition by allowing for three categories of exemptions from the application of Art. 54:

- The *territoriality exception*, according to which acts are exempted that took place in whole or in part in one Member State's own territory;
- The *national security exception*, according to which acts that constitute an offence against national security or other equally essential interests of a Member State are exempted;
- The *national official exception*, according to which acts that have been committed by a Member State's own officials in violation of the duties of their office, are exempted.[12]

Even in cases where a Member States resorts to one of these three exemptions, it must nevertheless apply the principle of deduction according to Art. 56 of the CISA.

1. General rules of interpretation

The preliminary rulings delivered by the ECJ on the interpretation of Art. 54 of the CISA crystallise mutual trust and safeguarding the right to freedom of movement as general rules for the transnational application of the *ne bis in idem* principle.[13]

In this sense, the ECJ has repeatedly emphasised that Art. 54–58 of the CISA are based on Art. 34 and 31 of the Treaty on European Union (TEU) and thereby imply that Member States have mutual trust in each other's criminal justice systems.[14] Mutual trust means that each Member State "recognises the criminal law in force in other Member States even when the outcome would be different if its own national law were applied."[15] The concept of mutual trust was thus employed by the ECJ to underpin that "the application of Art. 54 of the CISA [is not] made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States."[16] Separating the application of the *ne bis in idem* principle from the national criminal laws of the Member States opened the possibility for the ECJ to set autonomous standards for its transnational application.

The argumentation of the ECJ makes clear that the Court considers the *ne bis in idem* principle enshrined in Art. 54 of the CISA to be based on the concept of mutual recognition. In the widest sense, mutual recognition means that Member States recognise the criminal decisions of other Member States without any further formalities, thus giving them the status of a domestic decision. Though this viewpoint has been hotly debated among academics,[17] the ECJ's case law on the *ne bis in idem* principle leaves no doubt that the Court utilises the concept of mutual recognition in connection with the *ne bis in idem* principle as a means of identifying rules for the coexistence of multiple criminal jurisdictions in the European Union. Interpreting the *ne bis in idem* principle enshrined in Art. 54 of the CISA on the basis of the mutual recognition principle has far-reaching consequences for the interpretation of the elements of the *ne bis in idem* principle, as will be shown below in Sections 2–4.

Before looking into the elements of the *ne bis in idem* principle, attention should be drawn to the second general guideline of its application as developed by the ECJ. The ECJ already emphasised in its first decision on Art. 54 of the CISA that there is an intrinsic link between Art. 54 of the CISA and the free movement of persons:[18] the "right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on

the basis that the legal system of that Member State treats the act concerned as a separate offence." The fundamental right to free movement could be undermined if individuals had to face several prosecutions for the same criminal behaviour within the European Union. The Court held that the objective of Art. 54 of the CISA is "to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement."[19]

This "pro-free movement" approach, was however, streamlined and further elaborated by the ECJ in *Miraglia*. The ECJ established that the objectives of the TEU must be properly taken into account when interpreting the *ne bis in idem* principle. Consequently, in an Area of Freedom, Security and Justice, "the free movement of persons is assured in conjunction with appropriate measures with respect to […] prevention and combating of crime."[20] The right to freedom of movement, therefore, cannot run counter to the objective of "providing citizens with a high level of safety" as proclaimed in Art. 29 of the TEU. The prevention and combating of crime may, under certain conditions, restrain the right to freedom of movement and thus the *ne bis in idem* principle. The interpretation of the *ne bis in idem* principle has to balance these conflicting interests.

2. The meaning of *idem* for the purposes of Art. 54 of the CISA

Although all official language versions of the CISA refer to the "same acts",[21] the interpretation of this phrase triggered quite some academic debate even before the ECJ had the opportunity to address this question. The central debate on *idem* was whether "same acts" should be understood in a legal sense, as acts constituting the same offence in two or more systems,[22] or in a (broader) factual sense as "same facts",[23] or as a combination of these two as the same protected legal interest.[24]

Relying on the concept of mutual recognition and freedom of movement, the ECJ clarified in *Van Esbroeck*[25] that the only relevant criterion for the purposes of Art. 54 of the CISA is that there should be an "identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject matter."[26] The Court went on to emphasise that "[b]ecause there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States."[27] Viewed from the perspective of mutual recognition and free movement, the ECJ strived to develop rules of an autonomous interpretation of Art. 54 of the CISA that does not depend on the national criminal laws of the Member States.[28] Such autonomous interpretation was enabled only by a factual approach.

The ECJ reaffirmed and further outlined its approach in *Van Straaten*,[29] where it pronounced that a lack of complete identity of the material facts does not prevent the application of the *ne bis in idem* principle.[30] For example, the place of commission may change (as, e.g., in *Van Esbroeck*) or the commission may stretch over a longer period of time (as, e.g., in *Kraaijenbrink*).

To help the task of the national judge, the ECJ put the *Van Esbroeck* standard in a concrete context with regard to the illegal smuggling of narcotic substances, contraband tobacco, and other goods. The ECJ explicitly stated "that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54 of the CISA."[31] The ECJ has, however, always underlined that the definitive assessment as to whether the concrete circumstances constitute the same act for the purposes of Art. 54 of the CISA is the task of the competent national courts.

3. The meaning of "finally disposed of" for the purposes of Art. 54 of the CISA

The wording of Art. 54 of the CISA concerning the types of decision that should bar further prosecution is not homogenous in the various language versions: in German *rechtskräftig abgeurteilt*, in Dutch *onherroepelijk vonnis*, in French *définitivement jugée*. There has been a wide consensus that conviction or acquittal pronounced by a criminal court falls within the scope of Art. 54 of the CISA. It was, however, unclear, whether Art. 54 of the CISA requires *res iudicata* in a material sense, i.e., that the decision of the first prosecuting State definitively bars further prosecution at the national level.[32] In addition, there have been differing opinions regarding whether out-of-court settlements and procedural agreements also fall within the scope of the *ne bis in idem* principle.[33]

The first preliminary reference to the types of decisions having a *ne bis in idem* effect concerned out-of-court settlements.[34] Here, the ECJ held that Art. 54 of the CISA neither requires that a court is involved in the procedure nor that the decision in which the procedure culminates takes the form of a judicial decision.[35] According to the Court, a "decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned"[36] is sufficient to trigger a *ne bis in idem* effect if the accused undertakes "to perform certain obligations prescribed by the Public Prosecutor,

[which] penalises the unlawful conduct"[37] allegedly committed by him/her. Thus, the *ne bis in idem* principle laid down in Art. 54 of the CISA "also applies to procedures whereby […] the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor."[38]

The very broad interpretation given in *Gözütök and Brügge* to the phrase "finally disposed of" as part of the *ne bis in idem* principle suggested that this principle may also apply to situations where national law bars further prosecution based on a purely formalistic ground. This was at issue in *Miraglia*[39] where the ECJ explicitly held that Art. 54 of the CISA does not apply "to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case."

In its examination of the case law of the ECJ, *Wassmer* rightly concluded that, in *Miraglia*, the ECJ did not made the examination of the merits of the case an absolute condition for the application of Art. 54 of the CISA.[40] It rather aimed at streamlining its ruling in *Gözütök and Brügge* so as to exclude from the scope of the *ne bis in idem* provision decisions that "clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union […] namely: to maintain and develop the Union as an Area of Freedom, Security and Justice."[41]

The fact that situations – in which national law bars further prosecution based on a purely formalistic ground – may be covered by Art. 54 of the CISA as long as they do run counter to the objectives of the TEU is confirmed by two further rulings in *Van Straaten*[42] and *Gasparini*.[43] In *Van Straaten,* the Court held that the *ne bis in idem* principle applies in respect of a decision of the judicial authorities of the Member States by which the accused is acquitted for lack of evidence.[44] The ECJ stipulated that "in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations"[45] and would jeopardise the exercise of the right to freedom of movement.[46] Moreover, the ECJ mentioned that – taking into account its ruling in *Miraglia* – an acquittal for lack of evidence presupposes the assessment of the merits of the case.[47]

Similarly, the ECJ ruled in *Gasparini* that the *ne bis in idem* principle also applies in respect of a court's decision of a Member State by which the accused is finally acquitted because prosecution of the offence is time-barred.[48] To arrive at this conclusion, the ECJ recalled again the aim of Art. 54 of the CISA, namely to ensure the exercise of the right of free movement,[49] which would be undermined by a second prosecution. In *Gasparini*, the ECJ again adopted a "pro-free movement and mutual trust reasoning" and decided not to follow the suggestions of the Advocate General. The latter argued, by referring to *Miraglia*, that since an acquittal due to lapse of time implies that there had been no assessment whatsoever of the unlawful conduct of the defendant, such an acquittal should not bar a second prosecution in another Member State.[50] Contrary to this, the ECJ clarified in *Gasparini* that the assessment of the merits of the case is not a general condition for the transnational application of the *ne bis in idem* principle. It reconfirmed that the interpretation of Art. 54 of the CISA may by no means depend on the national criminal laws of the Member States.

Finally, the ECJ clarified in its recent ruling in *Turansky* that "a decision which does not, under the law of the first [prosecuting State] definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State."[51] In line with its decision in *Gözütök and Brügge*, the Court has accepted in *Turansky* that a final decision can come from a police authority that examined the case. However, in *Turansky*, the decision of the Slovak police authority did not preclude under Slovak law the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic. Consequently, the decision of the Slovak police authority did not preclude proceedings in another Member State. The Court thereby underlined the importance of *res judicata* in a material sense for the application of Art. 54 of the CISA.

4. The enforcement condition in Art. 54 of the CISA

According to Art. 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies only if "it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." The reason for the enforcement condition in Art. 54 of the CISA is to avoid having those who successfully fled from justice to another country invoke the *ne bis in idem* principle and thereby impede punishment.

In *Kretzinger,* the referring court asked whether a suspended custodial sentence may be regarded as a sentence that is enforced, or is actually in the process of being enforced.[52] The Court confirmed that since "a suspended custodial sentence penalises the unlawful conduct of a convicted person, it con-

stitutes a penalty within the meaning of Art. 54 of the CISA. That penalty must be regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period."[53] The ECJ also noted that the very wording of Art. 54 of the CISA allows for taking into account only sanctions applied after the trial of the person in question has been finally disposed of. Therefore, procedural coercive measures preceding the final judgment, such as, e.g., police custody and detention on remand pending trial, fall outside the scope of the *ne bis in idem* principle.[54]

Especially with a view to the above-mentioned reason for the enforcement condition – namely that those who successfully fled from justice to another country should not be in a position to invoke the *ne bis in idem* principle –, the question arose as to whether Art. 54 of the CISA should be understood in such a way that the penalty imposed by the sentencing State must have been capable of being enforced at least on the date it was imposed. This was the issue of the reference for a preliminary ruling in *Bourquain*, where the ECJ decided "that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never […] have been directly enforced."[55] In this way, the Court once again underlined that the EU–wide application of the *ne bis in idem* principle cannot depend on the national criminal laws of the Member States.

III. Is Further Legislative Action on *ne bis in idem* Necessary?

The overall jurisprudence of the European Court of Justice on the interpretation of Art. 54 of the CISA has developed a set of rules that is not dependent on the national criminal laws of the Member States. By rejecting categories of the national legal systems, the Court has given preference to the exercise of the right to free movement, which may not be hindered by the national criminal laws of the Member States.[56] It is new in the Court's approach, however, that the *ne bis in idem* principle in the interstate relations of the Member States must be related to mutual recognition. The Court reaffirms thereby that Member States are obliged to recognise decisions of other Member States even if there are substantial differences between their legal systems. According to the Court, such recognition should prevail even if it was adopted on purely formalistic grounds as long as recognition of a criminal decision of another Member State does not run counter to the objectives of the Treaty. Such formalistic grounds may derive both from the substantive and procedural criminal laws of the Member States, such as, e.g., age of criminal responsibility, lapse of time, pardon, or lack of evidence. The ECJ does not distinguish between substantive and procedural grounds of termination; if one Member State finally terminates the prosecution of the defendant, such a decision seems to trigger the application of *ne bis in idem* in other Member States, except for cases in which it would run counter to the objectives of the TEU.

The *Commission Staff Working Document* drawn up in 2005 raised the dilemma that the balance struck by the ECJ in interpreting the *ne bis in idem* principle might lead to undesirable consequences in cases where the discharging authority has ignored relevant interests of another Member State.[57] Therefore, the Commission is seeking ways of protecting individuals from multiple prosecutions without their having to resort to *ne bis in idem*.[58] Indeed, one major weakness of the principle from the viewpoint of the defendant is that it does not, as currently framed, actually prevent multiple prosecutions. In order to strengthen the fundamental rights character of the *ne bis in idem* principle, the Commission suggests removing the exceptions and conditions contained in Art. 54–55 of the CISA.

Even though one may agree with the Commission that the optional derogations based on the territoriality, national security, and national official exemptions contained in Art. 55 of the CISA[59] unjustifiably prioritise the interests of national sovereignty and criminal prosecution over the fundamental rights of the person prosecuted and thereby run contrary to the objective of an "area of justice" as proclaimed in Art. 29 of the TEU, lifting the derogations will not solve the remaining problems of the *ne bis in idem* principle. It is not only the details of the concrete application of the *ne bis in idem* principle that are still unclear, but also the more fundamental issue concerning the rationale of *ne bis in idem* at the transnational level. As has been explained earlier, the *ne bis in idem* principle was founded in the national legal systems upon the twofold basis of securing due process rights for the individual and securing the finality of judgments in order to legitimise the legal order. The jurisprudence of the ECJ has not yet struck the balance between the contending values of legal certainty and material justice at the transnational level. In light of the case law on *idem,* it is not evident whether all situations in which national law bars further prosecution based on a purely formalistic ground are covered by Art. 54 of the CISA as long as they are in line with the objectives of the TEU. Or would the ECJ only accept such decisions provided that "the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor?" In other words, it is unclear which weight the Court attributes to *res judicata* and legal certainty. In this respect, the *Turansky* judgment still leaves open whether the final decision of an investigating body

other than the Public Prosecutor – such as, e.g., the police – could result in *ne bis in idem,* provided that such a decision bars further prosecution at the national level.

IV. Conclusion

It clearly emerges from the analysis of the jurisprudence that the ECJ faces great difficulties when trying to define rules for the transnational application of legal principles. This is partly a consequence of the nature of the preliminary ruling procedure where the ECJ may only decide on the very legal problem referred to it. Therefore, the suggestion of the Commission to adopt more coherent and detailed rules on the conflicts of jurisdiction and the *ne bis in idem* principle is certainly well founded. The two legislative proposals[60] brought forward so far have, however, ended in talk only. The very recent Presidency proposal for a framework decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings[61] does not contain stringent criteria for selecting jurisdiction either. Rather, it is limited to the strengthening of cooperation and coordination between the Member States. The further specification of the transnational *ne bis in idem* principle therefore remains the job of the ECJ.

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1 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle. *O.J. C 100 of 26 April 2003, p. 24.*
2 For the application of the *ne bis in idem* principle in the EC internal market, see *T. Liebau,* „Ne bis in idem" in Europa, Berlin Vienna Zurich 2005.
3 The Law Commission, Double Jeopardy and Prosecution Appeals, Report, Law Com No. 267, pp. 37-38. Available at www.lawcom.gov.uk.
4 *F.C. Schröder,* Die Rechtsnatur des Grundsatzes „ne bis in idem". JuS 1997, p. 227.
5 *H.-H. Kühne,* Anmerkung zum EuGH Urteil v. 11.2.2003. JZ 2003, p. 306. The finality of criminal proceedings may be outweighed only exceptionally and usually in favour of the affected individual. Some national legal systems, however, permit the extraordinary reopening of criminal cases even to the detriment of the sentenced person, e.g., Hungary (*B. Gellér/N. Kis/P. Polt,* Hungarian Report. RIDP 2002/3-4, pp. 995-996.) and Finland (*R. Lahti,* Finnish national report. RIDP 2002/3-4, p. 906).
6 *W.P.J. Wils,* The principle of ne bis in idem in EC antitrust enforcement: a legal and economic analysis. World Competition 2003/2, p. 136.
7 *H. van der Wilt,* The European Arrest Warrant and the Principle *Ne Bis In Idem.* In: R. Blexton (ed.), Handbook on the European Arrest Warrant. The Hague 2005, p. 99.
8 *J.L. de la Cuesta,* General Report on Concurrent National and International Criminal Jurisdiction and the Principle *ne bis in idem.* RIDP 2002/3-4, p. 712.
9 The autonomous interpretation of a criminal charge by the European Court of Human Rights has induced some national legal orders to oblige the prosecuting authorities to choose between criminal and administrative proceedings in cases where the same act can be sanctioned both ways. See *A. Kilp/H. van der Wilt,* Dutch national report. RIDP 2002/3-4, p. 1109.
10 In cases involving an extraordinary reopening of the prosecution, *ne bis in idem* does not block the opening of a new prosecution, but it usually impedes double punishment. The principle of deduction obliges the court to deduct from the sanction the punishment imposed in the first decision.
11 *H.-H. Kühne, op. cit.* (note 5).
12 Of the EU Member States, AT, DE, DK, EL, FI, SE, and UK have made use of the territoriality exemption and four of them (AT, DK, EL, FI) also of the national security exemption. See Commission Staff Working Document SEC (2005) 1767, p. 47.
13 *M. Wassmer,* The principle of ne bis in idem. RIDP 2006/1-2, p. 123. For the judgments, cited in the following, and relevant developments regarding the *ne bis in idem* principle, see also the news section of eucrim (1-2/2006, pp.16-17; 3-4/2006, pp. 64-65; 1-2/2007, pp. 33-34, 3-4/2007, p. 104; 1-2/2008, pp. 31-32).
14 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 32. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 29; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.
15 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 33. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 30; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 43; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 30; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.
16 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 32. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 29; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 36.
17 There is a debate on whether one needs to first harmonise substantive and procedural criminal law in order to be able to mutually recognise criminal decisions made by foreign judicial authorities. *S. Peers,* Mutual recognition and criminal law in the European Union: Has the Council got it wrong? CMLR 2004/41, pp. 5-36.
18 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 38. Recalled in C-469/03 *Miraglia* [2005] ECR I-2009, para. 32; C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 34; C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 46., 57; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 27; C-491/07 *Turansky*, Judgement of 22 December 2008, para. 41.
19 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 38.
20 C-469/03 *Miraglia* [2005] ECR I-2009, paragraph 34.
21 In Dutch "kann terzake niet meer worden vervolgd wegens dezelfde *feiten*"; in French "ne peut, pour les mêmes *faits*, être poursuivie" and in German "wegen derselben *Tat* nicht verfolgt werden".
22 Similarly, e.g., *Wyngaert* and *Stessens* suggest that "Without expressing an opinion as to the exact meaning of Art. 54 of the Schengen Convention, any general international *non bis in idem* provision should, in principle, *bar only new prosecutions for the same offence, not for the same facts*." *C. Van den Wyngaert/ G. Stessens,* The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions, ICLQ 1999, p. 791.
23 A similar approach was adopted in the Freiburg Proposal, according to which *idem* is defined by the objective criteria of the *human behaviour* at the *same place* and at the *same time.* Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union. MPI Freiburg 2003, p. 23.
24 *K. Ambos,* Internationales Strafrecht. Munich 2006, p. 437; *K. Ligeti,* Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union. Berlin 2005, pp. 107-108.
25 C-436/04 *Van Esbroek* [2006] ECR I-2333, paras. 14-17.
26 C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 38. Recalled in C-150/05 *Van Straaten* [2006] ECR I-9327, para. 48; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 54; C-367/05 *Kraaijenbrink*, Judgement of 18 July 2007, para. 26.
27 C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 35. Recalled in C-150/05 *Van Straaten* [2006] ECR I-9327, para. 48; C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 29. The Court thereby chose to interpret *ne bis in idem* more broadly than it had previously done in the area of EC law, and it held that 'unity of the legal interest protected' is not required for the application of Art. 54 of the CISA.
28 In support of an autonomous interpretation, the ECJ also underlined that the wording of Art. 54 of the CISA differs from that in other international instruments which enshrine the *ne bis in idem* principle. C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 28; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 42.
29 C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 19-23.

30 The ECJ contested that "[i]n case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the act in the two States are not required to be identical. It is […] possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked." C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 50-51.
31 C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 35 contains a summary of the case law of the Court on the meaning of "same act" for the purposes of Art. 54 of the CISA.
32 *H. Radtke/D. Busch,* Transnationaler Strafklageverbrauch in der Europäischen Union, NStZ 2003, p. 284.
33 For different opinions, see *B. Hecker,* Das Prinzip „*ne bis in idem*" im Schengener Rechtsraum, StV 2001, p. 309; *K. Ambos, op. cit.* (note 24), p. 429.
34 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, paras. 9-21.
35 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 31.
36 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 28.
37 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 29.
38 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 48.
39 C-469/03 *Miraglia* [2005] ECR I-2009, paras. 13-23.
40 *M. Wassmer, op. cit.*, p. 126.
41 C-469/03 *Miraglia* [2005] ECR I-2009, para. 34.
42 C-150/05 *Van Straaten* [2006] ECR I-9327.
43 C-467/04 *Gasparini and Others* [2006] ECR I-9199.
44 C-150/05 *Van Straaten* [2006] ECR I-9327, para. 61.
45 C-150/05 *Van Straaten* [2006] ECR I-9327, para. 59.
46 C-150/05 *Van Straaten* [2006] ECR I-9327, para. 58. Contrary to the national criminal laws of the Member States that, under certain circumstances, allow for extraordinary revision of *res judicata* in order to rectify judicial wrongdoing, such an extraordinary remedy is not available in the interstate relations of the Member States. Therefore, if a Member State terminates prosecution of the defendant due to lack of evidence, no other Member States may prosecute the defendant for the same facts even if they dispose of the necessary evidence. In such scenarios, material justice may only be satisfied in the first prosecuting State, which may reopen the case if it receives the evidence in question from abroad.
47 The Court underlined that in *Van Straaten* there was no need to deliver a general ruling on whether an acquittal that is not based on a determination of the merits of the case may fall within Art. 54 of the CISA. C-150/05 *Van Straaten* [2006] ECR I-9327, para. 60.
48 C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 33.
49 C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 27.
50 The Advocate General in *Gasparini* argued that "a distinction can and should be drawn between trusting other Member States' criminal proceedings in general (including such matters as fair trial guarantees, the substantive delineation of offences and rules on production and admissibility of evidence), on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time-barred, on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States' criminal law. The second is tantamount to de facto harmonisation around the lowest common denominator." Opinion of the Advocate General of 15 June 2006, Case C-467/04, para. 109.
51 C-491/07 *Turansky*, Judgement of 22 December 2008, para. 36.
52 C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 38.
53 C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 42.
54 C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 49.
55 C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 52.
56 This "free movement" approach is in line with the previous case law of the Court, according to which "[a]lthough in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law." C-348/96 *Donatella Calfa* [1999] ECR-I 11, para. 17.
57 Commission Staff Working Document SEC (2005) 1767, p. 55.
58 In the Commission's view, the only way to more efficiently solve cases that have links to more than one jurisdiction would be to regulate how and when Member States are entitled to exercise their criminal jurisdiction. Green Paper on Conflicts of Jurisdiction and the Principle of *Ne bis in Idem* in Criminal Proceedings, COM (2005) 696 final = eucrim 1-2/2006, p. 16.
59 Critical remarks on national derogations by *F. Zeder,* Verbot der Doppelbestrafung (ne bis in idem) in der EU: Fragen, Fragen, Fragen – und einige Antworten, AnwBl 2007, p. 465.
60 Initiative of the Hellenic Republic*, op. cit.* (note 1) *and* Green Paper, *op. cit.* (note 58).
61 SN 1123/09 of 14 January 2009, Council of the European Union. For this proposal, see also the reports in the news section of this issue.

Mutual Recognition of Judicial Decisions in Criminal Matters with Regard to Probation Measures and Alternative Sanctions

Hanna Kuczyńska

I. Creation of an Area of Mutual Recognition of Judicial Decisions in Criminal Matters

The adoption of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions is a next step in the process of creating a common criminal procedural area within the European Union.[1] The principle of mutual recognition is fast becoming a foundation of cooperation in criminal matters among the EU Member States. From the present stage of development of the European Union, it has become clear that it is necessary to base cooperation on measures of a new quality and accept the idea of equivalency of decisions in criminal matters in all the EU Member States. It has become an accepted legal measure to

create a common area of criminal proceedings within the law of the European Union. However, despite wide acceptance of this idea, there is no uniform definition of this particular notion.[2] There is no legal act regulating, in a coherent way, the entire area of cooperation that would indicate which groups of legal decisions should enjoy the privilege of mutual recognition and which organs should decide on the binding force of such decisions. There is no doubt that this measure of cooperation should be defined more precisely. Presently, this principle has not yet been systematically introduced.[3]

Although the principle of mutual recognition is recognised as a foundation of cooperation, it has become operative only as a result of the introduction of legal acts paving the way for this specific form of cooperation. The present practice is based on adopting several legal regulations relating only to specific problems – commonly those most pressing in cooperation. This method of legislation results in a fragmentary regulation and cannot substitute a coherent system of mutual recognition. Therefore, the principle of mutual recognition is applied only in several areas of cooperation in criminal matters, such as: arrest warrants, freezing of property, execution of fines. However, the analysis of the relevant non-binding Communications of the Commission leads to the conclusion that all areas of cooperation among Member States should be based on mutual recognition of decisions – starting from the state of investigation till final decisions.[4] The envisaged instruments let us presume the direction in which the next initiatives will go.

II. The Development of Judicial Cooperation Regarding Probation Law

The execution of final decisions in criminal matters is the most advanced form of mutual recognition.[5] Final decisions (sentences, verdicts) should be executed without the need to adapt them – in a procedure of conversion – into the frameworks of the executing state's law.[6] The principle of mutual recognition should apply to all forms of final decisions: sentencing to fines, imprisonment, applying probation, verdicts of not guilty as well as sentences applying alternative sanctions, such as community work or the deprivation of qualifications.

The latest development in this area, ultimately regulating the functioning of the mutual recognition of judgments on probation and alternative sanctions, is the above-mentioned Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions. Member States should take the necessary steps to implement the provisions of the Framework Decision by 6 December 2011.

Until now, the operating instruments on probation were those adopted by the Council of Europe; the most important of them is the Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders,[7] which has been ratified by 12 Member States (with numerous reservations). This Convention was intended to provide for those conditionally released to be able to leave the territory of the sentencing state under the condition that adequate control over these persons would be executed. The main idea was to offer assistance in the process of social rehabilitation. However, this cooperation was limited by the usual conditions of cooperation applied by the Council of Europe: double criminality and the non-political character of the offence. The Council of Europe established a certain pattern of cooperation, which has become common in the cooperation among the Member States. The basic rule provides for the execution only after applying the procedure of *exequatur*, either in its simple form or in the form of conversion of a decision. The procedure of *exequatur* is a special procedure for recognition and enforcement of foreign judgments according to which a foreign judgment must be modified in order to be declared enforceable. Now, with the new Framework Decision, the Member States of the European Union have agreed that decisions relating to probation should be executed without the procedure of *exequatur*. The Framework Decision is to replace the Council of Europe Convention from 6 December 2011 (Art. 23(1)).

Within the framework of the European Union, several attempts were made to facilitate the application of the principle of mutual recognition in the area of probation and alternative sanctions beforehand. The Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union[8] of 2004 focuses on areas where a need has been identified to develop further harmonisation among the Member States' legislation. It notes, on the basis of a comparative analysis of the Member States' legislation on the various modes of enforcement of custodial penalties, that states have a relatively large variety of modes of enforcement, allowing a gradual transition from prison to freedom. The approach generally stems from the desire to make use of forms of punishment that are more appropriate than firm imprisonment, as a means of supporting the offender's reintegration into society, as well as from problems linked to overcrowding in prisons. The most widespread form is the suspended sentence, available in almost all the Member States. Electronic surveillance is applied in six Member States and is under testing or consideration in a further five. All the other instruments (suspended or deferred sentencing, day-release, sentences served in installments, and home detention) are known and applied only in a minority of Member States. However, the Green Paper considered only existing possibilities of harmonisation, not providing for any measure to solve the problem of diversities.

III. The Transnational Handling of Disqualifications

The above-mentioned Green Paper also considers the problem of disqualifications, which can be issued as an additional or independent sanction, as an alternative to sanctions connected with the deprivation of liberty. For the purpose of the Green Paper, disqualification means a penalty withdrawing or restricting rights or a preventive measure, whereby a natural or legal person is prohibited, for a limited or unlimited period, from exercising certain rights, occupying a position, going to certain places, or doing certain things.[9] It is usually connected with the deprivation or limiting of rights – such as the right to be present in specified places, take up certain occupations – e.g., connected with taking care of children – for a given time. This problem was further reflected on in the Communication of the Commission to the Council and Parliament on disqualifications arising from criminal convictions in the European Union of 21 February 2006.[10] It was stressed that the efficiency of decisions concerning the deprivation of rights depends on their widespread recognition in all the Member States. The Commission planned to facilitate recognition of such decisions, admitting at the same time that it might be difficult due to huge differences among the legal systems. Another difficulty, namely the lack of necessary information on existing decisions related to disqualifications, was pointed out.

So far, the area of recognition of alternative sanctions has been regulated in a fragmentary manner. The Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography,[11] for instance, requires the adoption of measures guaranteeing that persons sentenced for crimes involving child abuse will be deprived of the right to carry out occupations related to taking care of children. Presently, from the existing measures, we can see that there is no uniform means of information exchange among the Member States on the topic of disqualifications. Moreover, such decisions are not always present in national criminal records. A person deprived of a driving license or the right to engage in certain occupations can proceed with these activities in another Member State. In a situation involving a factual lack of boundaries and the freedom of movement, such a situation should not be accepted. There can be no doubt that, in order to make a sanction truly effective, information about disqualifications should be available in all the Member States.[12]

A proposition to solve the problems resulting from lack of information was contained in an Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation among European Union Member States regarding disqualifications of 19 September 2002.[13] According to the proposition, each Member State would have the possibility to forward information in relation to disqualifications to another Member State on the latter's request. Even without a request to forward data on such convictions, relevant information concerning convictions of citizens of a Member State should be forwarded to the requesting state. Such an obligation would function only for relations between two states, and information about disqualifications would be shared only between the two states concerned, not in all the European Union. This initiative was never adopted, and the only instrument concerning disqualifications that exists among Member States is the Council of Europe Convention on driving disqualifications of 17 June 1998.[14] However, the Convention does not mention mutual recognition of such alternative sanctions.

IV. Mutual Recognition of Probation Decisions with a View to Supervision of Probation Measures and Alternative Sanctions

1. Objectives of the Framework Decision

The Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions (in the following: "the Framework Decision") aims at providing for a more effective instrument as it is based on the principle of mutual recognition. In this context, it is noteworthy that the Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters, imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union, was adopted on the same day, 27 November 2008.[15] Together, these two Framework Decisions form a coherent area of legislation in the field of recognition of final judgments, regardless of their nature: either related to the deprivation of liberty or to alternative solutions. The Framework Decisions have certain advantages over previous Conventions. First, regulation in the form of a framework decision is more flexible and proved to be more efficient than legislating in the form of a Convention. Secondly, the scope of application of framework decisions is much wider and adjusted to present requirements of cooperation.

The main goal of the Framework Decision on probation measures and alternative sanctions is to build foundations for the recognition of two types of decisions: measures connected to probation *and* sanctions alternative to the deprivation of liberty. It was intended that the provisions will enable the sentenced persons to "preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with a view to preventing recidivism thus paying due regard to the protection of victims and the general public."[16] The provisions are to facilitate the social rehabilitation of sentenced persons and facilitate the application of probative measures and alternative

sanctions in case of offenders who do not live in the state of conviction. The aim is to resolve the cross-border nature of such situations as well as ensure the execution of measures connected to probation and sanctions alternative to the deprivation of liberty on a Union-wide scale. The characteristic feature is the need to extend supervision over the execution of probation measures and alternative sanctions in states other than only the state issuing such a decision.

2. The scope of application

The Framework Decision applies only to final judgments or orders issued by a court establishing the guilt of a natural person (Art. 2 (1)). These judgments must include solutions regarding probation measures or alternative sanctions, irrespective of whether, in the relevant Member State, such decisions are included in the judgment itself or in a separate decision. Such decisions are grouped into four types (Art. 2): The first type relates to custodial sentences or measures involving the deprivation of liberty if a conditional release is granted on the basis of that judgment or by a subsequent probation decision (Art. 2 (1(a)) and Art. 2 (5)). Second, there are suspended sentences, i.e., measures involving the deprivation of liberty, the execution of which is conditionally suspended, wholly or in part (Art. 2 (2)). Third, there are conditional sentences – judgments in which the imposition of a sentence has been conditionally deferred by imposing one or more probation measures instead of a custodial sentence or measure involving a deprivation of liberty (Art. 2 (3)).[17] The fourth type relates to alternative sanctions – defined in the Framework Decision as sanctions other than a custodial sentence involving the deprivation of liberty or a financial penalty, imposing an obligation or instruction (Art. 2 (4)). The last category is the widest – it concerns all other measures that exist in national systems of law.

As regards the types of probation measures and alternative sanctions to be recognised, the Framework Decision does not distinguish between alternative sanctions and probation measures and joins them into one group (Art. 4). It includes in this group:

- an obligation for the sentenced person to inform a specific authority of any change of residence or workplace;
- an obligation not to enter certain localities, places, or areas defined in the issuing or executing state;
- an obligation containing limitations on leaving the territory of the executing state, instructions relating to behaviour, residence, education and training, leisure activities or containing limitations on or modalities of carrying out a professional activity;
- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons;
- an obligation to avoid contact with specific objects, which have been used or are likely to be used by the sentenced person with a view to committing a criminal offence;
- an obligation to compensate financially for the injury caused by the offence and/or an obligation to provide proof of compliance with such an obligation;
- an obligation to carry out community service;
- an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;
- an obligation to undergo therapeutic treatment or treatment for addiction.

Additionally, Member States should provide information about other probation measures and alternative sanctions that they are prepared to supervise. The recitals of the Framework Decision give further information on what type of measures should be subject to mutual recognition. Accordingly, probation measures and alternative sanctions include, inter alia: orders relating to behaviour (such as the obligation to cease 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 take a "safe-driving course"), leisure activities (such as an obligation to cease playing or attending certain sports) as well as limitations on or modalities of carrying out a professional activity (such as an obligation to seek a professional activity in a different working environment).[18] The set of probation measures may relate to the use of electronic monitoring, although not in all the Member States such solutions have been adopted. The decision does not apply to the execution of sentences imposing custodial sentences or measures relating to the deprivation of liberty as well as sentences imposing financial penalties and confiscation orders as they fall within the scope of other Framework Decisions.

3. The procedure of execution of probation decisions

The basic rule of the Framework Decision is to make it possible for sentenced persons to forward a judgment accompanied by a probation decision (or only a judgment if it itself contains probation measures) or an alternative sanction to the Member State in which he/she resides (or wants to return to), with the aim of the recognition of this decision (Art. 5). The decision on forwarding the probation decision or alternative sanction should be made by a competent authority of the issuing Member State. Such a decision should be accompanied by a certificate containing essential information about the sentenced person and the decision, and it should be sent to the competent authority of the executing state (Art. 6 (1)). Such authorities,

as mentioned in the Framework Decision, are institutions – judicial or non-judicial – designated by the state if they are competent to take such decisions under national law. If the receiving authority is not competent to take any probation decisions under national law, it should take the necessary measures to forward the matter to the competent authority (Art. 6 (7)). However, the revocation of the suspension of the execution of the judgment or the decision on conditional release, as well as imposition of a custodial sentence or measure involving deprivation of liberty in the case of alternative sanctions or a custodial sentence, if taken by an authority other than a court, should be reviewed, on the request of the person concerned, by a court, or another independent court-like body. The decision may be forwarded to a Member State other than the one of residence under the condition that it agrees to take part in execution of such a decision. Once the executing Member State receives the decision, it is obliged to recognise it and take, without delay, all the necessary steps for the supervision of probation measures or alternative sanctions. The decision as to recognition of the decision should be taken within the time limit of 60 days of receipt of the decision (Art. 12). The state can only postpone the decision of recognition if the certificate accompanying the decision is incomplete, thus making it impossible to execute the decision.

A Member State has the right to refuse recognition of such a decision only in exceptional cases (Art. 11). There are only facultative grounds for refusal, connected with incompleteness of the certificate, violation of *ne bis in idem* principle, the lack of a possibility for execution in the national law, existing immunity, the age of the sentenced person, and rendering the judgment in absentia. Another ground for refusal relates to situations in which the specific probation decision concerns a person who has not been found guilty, such as persons who are mentally ill, and the decision provides for medical/therapeutic treatment that the executing state cannot supervise. Additionally, if the offence has been committed on the territory of the executing state, the recognition can be refused – but only in exceptional cases.

As regards the lack of double criminality, it may be a ground for refusal only in some cases. There is a list of offences which, if they are punishable in the issuing state by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, give rise to recognition of the judgment or probation decision, without verification of the double criminality (Art. 10). The list of offences is well known from other Framework Decisions in the third pillar. Such lists have become a characteristic feature of the instruments relating to mutual recognition. They provide for automatic recognition only in cases of most serious crimes. Other crimes are subject to the condition of double criminality – when, in order to recognise a sentence, the specific behaviour giving rise to this conviction must be penalised by both the requesting state and the requested state. It can certainly expected that, in cases involving suspended sentences and probation measures, the scope of most serious crimes in the number of forwarded decisions is not going to be high.

An important guarantee for the executing state is the possibility to adjust the forwarded decision on the probation measure or alternative sanction to its own legal system (Art. 9 (1)). If the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probating period, is incompatible with the law of the executing state, it may be adapted in line with the nature and duration of the probation measure and alternative sanctions for equivalent offences in national law. The affected Member State should, however, change the decision only in such a way that it still corresponds as much as possible with the one imposed in the issuing state. Furthermore, the duration of such a probation period should not then be lower than the maximum duration provided by the executing state.

4. Supervision of the execution of probation decisions

If the executing state decides to recognise such a decision, it thus agrees to supervise the probation measures or alternative sanctions. As a result, only the rules and procedures of the executing state can be applied to the execution of the probation decision or alternative sanction. The executing state not only supervises the probation measures but also is responsible for taking all other decisions relating to that judgment. The competent authority of the executing state has the jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence, and alternative sanctions, in particular in case of non-compliance with obligations and instructions connected to such a decision (Art. 14). Such decisions may relate to the modification of obligations or instructions, the revocation of the suspension of the execution of the judgment or of the decision on conditional release, and the imposition of a custodial sentence or measures involving the deprivation of liberty in case of an alternative sanction or conditional sentence. The issuing state should be notified of such decisions.

If the probation or alternative sanction decision does not contain a custodial sentence or measure involving the deprivation of liberty in case of non-compliance with the obligations or instructions provided by the issuing state, it implies that the executing state can only take a decision to execute such a modification of obligations or instructions or duration period as is contained in the probation decision. The executing Member

State may decide – at the time of adoption of the Framework Decision or at a later stage – that it does not assume the obligation of supervision as to certain categories of cases. Then, the jurisdiction of the issuing state is in force and the executing state is under an obligation to inform the issuing state of any incompliance of the sentenced person with a probation measure or alternative sanction. There are two types of decisions that can be taken by both the executing and the issuing states: amnesty and pardon (Art. 19). However, only the issuing state may decide on the applications for review of the judgment, which forms the basis for the probation measures or alternative sanctions. In a situation in which new criminal proceedings are taking place in the issuing state, the executing state can transfer the jurisdiction back in respect of the supervision. There is no obligation to supervise if, in fact, it is impossible to supervise the probation measure or alternative sanction because the sentenced person cannot be found in the territory of the executing state.

V. Conclusions

The main disadvantage of the Framework Decision's provisions is the limited obligation to forward information, which relates only to the issuing and executing states of which the sentenced person is a resident. In the situation of still greater mobility of EU citizens, limiting the recognition of probation decisions or alternative measures to only one more state than the issuing one is becoming an outdated solution. Problems may appear if the sentenced person is a resident in several Member States or has no place of residence. Nevertheless, as a common criminal record for all the Member States is still lacking, any other solution would be much more complicated and more difficult to achieve. We can only hope – taking into consideration the latest developments in this area – that such a record will soon be functioning. Even so, we will experience problems with much divergence among the Member States, which record different types of decisions in different types of data bases. In some states, there is no common record for final sentencing decisions and probation or decisions on alternative measures. In addition, once the competent authority of the executing state has recognised the decision forwarded to it and informed the issuing state of its recognition, the issuing state still does not have any competence in relation to supervision of the probation measures or alternative sanctions. Such a situation requires an additional action on the part of the executing state, if the sentenced person decides to return to the issuing state. Then, the competent authority of the executing state may transfer jurisdiction in respect of supervision back to the competent authority of the issuing state, if the sentenced person is no longer a resident on its territory. However, the flexibility of the measures regarding recognition seems to be the main advantage. Not only does mutual recognition relate to a broad range of measures and decisions, but it can still be extended by the decision of a Member State.

On the territory of the European Union, we are experiencing a gradual introduction of the mutual recognition principle. We cannot forget about the fragmentary character of existing legislation though, which results in serious gaps in cooperation. In order to facilitate cooperation in criminal matters, mechanisms should be increasingly standardised. Greater coherency in the adoption of legal acts regulating cooperation would solve most of the obstacles. Many of the existing problems could be also solved thanks to a gradual harmonisation of legal provisions in Member States in the area of criminal law and criminal procedure. The Framework Decision described above will help put an end to the inefficiency of disqualification measures in other states than the state of issuance. Presently, they are enforceable only in one state, namely the state of issuance. The Framework Decision will enable recognition of a judgment accompanied by a probation decision or an alternative sanction in EU Member States other than the state of conviction, When this Framework Decision comes into force, probation decisions and alternative sanctions will become a real discomfort to a criminal who will be subjected to probation measures and restrictions as well as deprived of certain rights in all the states where he chooses to reside. The Framework Decision also forms a part of the criminal procedural area in the European Union and, some day, may also become part of the Code of Criminal Procedure for the European Union if such a codification comes into being.

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1 OJ L 337 of 16 December 2008, p. 102.
2 *G. De Kerchove*, L'espace judiciaire pénal européen après Amsterdam et le sommet de Tampere, in : Vers un espace judiciaire pénal européen, Brussels 2000, p. 14; *A. Weyembergh*, L'avenir des mécanismes de coopération judiciaire pénale entre les Etats membres de l'Union européenne, in: Vers un espace judiciaire pénal européen, Brussels 2000, p. 165.
3 *A. Górski, A. Sakowicz*, Bariery prawne integracji europejskiej w sprawach karnych, Warsaw 2005, p. 8.
4 Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters, COM(2000) 495

final; Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States COM(2005) 195 final.
5 *L. Gardocki,* Zagadnienia internacjonalizacji odpowiedzialności karnej za przestępstwa popełnione za granicą, Warsaw 1979, p. 92; D. Paridaens, Transfer of Enforcement of Criminal Judgments, in: B. Swat, A. Klip (eds.), International Criminal Law in The Netherlands, Freiburg im Breisgau 1997, p. 195.
6 See: *A. Górski, A. Sakowicz,* Bariery prawne ... *op. cit.*, pp. 35-36; G. Stessens, The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security, in: G. de Kerchove, A. Weyembergh (eds.) L'espace pénal européen: enjeux et perspectives, Brussels 2002, p. 95.
7 CETS No. 51. See: *L. Moreillon, A. Willi-Jayet,* Coopération judiciaire pénale dans l'Union européenne, Paris 2005, pp. 305-307; *E. Muller-Rappard, M.C. Bassiouni M,* European Inter-state Co-operation in Criminal Matters. The Council of Europe's Legal Instruments, Dordrecht 1993, pp. 457-480.
8 COM(2004) 334 final.
9 Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (presented by the Commission), COM(2004) 334 final, 2.1.7.
10 COM(2006) 73 final.
11 Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20 January 2004.
12 COM(2005) 195 final.
13 Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member States with regard to disqualifications, OJ C 223 of 19 September 2002.
14 European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle of 28 April 1983, CETS No. 88.
15 OJ L 327 p.27 of 5 December 2008.
16 Recital 8.
17 Probation decisions are judgments granting conditional release or imposing probation measures. Probation measures mean the imposition of obligations and instructions in cases of a suspended sentence or conditional release.
18 Recital 10.

Vers la mort annoncée du juge d'instruction en France

Elisabeth Schneider

This article deals with the reform proposals in France pertaining to the replacement of the investigative judge (juge d'instruction) by a new authority (juge de l'instruction) with the mandate to control the investigations carried out under the responsibility of the prosecution. In the first part, the article highlights the different points of criticism expressed over the past decades concerning the concept of the investigative judge (I.). The first part also shows the current competences of the investigative judge in the criminal procedure law of France. The article further illustrates the converging points between the two different proposals relating to the reform of the investigative judge, which are, on the one hand, the proposals made by President Sarkozy in his speech of 7 January 2009 and, on the other hand, the report of the Léger Commission, which was mandated with elaborating proposals regarding the reform of the criminal law and criminal procedure (II.). In a third part, the article presents arguments made in favor or against the suppression of the investigative judge (III.). The article concludes that a suppression of the investigative judge implies a reorganisation of the prosecution office in order to be in conformity with the requirements of European law, namely in order to implement the findings of the Medvedyev case of the European Court of Human Rights stating that the public prosecutor in France cannot be considered a judge in the sense of Article 5 para. 3 of the European Convention on Human Rights (IV.).

I. Introduction

Lors de l'audience solennelle de rentrée de la Cour de cassation du 7 janvier 2009, le Président de la République *Nicolas Sarkozy* faisait un discours dans lequel il proposait le remplacement du juge d'instruction par le juge de l'instruction.[1] Le chef de l'Etat n'avait pas l'intention de faire un jeu de mot entre les expressions «*juge d'instruction*» et «*juge de l'instruction*» mais formulait l'objectif de réaliser une réforme importante de l'instruction pénale. Le juge d'instruction est un magistrat du siège du tribunal de grande instance nommé par décret du président de la République sur proposition du Garde des sceaux et après avis du Conseil supérieur de la magistrature.[2]

Ce projet présidentiel s'inscrit dans un contexte national et européen favorable à la suppression du juge d'instruction mais également dans le sillage du drame d'Outreau[3] dont le traumatisme a parcouru la Nation française et le corps judiciaire.[4] Suite aux dysfonctionnements apparus lors de cette tragédie, ont été mis en place un groupe de travail présidé par *Jean-Olivier Viout*, procureur général près la cour d'appel de Lyon (février 2005), et une commission d'enquête parlemen-

taire par l'Assemblée nationale qui a déposé un rapport contenant 80 propositions (juin 2006).[5] Dans le souci d'éviter les erreurs judiciaires grâce au regard croisé de plusieurs juges d'instruction sur les procédures, la loi n°2007-291 du 5 mars 2007 tendant à renforcer l'équilibre de la procédure pénale a, en réponse aux conclusions de la commission, notamment prévu la mise en place de 91 pôles de l'instruction regroupant plusieurs juges d'instruction qui sont seuls compétents, depuis le 1er mars 2008, pour connaître des informations en matière de crime et des informations faisant l'objet d'une cosaisine[6] (art. 52-1, 83-1 et 83-2 CPP) et la collégialité de l'instruction préparatoire[7] à compter du 1er janvier 2010 pour les actes les plus importants de l'instruction (mise en examen, octroi du statut de témoin assisté, placement sous contrôle judiciaire, saisine du juge des libertés et de la détention, mise en liberté d'office, avis de fin d'information, ordonnances de règlement et de non-lieu).[8]

Considéré comme une des pierres angulaires du système répressif français,[9] le juge d'instruction fait l'objet de nombreuses critiques depuis de nombreuses années. Comme l'a affirmé *Robert Badinter*, le juge d'instruction a toujours deux faces en tant qu'enquêteur et juge « à demi Salomon et à demi Maigret » et c'est principalement la figure emblématique du juge d'instruction en tant que « juge hybride » qui cristallise le plus de critiques. Ainsi, dès 1949, le Professeur *Donnedieu de Vabres*[10] proposait dans son rapport de confier, au cours de l'enquête, les pouvoirs d'investigation et de police judiciaire au ministère public et de réserver à un juge qualifié, le «*juge de l'instruction »,* les décisions juridictionnelles. Considéré comme trop révolutionnaire, le projet fut enterré.

A la demande de M. *Arpaillange*, Ministre de la Justice, la commission présidée par Mme le Professeur *Delmas-Marty* remettait un rapport portant sur *La mise en état des affaires pénales.*[11] S'appuyant sur les principes fondamentaux provenant de la jurisprudence du Conseil constitutionnel et de celle de la Cour européenne des droits de l'homme, cette Commission proposait la séparation des fonctions juridictionnelles et d'investigation exercées par le juge d'instruction ainsi que la conduite de toutes les investigations sous la direction du Parquet. De cette manière, le juge aurait pu contrôler la légalité des investigations et protéger les libertés individuelles. Parallèlement, la Commission prévoyait de renforcer les droits de la défense durant la période d'enquête.[12] Par ailleurs, ce rapport faisait le constat que le parquet traitait déjà des affaires déférées devant le tribunal en comparution immédiate ou par voie de saisine directe.[13]

Mais ce rapport suscita de l'incompréhension devant la volonté de confondre les fonctions d'enquête et de poursuite, ce que les auteurs du Code d'instruction criminelle en 1808 avaient tant voulu éviter[14] et fut à son tour enterré. Aujourd'hui, pourtant, la mort du juge d'instruction semble bien proche à la lecture des propositions contenues dans le discours du Président *Sarkozy* et du pré-rapport du comité de réflexion sur la justice pénale présidé par *Philippe Léger*, qui a le 6 mars 2009 formulé sept propositions portant sur la phase préparatoire du procès pénal.[15]

Avant d'étudier les projets actuels de réforme du juge d'instruction en France, nous proposons de décrire la répartition des fonctions entre l'enquête et l'instruction en procédure pénale française. En droit français, l'enquête est conduite par la police judiciaire sous le contrôle et les directives du procureur de la République. En comparaison aux dix- sept procureurs de la République présents en Allemagne fédérale, le ministère public est en France plus puissant parce qu'il est construit de manière centralisée en étant soumis au ministre de la justice au sommet de la hiérarchie judiciaire.[16] Contrairement à l'Allemagne où prévaut le principe de légalité, le procureur de la République peut décider de poursuivre ou non une infraction dont il a eu connaissance en vertu du principe d'opportunité des poursuites.[17]

Mis en place par la loi du 15 juin 2000, le juge des libertés et de la détention (JLD) intervient dans le cadre de l'enquête préliminaire en cas de perquisitions, visites domiciliaires et saisies.[18] Il est compétent pour prendre les décisions de placement en détention provisoire et de prolongation de la mesure ainsi que pour statuer sur les demandes de mise en liberté formées par le détenu. Il peut également révoquer le contrôle judiciaire et le placement en détention de la personne mise en examen. Par ailleurs, le juge d'instruction doit le saisir par ordonnance motivée afin de lui transmettre le dossier avec les réquisitions du parquet.[19] Malgré un domaine de compétence limité, le JLD possède dans cette partie de la procédure une fonction d'organe de contrôle analogue à celle du juge d'instruction allemand.

En revanche, la répartition des compétences est très différente entre le système allemand et français lors de l'instruction. Le juge d'instruction est compétent pour la recherche de preuves mais il ne peut pas introduire la procédure d'instruction par lui-même. Il doit être saisi par un réquisitoire introductif du procureur de la République ou par une plainte avec constitution de partie civile. Le juge d'instruction est compétent pour instruire en matière de crimes (instruction obligatoire), de délits (instruction facultative qui se rencontre uniquement dans les procédures complexes) et de contraventions (instruction rare seulement sur la demande du procureur de la République).[20] Le juge d'instruction n'intervient que dans 5 % des procédures mais il s'agit des cas les plus graves et les plus complexes.[21]

Toute l'instruction repose sur une procédure écrite contenue dans les procès-verbaux rédigés par le juge d'instruction.[22] Selon l'article 81 CPP, « le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge. » Il peut procéder à une mise en examen, à des constatations matérielles, à des auditions des témoins et de la partie civile, à des interrogatoires de la personne mise en examen, à des perquisitions, des saisies, des écoutes téléphoniques, à la désignation d'experts, au placement sous contrôle judiciaire, à la délivrance de mandats. L'article 122 CPP prévoit que « le juge d'instruction peut décerner, selon les cas, un mandat de recherche, de comparution, d'amener ou d'arrêt ».

Depuis la loi du 15 juin 2000, la procédure de mise en détention provisoire est confiée au juge des libertés et de la détention qui doit être saisi par une ordonnance motivée du juge d'instruction qui lui transmet le dossier de la procédure accompagné des réquisitions du procureur de la République. Le JLD statue après un débat contradictoire qui peut être public en présence de l'avocat et peut soit ordonner le placement en détention provisoire de la personne qui bénéficie alors d'un délai pour préparer sa défense,[23] soit ne pas l'envisager et prononcer par exemple un placement sous contrôle judiciaire.

Le Ministère public ou la personne mise en examen peut faire appel devant la Chambre de l'instruction sans effet suspensif. Depuis la loi PERBEN II, l'article 137-4 CPP prévoit que, malgré le refus du juge d'instruction, le procureur de la République peut, en matière criminelle ou pour les délits punis de 10 ans d'emprisonnement, saisir lui-même le juge des libertés et de la détention de réquisitions de mise en détention provisoire pour des motifs de sûreté.

Si les nécessités de l'information l'exigent, le juge d'instruction peut se rendre dans toute l'étendue du territoire national et peut déléguer ses pouvoirs en délivrant une commission rogatoire.[24] Le président de la Chambre de l'instruction et la Chambre de l'instruction contrôlent l'activité du juge d'instruction. Le juge d'instruction dispose également des pouvoirs de juridiction et rend des ordonnances susceptibles d'appel devant la Chambre de l'instruction.

Nous nous proposons à présent d'étudier tout d'abord les points de convergence entre les propositions présidentielles et celles formulées par le comité Léger (II) puis les critiques et les réserves qu'elles ont suscitées (III). Mais force est de constater aussi que si la France choisit de supprimer le juge d'instruction qualifié par Balzac de « colonne qui soutient tout notre droit criminel », elle devra aussi revoir le statut du Parquet pour être en harmonie dans le cadre européen avec la jurisprudence de la Cour européenne des droits de l'homme (IV).

II. Les propositions du Président Sarkozy et du pré-rapport Léger

1. La suppression du juge d'instruction et la séparation des fonctions d'instruction et d'enquête

Selon le Président de la République, « la confusion entre les pouvoirs d'enquête et les pouvoirs juridictionnels du juge d'instruction n'est plus acceptable. Un juge en charge de l'enquête ne peut raisonnablement veiller, en même temps, à la garantie des droits de la personne mise en examen […] Le juge d'instruction, en la forme actuelle ne peut être l'arbitre. Comment lui demander de prendre des mesures coercitives, des mesures touchant à l'intimité de la vie privée alors qu'il est avant tout guidé par les nécessités de *l'enquête* il est donc temps que le *juge d'instruction* cède la place à un *juge de l'instruction*, qui contrôlera le déroulement des enquêtes mais ne les dirigera plus. »[25]

Ainsi, c'est le ministère public qui devrait à l'avenir diriger les enquêtes et le juge de l'instruction dépendant du Siège[26] serait chargé de protéger les droits fondamentaux de la personne à l'encontre de laquelle une procédure d'instruction a été ouverte.

Le pré-rapport Léger recommande premièrement la suppression du juge d'instruction et propose de « transformer le juge d'instruction en *juge de l'enquête et des libertés* investi exclusivement de fonctions juridictionnelles ». En effet, le juge d'instruction ne pourrait agir avec une stricte neutralité et ne pourrait donc assumer pleinement une fonction de juge contrairement au parquet qui par sa nature et sa structure serait mieux adapté à ce travail d'enquête.

Deuxièmement, ce comité propose de « simplifier la phase préparatoire du procès pénal en instituant un cadre unique d'enquête » dans le but d'unifier la phase préparatoire en donnant pleinement au ministère public un rôle de directeur de l'enquête et d'autorité de poursuite. Le comité s'est prononcé « contre une rupture du lien existant entre le parquet et le pouvoir exécutif » dans la mesure où ce dernier est chargé d'appliquer harmonieusement une politique pénale sur l'ensemble du territoire.

Troisièmement, le comité propose d' « instituer un juge de l'enquête et des libertés disposant de pouvoirs importants » et compétent pour décider des mesures les plus attentatoires aux libertés individuelles et contrôler la loyauté de l'enquête.

Le juge de l'enquête et des libertés disposerait de larges prérogatives. Bien que le comité ne précise pas son rang hiérarchique, ce juge serait compétent pour décider des actes d'enquête les plus attentatoires aux libertés individuelles, tels que

les écoutes téléphoniques, la sonorisation ou la perquisition hors flagrance. Il pourrait également, à la demande du procureur, délivrer des mandats d'amener ou d'arrêt, prolonger une mesure de garde à vue ou prononcer un placement sous contrôle judiciaire. De plus, ce juge statuerait sur les éventuelles demandes d'actes formulées par les parties, en cas de refus du parquet d'y consentir. Par conséquent, le juge de l'enquête et des libertés serait le garant du « respect des droits » desdites parties tout au long du déroulement de l'enquête et constituerait « un recours » pour celles-ci « en cas d'inertie du parquet ».

2. Le changement de procédure : une procédure protectrice des libertés individuelles

Le projet présidentiel souhaite la mise en place d' « une nouvelle procédure pénale, plus soucieuse des libertés, plus adaptée aux évolutions de la police technique et scientifique. A l'heure de l'ADN,[27] la procédure pénale ne peut plus avoir pour socle le culte de l'aveu ».[28] Le Président de la République voudrait par ailleurs remplacer la procédure inquisitoire au cœur du procès pénal par la procédure accusatoire et voudrait organiser « un réel débat contradictoire dès l'origine du procès qui nous donnera les voies et moyens d'un véritable habeas corpus à la française ».[29] Notons que le caractère inquisitoire de l'instruction trouve son origine dans la procédure inquisitoriale prévue par l'ordonnance de 1670 critiquée par des juristes *(Beccaria)* et des philosophes (*Voltaire* et *Montesquieu*).[30] Cependant, le Code d'instruction criminelle de 1808 reprenait le système inquisitoire de l'Ancien Régime pour la procédure préparatoire au procès pénal. Prenant la suite du lieutenant-criminel du roi,[31] le juge d'instruction n'en restait pas moins soumis au Parquet dans la mesure où il était un « officier de police judiciaire supérieur ». Il faudra attendre le Nouveau Code de procédure pénale en 1958 qui proclamait clairement que le juge d'instruction était un juge et devienne une « juridiction d'instruction du premier degré ».[32] Voulant renforcer le caractère accusatoire de la procédure, le Président de la République préconise enfin la présence d'un avocat dès les premiers moments.

Quant au pré-rapport Léger, il propose de développer les droits du contradictoire[33] de différentes manières. Tout d'abord, il s'agit de « garantir et renforcer les droits de la victime et du mis en cause tout au long de l'enquête ». Le mis en cause devrait pouvoir bénéficier de deux régimes de droits distincts : régime soit restreint soit renforcé.

Le régime restreint serait applicable à toute personne mise en cause dans une enquête préliminaire ou de flagrance. En revanche, placé sous le régime renforcé, le mis en cause bénéficierait de droits équivalents à ceux du mis en examen dans l'information actuelle, à savoir principalement l'accès à tout moment au dossier de la procédure, l'assistance d'un avocat lors des interrogatoires, la possibilité de demander des actes et de saisir la chambre de l'enquête et des libertés pour obtenir la nullité d'un acte. Le régime renforcé s'appliquerait en matière criminelle ou lorsqu'il s'agirait de prononcer une mesure restrictive de liberté telle que la détention provisoire ou le contrôle judiciaire. De plus, le mis en cause pourrait demander au parquet l'application de ce régime renforcé dans toute procédure et, en cas de refus, saisir le juge de l'enquête. Ce dernier pourrait faire droit à la demande en présence d'« indices graves ou concordants » de participation aux faits à l'encontre de l'intéressé.

La décision de placement en détention provisoire serait prise par le juge de l'enquête et des libertés, à moins que le mis en cause ou le juge de l'enquête ne souhaitent que la décision soit prise par une collégialité.[34] Ce comité propose également de réduire les délais butoirs concernant la détention provisoire et de renforcer les droits du détenu provisoire quant aux conditions de sa détention.

Selon le comité, il faut également « renforcer le respect des droits et des libertés individuelles dans la phase préparatoire au procès pénal » en réformant la garde à vue suivant trois lignes directrices : l'augmentation des droits du gardé à vue, le resserrement des conditions de son utilisation et la création d'une retenue judiciaire pour majeurs d'une durée maximale de six heures. L'avocat pourrait intervenir dès le début de la garde à vue pour un entretien d'une demi-heure, puis pourrait s'entretenir à nouveau à la douzième heure[35] et être présent aux auditions si la mesure est prolongée, soit à l'issue de la vingt-quatrième heure. De plus, la loi devrait indiquer que le placement d'une personne en garde à vue ne pourrait intervenir uniquement si cette contrainte est nécessaire et seulement pour des faits pour lesquels une peine d'emprisonnement supérieure à un an est encourue.

Par ailleurs, le comité suggère que la délivrance du mandat d'amener ne puisse intervenir que si les faits reprochés sont punissables d'une peine d'emprisonnement.
Enfin, le pré-rapport Léger propose de « simplifier, harmoniser et sécuriser la procédure préparatoire au procès pénal » en harmonisant les délais de procédure et les différents régimes de garde à vue.

3. La réforme du secret de l'enquête

Le Président de la République voudrait introduire également un autre changement important de la procédure pénale[36] en

supprimant le secret de l'instruction. L'instruction est secrète[37] en premier lieu à l'égard des parties et notamment de la personne mise en examen. En deuxième lieu, l'instruction est secrète parce qu'elle est faite seulement en présence du greffier et le cas échéant de l'avocat mais hors de la présence du public ou de témoins. En troisième lieu, l'instruction est secrète parce les divers éléments de la procédure ne doivent être ni divulgués ni publiés, ni même communiqués aux tiers, par les personnes qui l'ont dirigée ou qui y ont participé.

D'après le Président *Sarkozy*, « le secret de l'instruction est une fable à laquelle plus personne ne croit », car ce secret est souvent violé dans la pratique. Le secret de l'instruction est expressément prévu par l'article 11 CPP.[38]

C'est pourquoi il voudrait le remplacer par le *secret de l'enquête*. Parallèlement, le projet présidentiel voudrait renforcer la communication du Ministère Public « afin, le cas échéant, de démentir les informations fausses qui, souvent à dessein, sont diffusées dans le seul but de nuire à tel ou tel ».[39]

Le pré-rapport Léger propose de « réformer le secret de l'enquête » en maintenant le principe de secret mais en dépénalisant sa violation. Mais en pratique il serait toujours possible de poursuivre les auteurs de violations du secret de l'instruction pour violation du secret professionnel en application des articles 226-13 et 226-14 CP. Cette réforme serait l'aboutissement d'une évolution originale de la procédure pénale française « ni accusatoire, ni inquisitoire, mais contradictoire ».[40]

Si ces propositions de réforme de la justice pénale par le Président de la République et le pré-rapport Léger apparaissent comme l'aboutissement d'un long processus, elles sont discutées de manière intensive dans l'ensemble du monde judiciaire, universitaire et politique et suscitent de nombreuses questions et critiques.

III. Critiques et réserves

Même si aujourd'hui, très peu d'affaires sont instruites par le juge d'instruction, il s'agit de s'interroger sur la nécessité de supprimer l'institution du juge d'instruction. Et le Professeur *Pradel* de poser la question : « Tous les péchés du juge d'instruction méritent-ils sa mise à mort ? »[41]

Et en premier lieu, c'est la méthode suivie en tant que telle qui est dénoncée. Le Président de la République a énoncé ses propositions de réforme sans attendre l'issue des travaux du comité Léger et a donné l'impression qu'il dictait à la commission ses conclusions. Selon les propos du Professeur *Conte*, « on a renoué avec le fait du prince ».[42]

De plus, poursuit-il, on peut aussi constater « la volonté d'empêcher l'instauration de la collégialité de l'instruction » au 1er janvier 2010 prévue par la loi du 5 mars 2007.[43] En effet, dans son article 136, la loi n°2009-523 du 12 mai 2009 de simplification et de clarification du droit et d'allègement des procédures reporte au 1er janvier 2011 l'entrée en vigueur des dispositions de la loi du 5 mars 2007 imposant une collégialité obligatoire pour l'ensemble des instructions.

Selon le Professeur *Delmas-Marty*, la collégialité a été reportée pour des questions budgétaires[44] et certains membres du pré-rapport Léger ont affirmé « qu'il n'y a pas lieu de modifier les règles existantes, en cours d'évolution, et qu'il faut expérimenter suffisamment la cosaisine ainsi que l'instruction par une formation collégiale, dont l'entrée en vigueur est prévue par la loi le 1er janvier 2010 ». D'autres membres ont souligné que « des réformes en profondeur, telle que celles suggérées par la majorité, faisant suite à tant d'autres réformes, risquent d'accroître l'insécurité juridique et peuvent manquer leur effet ».[45] A cet égard, le Professeur *Delmas-Marty* dénonçait, dès 1990, l'accumulation de réformes partielles sans réflexion d'ensemble du système pénal, parlant à ce sujet de « rapiéçage, parfois même ce bégaiement législatif, paraît irréaliste et néfaste ».[46]

L'Association française des magistrats instructeurs préconise à travers la voix de sa Présidente, *Catherine Giudicelli*, le développement d'une cosaisine souple et améliorée c'est-à-dire « la conduite d'un dossier d'information particulièrement grave ou complexe par deux juges d'instruction ou plus afin de se répartir les investigations à réaliser et échanger sur les décisions à prendre. C'est donc une notion qui se décline par dossier. »[47]

En deuxième lieu, les partisans de la suppression du juge d'instruction invoquent l'incompatibilité des fonctions d'enquêteur et de juge car le juge devrait être neutre alors que l'enquêteur aurait pour mission de rechercher les preuves et élaborer des hypothèses de culpabilité de la personne accusée. Certains parlent même de juge schizophrène puisque le juge d'instruction est censé instruire à charge et à décharge.[48] L'affaire d'Outreau constitue un exemple bien connu des dangers de l'unilatéralité de l'enquête du juge d'instruction face à des dossiers complexes et très médiatisés. Mais comme l'observe l'Avocat général près la Cour d'appel de Paris *Philippe Bilger* « Là où un juge a failli, au coeur d'un désastre collectif, davantage à cause d'un tempérament déserté par l'écoute, la volonté de comprendre et la lucidité que pour des déficiences techniques qui n'ont été que des conséquences, un autre, à Angers, accomplissait un remarquable travail loué par tous. Ce n'est donc pas l'impéritie personnelle d'un magistrat qui doit déterminer la conviction sur notre sujet mais l'examen du système actuel. »[49]

En troisième lieu, les arguments selon lesquels un système accusatoire et l'attribution de davantage de pouvoirs au Parquet permettraient de lutter plus efficacement contre les erreurs judiciaires et seraient plus protecteurs des libertés individuelles sont également critiqués. D'une part, les systèmes anglo-saxons doivent aussi faire face à un certain pourcentage d'erreurs judiciaires. Ainsi, le professeur *Philippe Conte* cite une étude universitaire selon laquelle aux Etats-Unis 68 % des 5760 condamnés à mort entre 1973 et 1995 ont vu leur condamnation réformée en appel en raison d'une erreur des premiers jurés ; 58 % seraient de race noire ; grâce aux nouvelles techniques de l'examen des empreintes génétiques, 200 condamnés ont été déclarés innocents et libérés grâce à l'action d'une organisation non gouvernementale américaine.[50] D'autre part, dans un système accusatoire, les parties doivent se procurer leurs propres preuves éventuellement en recourant aux services d'avocats spécialisés et des investigateurs privés. Seules les personnes mises en cause et les victimes bénéficiant des moyens financiers pourront bénéficier d'une justice de qualité. Telle est l'opinion de l'avocat célèbre, *Jacques Vergès,* qui affirme que la procédure accusatoire est injuste et n'évite pas les erreurs judiciaires en citant le système américain : « Quand vous êtes Simpson, que vous avez de l'argent, vous prenez les meilleurs avocats, vous influencez sans peine la presse. Si de surcroît votre avocat dispose d'un gros budget pour mener une enquête, vous serez acquitté. Si vous êtes un petit noir de l'Alabama, accusé dans des conditions troubles d'avoir tué un flic, vous vous retrouvez avec un petit avocat commis d'office, sans grande expérience des rouages médiatico-judiciaires, sans budget. Au final, vous serez condamné à mort. »[51] Nous pouvons en déduire que l'on risque d'aboutir à une justice à deux vitesses en violation du principe d'égalité de tous devant la justice.

C'est pour cette raison que les moyens humains et financiers doivent donc mis en oeuvre dans l'organisation de la réforme de la procédure pénale. En effet, il faudrait renforcer substantiellement les équipes des parquets chargés de suivre les enquêtes puisqu'elles devraient assumer le travail effectué jusqu'à présent par le juge d'instruction.

De plus, en accordant au Parquet des pouvoirs auparavant dévolus aux juges du siège et en réservant le déclenchement du procès pénal uniquement au procureur de la République, ne risque –t – on pas d'aboutir à « une caste d'intouchables pouvant violer la loi pénale en toute impunité assurée qu'elle est de l'inertie du parquet » ?[52] Les affaires Elf, Borrel, Kieffer ou encore Clearstream auraient – elles pu voir le jour si les investigations avaient été sous le contrôle du Parquet soumis à la tutelle politique ? Il existe un risque de pression exercée sur le parquet pour enterrer une enquête en décidant de classer une affaire sans suite.

Par ailleurs, la création d'un nouveau juge de l'enquête et des libertés implique le renforcement de moyens financiers par le déploiement de postes de magistrats suffisants pour qu'ils puissent se consacrer sereinement à leur fonction, la reconnaissance d'un statut de haut niveau pour que ces juges puissent avoir autorité sur le procureur et enfin le renforcement de moyens juridiques afin que le juge puisse intervenir tout au long de l'enquête afin de trancher les litiges entre le parquet et la défense et notamment le contrôle du choix entre le régime restreint ou renforcé. Enfin, le dessaisissement du parquet devrait pouvoir être demandé à la juridiction d'appel par le juge des libertés en cas de dysfonctionnement grave.[53]

IV. Le statut du Parquet et les développements en droit européen

La question du statut du Parquet français se trouve à nouveau sous les feux de la rampe depuis le jugement de l'affaire *Medvedyev*[54] le 10 juillet 2008 par la Cour européenne des droits de l'homme. Le contentieux porte sur les conditions dans lesquelles un bateau pavillon cambodgien transportant de la drogue fut arraisonné par un navire militaire français près du Cap-Vert. Les militaires français ont détenu à bord les membres de l'équipage durant treize jours jusqu'à Brest où ils ont été placés en garde à vue puis mis en examen pour trafic de stupéfiants. Une partie des marins ont alors introduit une requête en se fondant sur l'article 5 de la Convention européenne des droits de l'homme devant la cour parce qu'ils s'estimaient victimes d'une privation arbitraire de liberté pendant les treize jours passés à bord en raison notamment de l'absence de contrôle de cette détention par une autorité judiciaire.[55]

Les juges strasbourgeois ont fait partiellement droit à cette requête en formation de chambre. La Cour affirme que la privation de liberté – à la différence de l'arraisonnement du navire en tant que tel – ne reposait pas sur une base légale suffisante, tant au regard du droit international que du droit français. La Cour relève surtout « que les normes juridiques sus-évoquées n'offrent pas une protection adéquate contre les atteintes arbitraires au droit à la liberté » en affirmant, notamment, que « force est […] de constater que *le procureur de la République n'est pas une « autorité judiciaire* » au sens que la jurisprudence de la Cour donne à cette notion : comme le soulignent les requérants, il lui manque en particulier l'indépendance à l'égard du pouvoir exécutif pour le pouvoir être ainsi qualifié ».[56]

Ainsi, si la France a été condamnée pour violation de l'article 5 § 1, en revanche sur le terrain de l'article 5 § 3 de la Convention,[57] la Cour a estimé qu'il existait « des circonstances tout à fait exceptionnelles » qui permettaient une exception à l'« exigence de promptitude »[58] pesant sur les Etats quant au

fait de traduire aussitôt les personnes privées de liberté devant un juge.[59] De même, la garde à vue de deux à trois jours sur le sol français a été jugé raisonnable par la Cour,[60] de sorte que la requête est rejetée sur ce point. Cependant, la Cour rappelle une seconde fois que « la détention imposée aux requérants à bord du Winner n'était pas sous la supervision d'une « autorité judiciaire » au sens de l'article 5 (le procureur de la République n'ayant pas cette qualité) ».[61]

Contrairement au Conseil constitutionnel français[62] qui a estimé que la notion d'« autorité judiciaire », au sens de l'article 66 de la Constitution,[63] incluait les magistrats du parquet, la Cour européenne des droits de l'homme refuse la qualité d'autorité judiciaire au Procureur de la République. Cette solution des juges européens provient de l'absence d'indépendance du parquet vis-à-vis de l'exécutif. En effet, l'article 5 de l'ordonnance n°58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature dispose que « Les magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l'autorité du garde des sceaux, ministre de la justice. A l'audience, leur parole est libre ». Dans les faits, l'ancienne Garde des Sceaux[64] *Rachida Dati* n'a pas hésité à dire qu'elle était le « chef des procureurs » et a procédé à des mutations et à des convocations de manière brutale.

Le gouvernement français a demandé le renvoi devant la Grande Chambre mais cet arrêt « interpelle sur le statut ambigu du parquet ».[65] La Grande Chambre[66] a placé cette affaire en délibéré et rendra certainement son arrêt en fin d'année ou au début de l'année 2010.

Si la suppression du juge d'instruction doit être entérinée, en contre partie, il est plaidé pour une indépendance complète du Parquet vis-à-vis du pouvoir exécutif et un renforcement des droits de la défense considérés comme indispensables, qui seraient actuellement trop faibles par rapport aux enquêtes de la police.[67]

Pourtant, le Professeur *Renucci* estime que la décision des juges européens constitue un « séisme judiciaire » et s'il est incontestable que pose problème la dépendance du Parquet vis-à-vis du pouvoir exécutif puisqu'au sommet de la hiérarchie judiciaire se trouve le Garde des Sceaux, il y a dans le fait de refuser de considérer le Parquet comme une autorité judiciaire « un pas qu'il fallait oser franchir ».[68] Il remarque que les membres du Parquet sont des magistrats qui appartiennent au corps judiciaire car ils sont recrutés par le même concours, peuvent passer du Parquet au siège et inversement tout au long de leur carrière et enfin « leur état d'esprit et leur indépendance ne saurait fluctuer aussi fortement au gré de leurs différentes affectations, même s'il est évident que les missions – et les garanties – ne sont pas les mêmes selon les fonctions ».

Force est de constater que l'accroissement des pouvoirs du parquet semble appartenir à un mouvement européen au détriment du juge d'instruction qui se trouve marginalisé. Ainsi, si l'on se tourne sur la scène de l'Union Européenne : le Traité de Lisbonne institue un Parquet Européen destiné à poursuivre les infractions portant atteinte aux intérêts financiers de l'Union ainsi qu'à lutter contre la criminalité grave ayant une dimension transfrontalière de manière transnationale.[69]

Par ailleurs, un rapport du Sénat intitulé *L'instruction des Affaires Pénales* publié en mars 2009 constate que l'examen des procédures pénales allemande, anglaise, espagnole, italienne, néerlandaise, portugaise et suisse montre la place grandissante du Ministère Public. L'Espagne est le seul pays où l'instruction des affaires pénales les plus importantes est encore réalisée par un juge. Les Pays-Bas et le Portugal ont conservé le juge d'instruction mais en restreignant son rôle. L'Allemagne[70] et l'Italie ont supprimé le juge d'instruction pour confier l'instruction au Ministère Public respectivement en 1975 et en 1989.[71] Enfin, la Suisse a récemment adopté un nouveau code de procédure pénale, qui fait disparaître le juge d'instruction au profit du Ministère Public.

Face à ce mouvement européen en défaveur du juge d'instruction, héritage de la procédure inquisitoire issu du *ius commune*, nous pouvons interroger à la suite du Professeur *Renucci* si la Cour européenne des droits de l'homme « cherche à imposer, sans en avoir eu le mandat, un modèle anglo-saxon de justice accusatoire à l'ensemble du continent ».[72]

1 Discours de Monsieur le Président de la République à l'audience solennelle de la Cour de Cassation Mercredi 7 janvier disponible sur le site internet de la Cour de cassation 2009 http://www.courdecassation.fr/institution_1/occasion_audiences_59/debut_annee_60/discours_m._sarkozy_12048.html. Nous l'abrégerons par la suite Discours.

2 Sur le juge d'instruction, voir notamment *B. Bouloc*, Procédure pénale, Paris, Dalloz, 21e éd, 2008, pp. 602 s. et *P. Chambon* et *Ch. Guéry*, Droit et Pratique de l'instruction Préparatoire. Juge d'instruction. Chambre de l'instruction, Paris, Dalloz, Collection Dalloz Action, 2007, 1040 p. *G. Giudicelli-Delage*, La figure du juge de l'avant-procès entre symboles et pratiques, in Le droit pénal à l'aube du troisième millénaire. Mélanges offerts à Jean Pradel, Paris, Cujas, 2006, pp. 335-347.

3 Cette affaire a donné lieu à un procès aux assises de Saint-Omer (Pas-de-Calais) du 4 mai au 2 juillet 2004, puis un procès en appel à Paris en novembre 2005. La mère des enfants victimes des actes de pédophilie (elle-même mise en cause dans le dossier) a reconnu à l'audience que les treize accusés étaient innocents et qu'elle avait menti pendant plus de trois ans. Durant cette période, les vies de certains accusés ont été « fracassées » : longues périodes de détention provisoire, perte de la garde de leurs enfants, perte de leur travail, obligation pour certains de vendre leur maison …etc. Celle-ci provoqua une émotion dans l'opinion publique et mit en évidence les dysfonctionnements du monde politique, des médias, de

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l'institution judiciaire et des acteurs sociaux, notamment dans la lutte contre la pédophilie annoncée depuis 1996 au plus haut niveau de l'Etat. Cf. *F. Aubenas*, La méprise d'Outreau, Paris, Seuil, 2005, 254 p.; *S. Guinchard*, De l'irresponsabilité des juges d'instruction: pour combien de temps encore in Le droit pénal à l'aube du troisième millénaire. Mélanges offerts à Jean Pradel, Paris, Cujas, 2006, pp. 349-351.

4 Rapport du Sénat, L'instruction des Affaires Pénales de mars 2009.

5 Rapport Assemblée Nationale n° 3125, 2006-2007 au nom de la commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement. Sur les suites législatives du drame d'Outreau, lire *J. Pradel*, Les suites législatives de l'affaire dite d'Outreau. À propos de la loi n° 2007-291 du 5 mars 2007 in JCP n°14, 4 avril 2007, pp. 13-21.

6 Art. 83-1 CPP: «Lorsque la gravité ou la complexité de l'affaire le justifie, l'information peut faire l'objet d'une cosaisine […] Le président du tribunal de grande instance dans lequel il existe un pôle de l'instruction ou, en cas d'empêchement, le magistrat qui le remplace désigne, dès l'ouverture de l'information, d'office ou si le procureur de la République le requiert dans son réquisitoire introductif, un ou plusieurs juges d'instruction pour être adjoints au juge d'instruction chargé de l'information. » Nous utiliserons dans la suite de l'article l'abréviation CPP pour Code de Procédure Pénale et CP pour Code Pénal.

7 Selon le principe de la collégialité, l'instruction préparatoire serait confiée à trois juges.

8 Voir *infra* sur le report de cette mesure en 2011.

9 Sur le juge d'instruction, lire *P. Chambon* et *Ch. Guéry*, Droit et Pratique de l'instruction préparatoire. Juge d'instruction. Chambre de l'instruction, Paris, Dalloz, 2007, 1040 p. ; *B. Bouloc*, Procédure pénale, Paris, Dalloz, 21e éd, 2008, pp. 602 s.

10 *H. Donnedieu de Vabres*, « La réforme de l'instruction préparatoire » in RSC 1949, p. 500.

11 Rapport préliminaire en 1989 et rapport final en juin 1990.

12 *H. Leclerc*, L'accès au juge d'instruction in Justice et Cassation. Revue Annuelle des Avocats au Conseil d'Etat et à la Cour de Cassation. Dossier l'accès au juge, 2008, Paris, Dalloz, p. 128.

13 *H. Leclerc*, op. cit., p. 128.

14 *H. Leclerc, ibid ;* Sur cette question, lire l'article intéressant de *M.-R. Marrero*, Entre poursuite et instruction : Ministère Public et Police Judiciaire, 1808-1957 in Staatsanwaltschaft. Europäische und amerikanische Geschichten (Herausgegeben von *B. Durand, L. Mayali, A. Padoa Schioppa* und *D. Simon)*, Frankfurt am Main, Vittorio Klostermann, 2005, pp. 171-202.

15 Comité de réflexion sur la justice pénale. Rapport d'étape sur la phase préparatoire du procès pénal. La version définitive du rapport Léger devrait remise au Président de la République en septembre 2009. Sur le pré-rapport Léger, lire *H. Matsopoulou*, A propos du rapport d'étape du Comité de réflexion sur la justice pénale in JCP N°13, 25 mars 2009, pp.4-6 ; *Ph. Conte*, « Les propositions du pré-rapport du comité de réflexion sur la justice pénale » in *Droit Pénal. Revue Mensuelle Lexisnexis Jurisclasseur*, Juin 2009, pp. 6-8.

16 *H. Satzger*, Die Rolle des Richters im Ermittlungsverfahren in Deutschland und Frankreich in 2. Deutsch-Französisches Strafrechtsvergleichendes Kolloquium „Der Bicentenaire des Codes d'instruction criminelle" 13/14 März 2009 an der Universität des Saarlandes (Saarbrücken) (à paraître).

17 Art. 40 al. 1 CPP ; S'il permet d'adapter la solution judiciaire à chaque cas, ce principe peut conduire à introduire un risque d'arbitraire entre les particuliers. Cf. *L. Simat-Durand*, Le parquet et l'opportunité des poursuites in Gaz. Pal. Doctrine, 20 juin 1996, pp.

18 Art. 76 al. 4 CPP ; *M. Le Monde*, Le juge des libertés et de la détention : une nouvelle avancée ? in RSC 2001, pp. 51-54 ; *C. Guéry*, Le juge des libertés et de la détention : un juge qui cherche à mériter son nom » in Recueil Dalloz 2004, pp. 583-586.

19 Art. 137-1 al. 4 CPP ; Le JLD intervient dans la procédure applicable à la criminalité et à la délinquance organisée. Cf. Art. 706-88, 706-89, 706-90 et 706-95 CPP.

20 Art. 79 CPP.

21 *B. Lavielle* et *J. Danet*, « juge d'instruction : ni cet excès d'honneur ni cette indignité » in Gaz. Pal. Dimanche 22 au mardi 24 février 2009, p. 1.

22 Tout ce qui n'est pas fixé dans les procès-verbaux ne pourra pas être invoqué dans la suite du procès.

23 Le juge des libertés et de la détention peut décerner mandat de dépôt qui consiste dans l'ordre donné au chef de l'établissement pénitentiaire de recevoir et de détenir la personne mise en examen. Cf. *supra* p. 3.

24 Art. 93 CPP.

25 Discours, ibid.

26 On oppose les magistrats du siège au magistrat debout ou Procureur de la République.

27 Acide désoxyribonucléique.

28 Discours, ibid.

29 Discours, ibid.

30 *F. Tricaud*, Le procès de la procédure criminelle à l'âge des Lumières in Archives de philosophie du droit, t. 39, Le Procès, Sirey, 1995, p. 145.

31 « L'ancêtre du juge d'instruction est le lieutenant criminel, créé par la Déclaration de François Ier du 14 janvier 1522, et dont les Edits de Henri II de mai 1552 et novembre 1554 ont précisé les attributions. » Cf. *P. Chambon* et *Ch. Guéry*, *op. cit*, p. 10.

32 *H. Leclerc*, *op. cit.*, p. 126.

33 Erigé en tant que principe directeur de la procédure pénale, l'article préliminaire du CPP tel qu'il résulte de la loi du 15 juin 2000 dispose que « la procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties ». Notons que le principe du contradictoire est prévu également par l'article 6 de la Convention européenne des droits de l'homme. Cf. *A. Beziz-Ayache*, Dictionnaire de droit pénal général et de procédure pénale, v° Contradictoire (Principe du), 4e édition, Paris, Ellipses, 2008, pp. 60-61.

34 A l'instar du mis en cause, la victime pourrait devenir partie à une enquête et bénéficier des droits du contradictoire et de la défense. Le système de la plainte avec constitution de partie civile serait transposé dans la phase préparatoire.

35 L'avocat aurait accès aux procès-verbaux d'auditions de son client.

36 *Cl. Choquet et C. Giudicelli*, Regards croisés : pratique du contradictoire durant l'instruction in Les Cahiers de la justice. Revue semestrielle de l'Ecole nationale de la magistrature, Vol. La prévention des erreurs judiciaires, Dalloz, 2008, pp. 90-98.

37 *P. Chambon* et *Ch. Guéry, op. cit.,* p. 105 s.

38 Art. 11 CPP: « Sauf dans les cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète. Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines des articles 226-13 et 226-14 du code pénal. »

39 Discours, ibid.

40 Pré-rapport p. 30.

41 Sur les discussions dans la doctrine à propos du juge d'instruction, voir *Ph. Conte*, « Les galeux de la République » in JCP 2006 I 101 ; *J. Pradel*, „Haro sur le juge d'instruction" in Recueil Dalloz 2006 n° 4 p. 244 ; *idem*, Un problème français : que faire du juge d'instruction ? in Festschrift für Heike Jung zum 65. Geburtstag am 23. April 2007, Nomos, 2007, pp. 729-736 ; *idem*, Tous les péchés du juge d'instruction méritent-ils sa mise à mort ? in Recueil Dalloz 2009 p. 438 s. *; G. Roujou de Boubée*, Réformer ? oui Bouleverser non in Recueil Dalloz 2006, pp. 740-741 ; *C. Giudicelli*, Le juge d'instruction évoluera ou disparaîtra in AJ Pénal, n°2 Février 2009, pp. 68-71.

42 *Ph. Conte*, Les propositions du pré-rapport du comité de réflexion sur la justice pénale in Droit Pénal. Revue Mensuelle Lexisnexis Jurisclasseur, Juin 2009, p. 7 et *H. Matsopoulou*, A propos du rapport d'étape du Comité de réflexion sur la justice pénale in JCP N°13, 25 mars 2009, pp.4-6.

43 *J. Leblois-Happe*, Quelle collégialité pour l'instruction en 2010 ? in AJ Pénal n°9, Septembre 2008, p.364.

44 *M. Delmas-Marty*, Le parquet, enjeu de la réforme pénale in Le Monde, 25 Mai 2009 www.apcars.org/le-parquet-enjeu-de-la-reforme-penale.

45 Pré-rapport p. 8.

46 *M. Delmas-Marty*, ibid.

47 *C. Giudicelli*, Le juge d'instruction évoluera ou disparaîtra in AJ Pénal, n°2 Février 2009, p. 70.

48 Voir supra p. 4.

49 Blog de *Philippe Bilger*. http://www.philippebilger.com/

50 *Ph. Conte*, Les propositions du pré-rapport du comité de réflexion sur la justice pénale in Droit Pénal. Revue Mensuelle Lexisnexis Jurisclasseur, Juin 2009, p. 8.
51 *A. Fabbri*, Je suis l'enfant qui joue. Interview de Jacques Vergès in Les cahiers de la justice. Revue semestrielle de l'Ecole nationale de la magistrature, Dalloz, hiver 2008, p. 130.
52 *Ph. Conte*, ibid.
53 *M. Delmas-Marty*, ibid.
54 CEDH, 10 juillet 2008, *Medvedyev c/ France*, Affaire n° 3394/03. Nous abrégerons par la suite Affaire *Medvedyev*.
55 *N. Hervieu*, Le sort du parquet français en jeu devant la Cour européenne des droits de l'homme. Audience in www.droits-libertes.org.
56 Affaire *Medvedyev* § 61.
57 « toute personne arrêtée ou détenue […] doit être aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires »
58 Affaire *Medvedyev* § 65.
59 En l'espèce, « L'inévitable délai d'acheminement du Winner vers la France » Cf. Affaire *Medvedyev* § 67.
60 Affaire *Medvedyev* § 68.
61 Affaire *Medvedyev* § 68.
62 C.C. 93-326 DC, 11 août 1993, Loi relative aux contrôles et vérifications d'identité, § 6.
63 « Nul ne peut être arbitrairement détenu. L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi. »
64 Ministre de la Justice.
65 *F. Natali* et *L. L. Forster*, Justice pour tous : une alternative à la suppression du juge d'instruction in Gaz. Pal. Dimanche 22 au Mardi 24 Mars 2009, p. 3.
66 L'audience de la Grande Chambre s'est tenue le 6 mai 2009.
67 Sur la question de l'indépendance en matière pénale des décisions du Ministère Public vis-à-vis de la tutelle du pouvoir exécutif, voir *J. Pradel* et *J.-P. Laborde*, Du ministère public en matière pénale à l'heure d'une éventuelle autonomie ? in Recueil Dalloz 1997 chron. 141-144 et *A. Cadiot-Feidt*, Quelques réflexions relatives à la suppression du juge d'instruction in Gaz. Pal. N°17 du 17 janvier 2009, p. 8.
68 *J.F. Renucci*, Un séisme judiciaire : pour la CEDH les magistrats du parquet ne sont pas une autorité judiciaire in Recueil Dalloz 2009 n°9, pp. 600-601. M.-L. Rassat, Encore et toujours la Cour européenne des droits de l'homme in JCP La Semaine Juridique Edition Générale N° 16-17. 15 Avril 2009. pp. 3-4.
69 Traité de Lisbonne. Journal officiel de l'Union européenne, Chap. 4 Coopération judiciaire en matière pénale, Article 69 E. Voir aussi à ce sujet *L. Picotti*, La perspective de réforme des traités européens et la lutte contre la fraude in eucrim, 1-2, 2008, p.72.
70 Sur la réforme en Allemagne, lire *Ch. Wittekindt*, Enterrement du juge d'instruction : révolution ou réforme ? in Questions d'Europe n°140, 22 juin 2009, pp. 1-6 et *H. Satzger*, ibid.
71 Sur la réforme en Allemagne, lire *Ch. Wittekindt*, Enterrement du juge d'instruction : révolution ou réforme ? in *Questions d'Europe* n°140, 22 juin 2009, pp. 1-6 et *H. Satzger*, ibid.
72 *J.F. Renucci*, ibid.

The Constitution says yes [but …] to the Lisbon Treaty

The Judgment of the Second Senate of the Federal Constitutional Court of 30 June 2009

Dr. Marianne Wade

The German Federal Constitutional Court was asked to decide upon the constitutional compatibility of the changes foreseen by the Treaty of Lisbon and its implementation via various acts of legislation by the German parliamentary organs.[1] Above all, the complainants (inter alia, a number of Members of the German Bundestag and the parliamentary group "DIE LINKE") argued for constitutional breaches because, in their view, the federal government delegated powers to the EU that it was not competent to do and to such an extent as to undermine the authority of the Federal parliamentary organs (the Bundestag and the Bundesrat). The Constitutional Court held the competences assigned to the EU by the Treaty of Lisbon to be in line with the German Constitution (Grundgesetz), but that the foreseen legislation has failed to adequately provide for participation of the Bundestag and, where relevant, the Bundesrat in the legislative proceedings foreseen by the Treaty of Lisbon. On balance, the Federal Constitutional Court decided that the Act Approving the Treaty of Lisbon (Zustimmungsgesetz zum Vertrag von Lissabon) is compatible with the Grundgesetz. In contrast, the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union) infringes Article 38 para. 1 in conjunction with Article 23 para. 1 of the Grundgesetz insofar as the Bundestag and the Bundesrat have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures.

I. The Complainants' Arguments against the Lisbon Treaty

The major arguments heard against the Treaty of Lisbon, brought forward by a unique coalition of politicians of all political persuasions, included concerns that the ability of individual German citizens to participate in the selection and

indeed to control state authority is to be diminished, that the principle of democracy is undermined by the loss of competences assigned to the *Bundestag*, and that there is inadequate democratic legitimation of the EU itself (100).[2] Furthermore, the assignment of competences relating to military and criminal justice matters amounts to a "sellout of the state's very own competences" (103). Whilst the Treaty of Lisbon was acknowledged to have enhanced the status of the European Parliament, this development was found to be inadequate in a number of ways because voters are not equal (smaller Member States having a disproportionately greater say) and the relationship between voter and legislature is far from adequate (103 et seq.). It was further argued that, by means of the Treaty of Lisbon, the European Union "becomes a subject of international law and can act like a state on the level of international law" with far-reaching powers to determine its own competences and to regulate internal security and prosecution unchecked by Member States' constitutional courts.

II. The Court's Decision: Conditions for European Unification

In a comprehensive decision, the Court held: "European unification on the basis of a union of sovereign states under the Treaties may not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament" (249).

Chiefly, the Court emphasises the EU as a Union – the core of which is negotiated between sovereign, independent states to whom individual powers are conferred – whose role is to ensure that the powers conferred remain true to this context and to ensure "whether the inviolable core content of … constitutional identity"– in this case Germany – remains intact after this transfer of powers. It stresses such supervision to be in line with the *Grundgesetz*'s fundamental openness to European Law (so-called *Europafreundlichkeit*) and, thus, in line with the principle of loyal cooperation established by European law (Article 4 para. 3 TEU post-Lisbon).

The Court identifies a number of facts clearly illustrating the Member States' continuing sovereignty, not least each State's right to leave the Union (150, see also 295 et seq.). It emphasises that the ability of organisations, such as the EU, to exercise supranational powers stems from its Member States: "they therefore permanently remain the masters of the Treaties" (231). The principle of singular conferred powers is thus of central and indeed constitutional importance in expressing the EU's obligation to respect the identity of the Member States (as expressly stated by the Lisbon Treaty) [234]. Repeatedly, the need for national legislatures to agree to and implement decisions taken at the EU level is emphasised (see, e.g., 339, 344 et seq.).

The Court clearly states that the Treaty of Lisbon does not create a federation (263)[3] but extends the current German state by a supranational, cooperative dimension (277), leaving the Bundestag "as the body of representation of the German people [and thus] the focal point of an interweaved democratic system" (278). Differences with regard to the failed Constitutional Treaty are laid out (331). The Court lays down that "to safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the Treaties and in their application and interpretation in order to maintain the equilibrium of the political forces of Europe between the Member States and the level of the Union as the precondition of the allocation of sovereign powers in the association" (265). Decisively – in line with the Court's previous decision on the approval of the Treaty of Maastricht and keeping in mind its famous "*Solange*"-decisions – the Federal Constitutional Court continues that "*as long as* … the principle of conferral in cooperatively shaped decision-making procedures exists, taking into account the states' responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state" (272). Thus, for example, the "one man, one vote" rule must not be observed analogously (278). Within the EU "the European Parliament stands between the principle under international law of the equality of states and the state principle of electoral equality" (284). The contradictions to be found in the equality of citizens of the Union that are often evident in the Treaty of Lisbon and the fact that the European Parliament is decisively linked to nationality can be explained only "by the character of the European Union as an association of sovereign [national] states [*Staatenverbund*]" (287).[4] As a result, the international law principle of equality amongst States is offset somewhat by the idea of the majority of the population (291-293).

III. The Importance of the Principle of Conferral

In this judgment, the Federal Constitutional Court views the inalienable principle of democracy as centrally supported by

the citizens' right to vote freely and equally as well as the right "to free and equal participation in public authority" as "anchored in human dignity" (Article 1 para. 1 of the *Grundgesetz* – 211). In particular, acts resulting in binding decisions for citizens "in particular as regards encroachments on fundamental rights must have a nexus with a freely reached majority will of the people" (212). Nevertheless, this principle is amenable to "integrating Germany into an international and European peaceful order" and the Court acknowledges that the resulting instances of governance cannot be unconditionally bound to the specifics of the principle of democracy as seen by any one Member State or constituting state (219). Membership in the EU or in systems such as the UN is not submission to a foreign force but "voluntary, mutual commitment" amongst equals (220), and the judgment emphasises that the Constitution is indeed desirous of European integration and an order of international peace (225), as such empowering the legislature to confer sovereign powers, "under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility" (226). Any decision to depart from such independence, e.g., by joining a federation would require an explicit declaration by the German people (228).

The Court thus spells out that any transferral of powers must be fundamentally marked by the principle of conferral of singular powers because "the trust in the constructive force of the mechanism of integration cannot be unlimited" due to the Constitution (238). Thus, all legislation must reflect this and it is "constitutionally required not to agree dynamic treaty provisions with a blanket character'" (239); competences to define further competences *(Kompetenz-Kompetenz)* cannot be assigned. All EU actions are subject to "*ultra-vires*" checks by the Federal Constitutional Court and, where the Union-level makes no provision for it, to examinations as to whether they are in line with the principle of subsidiarity. "This ensures that the primacy of application of Union law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect" (240).

The Court points out that membership in the EU provides Member States with options to influence policy areas which would otherwise be negated by practical or territorial limits (248) but adds that "European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life" (249). The policy areas over which national control is necessary to ensure this include citizenship, taxes, decisions concerning military and civil force, as well as intensive interference with fundamental rights, such as imprisonment in enforcing criminal law. The limit to powers being conferred is to be drawn "where the coordination of circumstances with a cross-border dimension is factually required" (251).

IV. Conferral in Criminal Justice Matters and Its Limits

Several pages (352 et seq., see also 252) of the judgment are devoted to a discussion of criminal justice matters. The Court points out the significant loss of influence by national parliaments through the supranationalisation of police and judicial cooperation in criminal matters and the move away from unanimous decision requirements (293). It emphasises that conferral of any such competence must be particularly restrictive and well justified (358), stating "the core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics". The Court adds that "the fight against particularly serious crime, which takes advantage of the territorial limitation of criminal prosecution by a state, or which, as in the case of corruption, threatens the viability of the rule of law and democracy in the European Union, can be a special justification for the transfer of sovereign powers also in this context" (359). A critical passage ends with the conclusion that "The Treaty of Lisbon … provides sufficient indications for an interpretation in conformity with the constitution" (362) and the Court emphasising that EU actions must be kept to the absolute minimum necessary (363-366).

With its emphasis that criminal law, both substantive and procedural, is a culturally specific area of great sensitivity, the Court points out that German government representatives may only agree to decisions in this area being made in the Council that invoke the bridging procedure of Art. 48 para. 7 TEU – post–Lisbon, in order to allow them to be made by qualified majority rather than in unanimity, if both German houses of Parliament have previously passed legislation to this effect (para. 366).[5] The Court also indicates that court and judicial structures are fundamentally the business of the Member States (368) and goes on to insist that the EU cannot replace Germany's own membership and right to participate in international organisations (371 et seq.). It further emphasises that the Treaty of Lisbon in no way deprives the Member States of their influence upon and ability to make social policy. The Court points to the powers that Member States retain pertaining to social and criminal justice policy via the relevant emergency break provisions, again emphasising that action taken

by a representative of the German government can be based solely upon instruction by the German *Bundestag* and, where relevant, the *Bundesrat* (400).

The Court views an occasional refusal to follow harmonising impulses as legitimate and not contradictory to a fundamentally international law friendly stance as required by the Constitution – it sees this principle confirmed by the *Kadi* decision of the European Court of Justice in September last year (340).[6]

V. Envisaged Parliamentary Participation Not Sufficient to Comply with German Constitution

The Court held that The Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (hereinafter: Extending Act) failed to provide sufficiently for the participatory rights of the *Bundestag* and *Bundesrat* as regards subsidiarity checks and the right to reject the revision of the Treaty via the bridge provision of Article 48 para. 7 TEU – post-Lisbon (407). If the Treaty texts are changed significantly by the Member States themselves – in line with the principle of singular conferral or to a great extent by the organs of the EU, even where this is done by unanimous decisions in the Council – the national Parliamentary bodies have a particular responsibility to participate. In Germany, this must be done in accordance with Article 23 para. 1 of the *Grundgesetz*, and the national implementing legislation was found not to be doing so adequately.

The Court requires the two houses of Parliament to consider that they bear responsibility for integration[7] in a number of cases of dynamic Treaty development: changes to primary European law via simplified proceedings require agreement in legislation (412). *Bundestag* and *Bundesrat* must actively agree to each and every use of bridging clauses to allow changes in EU legislative proceedings (e.g., from unanimous to qualified majority voting, etc. – 413). Where bridging procedures foresee a right to rejection by national parliaments, a government representative may only agree to the proposed Resolution if parliamentarily mandated to do so. In relation to a number of special bridging procedures, the Court again insists that active parliamentary agreement is necessary (416). Ultimately, the Court requires particular forms of legislation or mandate for the use of the flexibility clause in Art. 352 TFEU, the emergency breaks of Articles 48 para. 2, 82 para. 3 and 83 para. 3 TFEU as well as "extension clauses" relating to judicial cooperation in criminal matters (Articles 82 para. 2 subpara. 2 lit. d, 83 para. 1 subpara. 3, and 86 para. 4 and 325 para. 3 TFEU).

The following eucrim ID refers to a summary and the full text of the judgment (both in English and German).
➤**eucrim ID=0901113**

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http://www.mpicc.de/ww/de/pub/home/wade.htm

1 For the action, see also eucrim 3-4/2007, p. 74.
2 The numbers refer to the paragraphs as indicated in the judgment of the Federal Constitutional Court.
3 "The idea that the Member States' own legal personality status in external relations gradually takes second place to a European Union which acts more and more clearly in analogy to a state [does not – sic] is not at all reflected in a predictable tendency, made irreversible by the Treaty of Lisbon, in the sense of a formation of a federal state that would factually be necessary at any rate. ... To the extent that the development of the European Union in analogy to a state would be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would be in contradiction to constitutional foundations. Such a step, however, has not been made by the Treaty of Lisbon." (376).
4 Supplements inserted by the author in view of head note 1 of the decision.
5 This is also the case for military action (381 et seq.) as well as aspects of social policy (400). Decisions as to military deployment must remain in the hands of the German Parliament. No government representative can agree to anything which would allow this to be circumvented, nor is there any provision in the Lisbon Treaty which would allow such circumvention (388).
6 For the *Kadi* case, see *Wahl/Staats*, eucrim 1-2/2008, p. 33 and *F. Meyer*, eucrim 1-2/2008, pp. 81-88.
7 "to the extent that the Member States elaborate the law laid down in the Treaties in such a way that an amendment of the law laid down in the Treaties can be brought about without a ratification procedure solely or to a decisive extent by the institutions of the Union, albeit under the requirement of unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation" (409).

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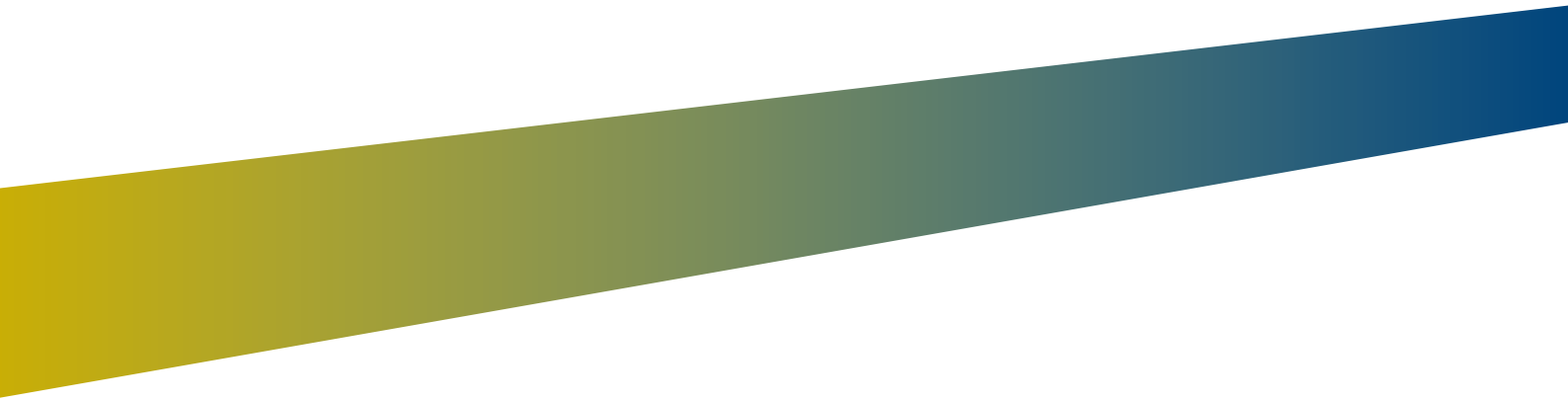

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