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Focus: Liability of Legal Persons
Dossier particulier: La responsabilité des personnes morales
Schwerpunktthema: Verantwortlichkeit juristischer Personen

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Guest Editorial

Dear Readers,

Legal entities may now be held criminally liable in many European countries. The days are long gone when this was a typically Anglo-American phenomenon and the advantages of introducing such a form of ascribing responsibility were subject for debate in civil law systems.

In fact, for many years awareness had been growing among criminologists – to paraphrase the fitting expression used by one of the masters of Italian criminal law, Franco Bricola, in the title of one of his celebrated papers – of the significant cost of the principle societas delinquere non potest with a view to modernising the regulation of company law. In this context, the idea gradually gained ground that, under certain conditions, legal persons could and indeed should be held liable for offences committed by persons working for them. This legal notion arose from the approach adopted in common law systems and the suggestions contained in the renowned US Supreme Court ruling of 23 February 1909 with regard to the New York Central & Hudson River Railroad Co., which signalled the birth of the "societas delinquere potest" notion in the US system.

The die had been cast but, at least in Italy, it was not until 2001 that Legislative Decree No. 231 was adopted to create a preventive/enforcement mechanism targeting legal entities directly as leading players in the penal system rather than simply as possible supporting actors.

Within the limited framework of this editorial, I would like to draw attention to two aspects of Italy's experience that I feel indicate equally significant trends in the development of the liability of legal entities. The provision made for the administrative responsibility of legal entities, which clearly contains retributive elements, for certain types of crime was introduced in Italy in order to comply with the mandate contained in Section 11 of Law No. 300/2000 to ratify and implement the OECD Convention on combating bribery of foreign public officials in international business transactions as well as the European Union Conventions against corruption and on the protection of the European Communities' financial interests, with its respective Protocols. The key challenge was to develop an autonomous system based on objective and subjective criteria for attributing responsibility to legal entities. The final result of this process can be found in the organisational, managerial, and supervisory models set out in Sections 6 and 7 of Decree No. 231, the true keystone of the system of making legal entities liable. These instruments have clearly been developed with an eye toward the North American experience with compliance programs, although they have obviously been adapted to take account of the particular nature of the Italian legal system.

Paola Severino

The models in question give expression to the preventive approach behind Decree No. 231, calling on entities to collaborate in the creation of preventive rules and, at the same time, defining the criteria for the responsibility of the entity itself when guilt is being established.

The Italian experience shows that this is a system of responsibility based heavily on what has gone before in other parts of the world and characterised by openness to models already tried out elsewhere. It is a system that, again in the light of Italy's experience, has distinguished itself by dint of its capacity to develop and, over time, has enjoyed increasingly widespread application. It is also a system which, as far as I can gauge from the recent reforms in Spain and the United Kingdom, is helping to fuel the debate on possible punitive models for entities.

It seems to me that the challenge now is to develop an approach that actually takes account of the way models "circulate" in order to draw on common features. By analysing best practices and the experience gained in applying the various systems, it will be possible to prepare the ground for setting out "model" guidelines.

Prof. Paola Severino
Italian Minister of Justice

European Union*

Reported by Dr. Els De Busser (EDB), Cornelia Riehle (CR), and Claudia Kurpjuweit (CK)

Foundations

Reform of the European Union

Common Approach to EU Decentralised Agencies

On 12 June 2012, a joint statement and a common approach were reached between the Commission, the Council, and the EP with regard to decentralised EU agencies. The governance and functioning of these agencies was the subject of an interinstitutional working group that was created in March 2009 and brought together representatives of the three institutions. This working group drafted 34 factsheets that included the existing situation, the problems, possible solutions, and their implementation regarding the role and position of the agencies in the EU's institutional landscape (their structure, their operation, etc.). The common approach contains improvements such as making an objective impact assessment before creating a new agency, rules for choosing the seat of an agency as well as regular evaluations and key performance indicators.

As a next step, the Commission will propose a roadmap to implement this agreement by the end of 2012 at the latest. (EDB)

➤eucrim ID=1203001

Council-EP Dispute over Schengen Continues

After the Council unilaterally changed the legal basis of a proposal on the reintroduction of internal border checks in the Schengen zone, excluding the EP from the procedure, the EP reacted by freezing progress on four other files: combatting attacks against information systems, the European Investigation Order, the 2013 budget aspects of Internal Security and the EU PNR files (see eucrim 2/2012, p. 50). On 19 June 2012, the EP's Legal Affairs Committee approved an opinion stating that the proper legal procedure for examining the Schengen Evaluation Mechanism is the co-decision procedure.

Commissioner for Home Affairs, Cecilia Malmström, reacted briefly by stating that the Commission is prepared to meet with the Council and the EP to seek common ground on furthering developing the Schengen area. (EDB)

➤eucrim ID=1203002

Enlargement of the EU

Efforts to Bring Moldova Closer to the EU

On 3 August 2012, the Commission announced that €94 million in financial support will be made available for the Republic of Moldova. The country is already an active member of the Eastern Partnership and, with this new funding, the EU confirms its commitment to further support the country's reform process.

The funding will be used for reforms in the area of justice, to enhance local and regional development, and to improve the educational system and technical assistance in negotiating and implementing future agreements with the EU and facilitating participation in EU programms and agencies. (EDB)

➤eucrim ID=1203003

Enlargement towards the Western Balkans

On 29 June 2012, accession negotiations were opened with Montenegro. The Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, recognised the large efforts that Montenegro has already made but pointed out that continued progress is needed in the areas of fundamental freedoms, the judiciary, the fight against corruption, and organised crime.

The Republic of Cyprus started its presidency in July 2012 with a clear agenda on EU enlargement. Foreign Affairs Minister of Cyprus, Dr. Erato Kozakou-Marcoullis, therefore embarked

* If not stated otherwise, the news reported in the following sections cover the period July – September 2012.

on a tour to visit several West Balkan countries. On 1 August 2012, the presidency announced that Albania is committed to making progress on the necessary reforms to apply for membership in the EU. With regard to Bosnia Herzegovina, the goal is to submit such an application during the term of the Cyprus presidency. (EDB)
➤eucrim ID=1203004

Institutions

Council of the EU

Priorities of the Cyprus Presidency

The rotating presidency of the Council of the EU is in the hands of the Republic of Cyprus from 1 July 2012 to 31 December 2012. In the area of criminal justice and security, the presidency aims at achieving agreement within the Council on the proposal regarding freezing and confiscating proceeds of crime (see eucrim 2/2012, pp. 59-60). Advancing negotiations on reform of the data protection legal framework that started in 2009 (see eucrim 1/2012, p. 13) is also listed as one of the priorities as well as combating violence against women. With regard to the Schengen governance, the Cyprus presidency is aware of the current difficulties (see eucrim 2/2012, p. 50) but is committed to continuing a constructive dialogue between the Council and the EP. (EDB)
➤eucrim ID=1203005

Commission

Commission Sets Up Expert Group on EU Criminal Law

On 19 June 2012, the Commissioner for Justice, Viviane Reding, opened the first meeting of the expert group on EU criminal policy. A group of judges, prosecutors, and defence lawyers of 13 Member States and representing the major legal traditions was brought together to meet twice a year and discuss key questions of EU criminal law.

The group of experts was set up following Commission communication COM(2011) 573 final of 20 September 2011 (see eucrim 4/2011, p. 134) and aims to improve the quality of EU criminal law, in the light of the new rules of the Lisbon Treaty and the Charter of Fundamental Rights. At its first meeting, the topic of sanctions was discussed, more specifically the interplay between administrative and criminal sanctions as well as the obligation for Member States to provide for "effective, proportionate and dissuasive" criminal sanctions. (EDB)
➤eucrim ID=1203006

OLAF

Progress on OLAF Reform

On 8 October 2012, the CONT Committee approved the proposed Regulation amending Regulation (EC) No. 1073/1999 on OLAF investigations (see eucrim 4/2011, p. 137). The proposal provides inter alia more specific rules on information exchange between OLAF and national authorities and sets out procedural guarantees which apply during the administrative investigation. New interinstitutional procedures to ensure information sharing should also improve the fight against EU fraud. Next, the EP and the Council need to adopt the text. (EDB)
➤eucrim ID=1203059

European Parliament

EP Calls Upon Member States to Investigate CIA Detention Centres

On 11 September 2012, the EP adopted – with an overwhelming majority – a non-binding resolution to request Lithuania, Poland, and Romania to start or resume independent investigations into allegations of colluding with the CIA to hold and interrogate terrorism suspects in secret detention centres.

The report on which the resolution is based states that research conducted by the UN, the CoE, national and international media, investigative journalists, and civil society has revealed new information on the location of such prisons in Europe, on rendition flights through European airspace, and on persons transported or detained. A parliamentary inquiry, including on-site visits to gather evidence on these allegations, concluded that more transparency is needed from Lithuanian, Romanian, and Polish authorities. Furthermore, Finland, Denmark, Portugal, Italy, the UK, Germany, Spain, Ireland, Greece, Cyprus, Romania, and Poland are called upon to disclose information on suspect flights into their territory. (EDB)
➤eucrim ID=1203008

Court of Justice (CJEU)

Amendments Adopted to Statute

The Council adopted a regulation amending the CJEU statute on 24 July 2012. The amendments are based on the CJEU's request of September 2011 and aim at alleviating the workload for the CJEU from the progressive expansion of its jurisdiction. Additionally, the working methods of the General Court were adapted:

- For both the ECJ (one of the three courts of the CJEU) and the General Court, the office of Vice-President will be established to assist the President with his or her responsibilities;
- The number of judges of the Grand Chamber will be increased from 13 to 15, and three of the Presidents of the chambers of five judges shall also form part of the Grand Chamber;
- The possibility of delegating temporary judges to the specialised courts is introduced. So far, there is only one specialised court, the Civil Service Tribunal. There is a continuing need to tackle delays arising from the heavy workload of the General Court. Therefore, it is considered appropriate to work towards putting in place adequate measures by

the time of the partial renewal of the membership of that Court in 2013.

An increase in the number of judges for the General Court was also part of the CJEU's request. This decision has been postponed to an unspecified later date. (EDB)

➤eucrim ID=1203009

Europol

Evaluation of the Implementation of the Europol Decision and of Europol's Activities

Commissioned by the Europol Management Board, RAND Europe together with BlueLight Global Solutions has conducted and published an evaluation of the implementation of the Europol Council Decision and of Europol's activities. RAND Europe is an independent non-profit policy research organisation and BlueLight is an independent UK limited company providing a "portal" for policing, criminal justice, and national security expertise.

Methodologically, the evaluation is based primarily upon three data sources, namely interviews with individuals working within Europol and in stakeholder organisations; focus groups with heads of the Europol National Units (ENUs); and a web-based survey whose respondents included law enforcement practitioners in Member States and countries outside of the European Union.

In the web-based survey, the question as to whether Europol has fulfilled its mandate of enhancing law enforcement cooperation among Member States earned the most positive response. Many of the problems mentioned, however, related to the fundamental principle of Europol: that it has no executive powers and is thus only as effective as the policies and actions of Member States. As a result, the report recommends taking action to increase homogeneity in the operation of the ENUs. A number of other key issues requiring further in-depth analysis were also raised.

Worthy of note are the changes taking place in the area of Justice and Home Affairs (JHA). These include the reform of the legal basis of Frontex, which will likely affect Europol, suggestions of increased parliamentary supervision of JHA agencies, and the restrictions on Europol's budget due to the current economic climate. The evaluation suggests measures Europol should take to adapt to this new environment, such as closely monitoring the demands placed upon it by EU and Member State stakeholders as well as monitoring proposed changes to other JHA agencies in order to avoid overlap, duplication, and even contradiction with them. It is also suggested that a new strategy should be developed by which future changes to Europol's accountability could be anticipated (in particular, changes to the role of the EP in this regard).

Concerning Europol's legal basis, the report suggests a series of changes to facilitate information sharing and data management. They include introducing a Europol regulation removing the statutory definitions of separate data processing systems, which would allow more flexibility in the design of processing environments; allowing Europol to share personal data from publicly available sources with third parties where there is no operational agreement; allowing new data processing systems to include sensitive, personal data (with the necessary safeguards); and allowing direct information exchange with private bodies in certain prescribed circumstances.

The report determined that the issues

Common abbreviations

AML	Anti-Money Laundering
CBRN	Chemical, Biological, Radiological, and Nuclear
CCJE	Consultative Council of European Judges
CDPC	European Committee on Crime Problems
CEPEJ	European Commission on the Efficiency of Justice
CEPOL	European Police College
CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
CONT	Committee on Budgetary Control
COREPER	Committee of Permanent Representatives
DG	Directorate General
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EIO	European Investigation Order
EJN	European Judicial Network
(M)EP	(Members of the) European Parliament
EPO	European Protection Order
EPPO	European Public Prosecutor Office
FATF	Financial Action Task Force
GRECO	Group of States against Corruption
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
JSB	Joint Supervisory Body
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
PNR	Passenger Name Records
SIS	Schengen Information System
SitCen	Joint Situation Centre
TFEU	Treaty on the Functioning of the European Union

concerning staff regulations at Europol received the most negative reviews, with the most common complaints being that EU staff regulations are not fit for purpose and are an obstacle to 24/7 operational policing in Member States. As a result, it is suggested that Europol could benefit from the law enforcement officials who no longer work in Europol by, for example, getting them involved in awareness-raising once they return to their Member State. Additionally, the incompatibilities in career progression structures between Europol and national police authorities should be examined, so that highly skilled law enforcement officers are not deterred from serving at Europol.

Ultimately, although trepidation is expressed in the evaluation as regards possible extensions of Europol's mandate, it recommends that the future Europol regulation provide more powers for Europol to support investigations and operational activities. Additionally, in view of the European Cybercrime Centre (EC3), which will be hosted at Europol (see eucrim 2/2012, p. 57), it is suggested that the Commission re-evaluate Europol's current legal framework if the EC3 is to fulfil its objectives and carry out planned activities. (CR)

➤eucrim ID=1203010

Europol Work Programme 2012

At its meeting of 6 July 2012, the Europol Management Board adopted Europol's work programme for the year 2012. The work programme is Europol's annual business plan that "translates" the goals of Europol's Strategy 2010-2014 and provides a basis for budgetary planning.

The first goal of Europol's Strategy 2010-2014 is to function as the principal EU support centre for law enforcement operations. Europol plans to focus on an efficient delivery of its products and services in line with Member States' operational needs and to make funds available to support Joint Investigation Teams (JITs). To tackle the increasing phenomena of crime with a regional dimension, Europol plans to operate more actively within these regions in and outside of the EU.

To achieve the second goal – to become the EU criminal information hub – Europol plans to produce the first Serious and Organised Crime Threat Assessment (SOCTA), to refine the Analysis Work Files (AWF) concept, to deliver a new generation in the Europol Analysis System, and to strengthen its financial intelligence capabilities by linking money flows to criminal activities.

For the third goal – the expansion of its capabilities as an EU centre for law enforcement expertise – Europol will enhance its overall crime intelligence picture of priority crime areas via strategic partnerships with the private sector, better trend and pattern identification, and early warning detection. Furthermore, a European Cybercrime Centre will be operational at Europol as of 2013, and Europol will enhance its efforts against the financing of terrorism and violent extremism.

The fourth goal of Europol's strategy is to ensure that it has the proper capabilities to achieve its operational goals. Hence, according to the work programme, Europol will continue to optimise its ICT support such as electronic workflows, the automation of records, and human resource management in 2013. Europol will also support the preparation of a future Europol regulation.

The annexes to the work programme include the following:

- An overview of resource allocation (27.5% of the total budget is allocated to the first goal, 12.7% to the second, 12.3% to the third, and 16.8% to the fourth);
- An overview of critical risks that could have a negative effect on annual business planning and mitigating measures;
- An overview of planned procurement activities;
- A Europol organisational chart.

The work programme will now be forwarded to the Council for endorsement. (CR)

➤eucrim ID=1203011

Increased and More Effective Use of the Europol Information System

To underline the importance of enhancing the use of the Europol Information System (EIS), the Council adopted conclusions at its meeting of 7-8 June 2012, inviting Member States to promote knowledge and to facilitate access to the Europol Information System for all relevant law enforcement authorities, to enhance the uploading of data, and to make more use of searches.

At the national level, standard procedures or guidelines for the use of the EIS in relevant law enforcement investigations shall be set up. Member States are invited to implement the use of data loader solutions as a cost-efficient standard procedure for the uploading of data to the EIS and to conduct quality checks of the data to be uploaded to the system.

Regular searches of persons and objects shall be conducted by a designated law enforcement unit that forwards the search results directly to the law enforcement authority conducting the investigation or inquiry in question.

Furthermore, Member States are invited to set up a mechanism to systematically feed any unit designated to carry out batch searches with data from relevant law enforcement authorities on persons and objects. They are also encouraged to define criteria in accordance with national law and the Council Decision establishing Europol as regards cross-border crime that may involve regular searches (automatic batch or manual).

Europol, however, is asked to promote knowledge of the capabilities and functioning of the EIS as well as its technical and administrative solutions. Along with compiling and presenting annual statistics from the EIS, Europol is asked to expand interoperability between the EIS and other Europol core information systems as well as relevant national systems. It shall continue monitoring the use of the EIS in Member States and discuss, within the framework of its management board,

specific measures and key performance indicators on how to promote and secure a more intensive and effective use of the system in the years to come. Finally, Europol shall follow up progress regarding the use of the EIS at the meetings of the Heads of Europol National Units and of the Europol Management Board. (CR)

➤eucrim ID=1203012

Consultation into the Future of Cybercrime Led by Europol

Europol is now leading an international consultation into cybercrime. The consultation is called Project 2020 and aims to help governments, law enforcement, and businesses to get a head start on cybercriminals. The project will analyse current trends in cybercrime and how they may evolve over the next eight years and beyond. Results will include policy briefs and white papers on developing threat scenarios as well as the establishment of a monitoring mechanism to assist organisations that combat cybercrime.

Project 2020 was launched on 18 July 2012 and is conducted by the International Cyber Security Protection Alliance (ICSPA) – a global non-profit organisation established to channel funding, expertise, and assistance in order to directly assist law enforcement cybercrime units operating in domestic and international markets. Via the ICSPA, the expertise of leading law enforcement agencies can be combined with that of the ICSPA's member companies, organisations, and professional communities. Among the business members joining Project 2020 are payment services such as Visa Europe, the Shop Direct Group (a UK home shopping retailer), customer insight and fraud prevention services, Transactis, and the logistics company Yodel. They will be joined by seven leading cybersecurity companies, namely McAfee, CGI Canada, Atos, Cassidian, Digiware, Core Security Technologies, and Trend Micro. Further contributors to the study will be the City of London Police and the European Network and Information Security Agency (ENISA) as well as experts from the International Information System Security Certification Consortium, $(ISC)^2$, and the International Association of Public Prosecutors.

On 28 March 2012, Europol had been designated as the European Commission's information hub on cybercrime and asked to establish the European Cybercrime Centre (see eucrim 2/2012, p. 57). (CR)

➤eucrim ID=1203013

Discussion on "Smart Policing"

One of the key topics of the European Police Chiefs Convention that took place in The Hague from 30-31 May 2012 was the question of "smart policing," i.e., how effective policing can still be delivered with fewer resources due to the austerity measures taken by most states in the current global economic crisis.

At the convention, participating police chiefs welcomed suggestions to mitigate cost-cutting measures at the national level by making more use of the centralised services provided at the EU level, e.g., the newly created European Cybercrime Centre at Europol. In this way, EU Member States would not need to develop expensive and specialised services.

The 2012 European Police Chiefs Convention was attended by high-level representatives from 34 European countries, Australia, Canada, Colombia, Israel, Mexico, the Russian Federation, Turkey, Ukraine, and the USA as well as representatives from Interpol and other EU agencies and institutions. (CR)

➤eucrim ID=1203014

Towards the European Public Prosecutor's Office (EPPO)
Institutional and Practical Challenges

ERA, Trier, 17-18 January 2013

The establishment of the European Public Prosecutor's Office (EPPO) is envisaged in Article 86 TFEU. The EPPO would be responsible for investigating, prosecuting and bringing to justice those who damage assets managed by or on behalf of the EU. The European Council may adopt a decision extending the powers of the EPPO to include serious crime having a cross-border dimension.

From 7 March to 6 June 2012, the European Commission carried out a public consultation on: "Protecting the European Union's Financial Interests and Enhancing Prosecutions". The consultation provided judicial professionals (such as judges, prosecutors ,and law enforcement officials) with the opportunity to present their views, helping the Commission to develop its proposal.

This conference will look at the institutional and practical challenges of establishing the EPPO. Issues of substantive and procedural criminal law will be examined together with the legal status and the possible internal organisation of the new Office. The conference will also debate the future relations of the EPPO with the other relevant EU bodies involved in cooperation in criminal matters such as Eurojust, OLAF and Europol.

Key topics are

- National experiences of prosecuting offences affecting the EU's financial interests and key challenges for prosecution;
- Analysis of the legal framework necessary to ensure more effective criminal enforcement of the protection of the EU's financial interests;
- General rules applicable to the EPPO, conditions governing the performance of its functions, and rules of procedure applicable to its activities (including issues of judicial review and democratic control);
- Practical and organisational conditions for setting up the EPPO.

The conference will be held in English, French, and German. Simultaneous interpretation will be provided. This event has been co-financed by the European Commission (OLAF) under the Hercule II Programme.

For further information, please contact Mr. Laviero Buono, Head of European Criminal Law Section, ERA. e-mail: lbuono@era.int

Europol Assists in Dismantling Counterfeit Print-Shops in Columbia

On 8 August 2012, the Colombian National Police DIJIN with the assistance of the Spanish Brigada de Investigación Del Banco, the US Secret Service and Europol dismantled two illegal print-shops in Bogota and Popayan in Columbia.

Europol was involved in both operations in its capacity as the EU Central Office for Combating Euro Counterfeiting. Europol provided analytical, technical and financial support. During the searches a Europol expert was present to deliver on-the-spot technical assistance and expertise to the Colombian authorities. (EDB)

➤eucrim ID=1203015

Eurojust

2011 Annual Report

Eurojust published its 10th annual report reviewing its activities in the year 2011. Besides information on its activities and management, the report focuses mainly on Eurojust's operational activities, relations with EU institutions and partners as well as the 2002 Eurojust Decision and its future and administrative developments. Compared to 2010, the number of cases dealt with at Eurojust in 2011 only increased from 1421 to 1441.

2011 saw a significant development in the coordination meeting tool, with 204 meetings held in 2011 compared to 140 in 2010. Approximately 70% of coordination meetings involved three or more countries, and Europol attended 89 of these coordination meetings. Furthermore, Eurojust developed the use of coordination centres providing technical facilities that allow Eurojust to be linked to its counterparts (prosecutors, judges, and police officers) securely and in real time. Seven coordination centres were held in 2011 targeting crimes such as drug trafficking, money laundering, tobacco smuggling, fraud and trafficking in human beings.

Recurrent obstacles encountered in Eurojust's judicial cooperation casework include delays in the execution of mutual legal assistance and issues stemming from differences in the definition of crimes.

In 2011, 18% of all cases (263) registered at Eurojust concerned the execution of EAWs. Particular problems identified by Eurojust are inadequate information regarding the description of facts or criminal offences in the EAW; lack of information about the sentence for which the EAW was issued; lack of accurate information regarding the period of time a person may have already spent in custody in the executing state before surrender; sentences in absentia and the different approaches to the right to a retrial. Additional issues included failure to notify withdrawal of an EAW in a timely fashion, cases where no reason was given for non-execution of an EAW, financial and other losses for the issuing state, refusal of temporary surrender, use of different channels to transmit the EAW, and delays in receiving consent to prosecute for additional (newly discovered) offences. In June 2011, the College adopted *Guidelines for internal proceedings on the provision of Eurojust's opinion in case of competing European Arrest Warrants* for cases in which Eurojust is requested to provide an opinion in accordance with Article 16(2) of the Framework Decision on the EAW

The report also outlines the problems encountered with freezing orders, asset recoveries, and controlled deliveries. Eurojust's operational priorities for 2010 included drug trafficking, fraud, other organised criminal activities, money laundering, trafficking in human beings, terrorism, corruption, and cybercrime.

Looking at terrorism, the report shows that the number of cases where Eurojust's assistance had been sought was comparable to 2010 (27 to 28). The largest number of cases (242) registered at Eurojust in 2010 concerned drug trafficking, constituting 16.8% of Eurojust's total casework. Seven JITs on drug trafficking cases were initiated in 2011 compared with only three in 2010, and Eurojust is now associated with all of Europol's AWFs dealing with drug trafficking. Looking at trafficking in human beings, the number of cases diminished slightly, with 79 registered cases in 2011. However, 24 coordination meetings were held for cases concerning trafficking in human beings. For fraud-related crimes including tax fraud, computer fraud, advanced fee fraud, misappropriation of corporate assets, and VAT fraud, the number of coordination meetings increased from 17 to 58. The number of corruption cases increased slightly to 19 cases in 2011. Regarding the phenomenon of cybercrime, Eurojust registered 24 cases in 2010 and held ten coordination meetings in 2011 as opposed to one in 2010. Concerning money laundering, the number of cases decreased slightly to 126 cases (146 cases in 2010). Money laundering comprises the fourth most common type of crime.

With regard to JITs, in 2011, the number increased again to 33 JITs set up with Eurojust's assistance. In 2011, the JIT Network Secretariat was established at Eurojust. Issues identified by Eurojust at the prosecutorial and judicial levels concerning JITs include the admissibility of evidence and disclosure of information.

In October 2011, Eurojust and Europol organised the seventh annual meeting of the Network of National Experts on JITs. Furthermore, in 2011, Eurojust continued its JIT funding project providing financial and logistical assistance.

As regards Eurojust's cooperation with third states, the most frequently requested third state was Switzerland, followed by Norway, Croatia, the USA, Turkey, Bosnia and Herzegovina, Serbia, Morocco, and Liechtenstein. Cases mainly concerned drug trafficking, swindling and fraud, money laundering, and crimes against life, limb, or personal freedom. In 2011, Eurojust had three seconded liaison prosecutors from third states, namely Croatia, Norway, and the USA.

Regarding Eurojust's cooperation with EU institutions, representatives of

Eurojust attended several meetings of the European Parliament, contributed to the work of various council bodies, and a Memorandum of Understanding between Eurojust and the Commission was renewed. Furthermore, by the end of 2011, Eurojust had become home to secretariats of three networks, namely the European Judicial Network (EJN), the JITs Network, and the European Network of contact points in respect of persons responsible for genocide, crimes against humanity, and war crimes (Genocide Network). Cooperation with Europol in 2011 led to Eurojust's association with two more AWFs, and an exchange programme was established for members (with functions) of both organisations. Eurojust's cooperation with third states in 2011 saw the entering-into-force of a cooperation agreement between Eurojust and the Swiss Confederation. Furthermore, Eurojust drafted a report on the tasks, functions, and professional status of potential future Eurojust liaison magistrates based in third states to act on behalf of all Member States.

Looking at the implementation of the 2009 Eurojust Decision, by June 2011, 18 Member States should have brought their national laws in line with the decision. According to the annual report, ten Member States had completed the necessary measures at the end of 2011. Furthermore, Eurojust completed the implementation of the On-Call Coordination (OCC) system. Templates for the easier transmission of information about serious cross-border cases to Eurojust were developed as well as a PDF form informing Member State authorities of how to notify their Eurojust national representative of serious cross-border investigations and prosecutions. A "fiches suédoises" template, a type of fiche suggested by the Swedish presidency in 2009, was set up to provide information about the composition of the Eurojust National Coordination System in each Member State and a task force on the future of Eurojust was installed.

Eurojust's budget in 2011 was €31.7 million. Eurojust executed 95.8% of its commitment appropriations budget. Its workforce in 2011 was 269 employees (compared to 267 in 2010).

Achievements with regard to administrative issues included the signing of a cooperation agreement with the Kingdom of the Netherlands to provide a new building for Eurojust.

The final chapter of the report deals with the follow-up of council conclusions to Eurojust's Annual Report of 2010. (CR)

➤eucrim ID=1203016

Eurojust Annual Report: Council Conclusions

Eurojust's 2011 Annual Report was welcomed by the JHA Council at its meeting from 7-8 June 2012.

In its conclusions, the Council recognized that most of the objectives for 2011 had been achieved and welcomed the initiatives undertaken to finalise the process of implementation of the 2002 Eurojust decision.

While it congratulated Eurojust on the increased number of coordination meetings, Member States' competent authorities were encouraged to continue using Eurojust as a case coordination centre.

Looking at the difficulties in relation to the collection and admissibility of evidence identified by Eurojust, the Council called on the EP, the Commission, and Member States to advance work on the draft Directive on the European Investigation Order.

Looking at the use of EAWs, the Council regrets that problems with the execution of EAWs identified by Eurojust are recurring from previous years and therefore urged Member States to further disseminate among their practitioners information about the use of existing EAW tools and to report to Eurojust.

With regard to the 2002 Eurojust Decision, Eurojust and Member States are asked to complete the implementation process and to advance cooperation accordingly as soon as possible.

Finally, the Council invited Member States, the relevant Council preparatory bodies, and the Commission to analyse the Annual Report with a view to identifying possible courses of action. (CR)

➤eucrim ID=1203017

9th Activity Report of the Joint Supervisory Body of Eurojust Published

The Activity Report of the Joint Supervisory Body (JSB) of Eurojust for the Year 2011 provides an overview of the main activities carried out by the JSB in 2011.

The JSB is an independent body, which collectively monitors the activities of Eurojust involving the processing of personal data and ensures that they are carried out in accordance with the 2002 Eurojust Decision and do not violate the rights of individuals concerned. It examines the appeals of individuals to verify that their personal data are processed by Eurojust in a lawful and accurate manner and monitors the permissibility of the transmission of data from Eurojust. It also provides its obligatory opinion concerning the provisions on data protection in agreements or working arrangements with EU bodies or cooperation agreements with third states.

In 2011, the JSB closely followed the discussions and work carried out by Eurojust in relation to implementation of Council Decision 2009/426/JHA on the strengthening of Eurojust, review of the existing legal framework on data protection in the light of the Lisbon Treaty, and developments related to the proposal to establish an EU Terrorist Finance Tracking System and Eurojust's possible role in this matter. Furthermore, the JSB closely cooperated with the Data Protection Officer of Eurojust and monitored Eurojust's cooperation with third states.

Within its supervisory mandate, in 2011, the JSB presented a final inspection report as a result of its 2010 inspec-

tion. In its report, the JSB concluded that Eurojust had further improved its compliance with the data protection rules in place. The introduction of a more user-friendly case management system contributed to this improvement. However, the JSB identified some areas for further improvement. The JSB formulated specific recommendations for Eurojust to improve and harmonise the processing of data.

In 2011, the opinions of the JSB were issued on data protection issues related to the login mechanism by which users gain access to the Customs Information System (CIS) and the implementation of new data protection requirements focusing on the changes brought about by the revised Eurojust Decision for Eurojust's case management system (the three-year storage limit for logfiles; the improvement of interactive statistics and improved reporting on case links; logging mechanisms).

Within its mandate to protect the rights of the data subject, in 2011, the JSB issued a decision on one case-related appeal and a decision on a non-case-related appeal.

Finally, in 2011, the JSB launched its new webpage, including a list of authorities in each Member State, which citizens can contact concerning their rights as a data subject. (CR)

➤eucrim ID=1203018

Memorandum of Understanding with the European Commission Sealed

On 20 July 2012, Eurojust and the European Commission sealed a Memorandum of Understanding in the fight against serious organised crime. The Memorandum aims at further strengthening cooperation between the two organisations, essentially with the Directorate General Justice and to ensure increased efficiency, transparency, and an optimal exchange of information between Eurojust and the Commission (for details, see eucrim 4/2011, pp. 139-140). (CR)

➤eucrim ID=1203019

Vice-President of Eurojust Approved

At its meeting from 7-8 June 2012, the Council approved the election of Carlos Zeyen, National Member for Luxembourg, as Vice-President of Eurojust. Mr. Zeyen was elected by the College of Eurojust as Vice-President on 29 May 2012.

Before joining Eurojust in 2006, Mr. Zeyen worked in the Luxembourg District Prosecution Office, where he specialised in prosecuting money laundering and terrorism financing. (CR)

➤eucrim ID=1203020

New National Members Appointed for Hungary

On 1 July 2012, Mr. László Venczl was appointed National Member for Hungary at Eurojust. Before joining Eurojust, Mr. Venczl had been a prosecutor for more than twenty years, holding different posts within the Hungarian prosecution service. Furthermore, he has played an active role in the International Association of Prosecutors (IAP) and is a Contact Point for the Genocide Network.

The former National Member for Hungary, Ms. Ilona Lévai, remains at Eurojust as Seconded National Expert for Hungary. (CR)

➤eucrim ID=1203021

International Operation against Albanian Drug Trafficking Network

In a coordinated action involving France, Belgium, the Netherlands, and Italy and supported by Eurojust and Europol, members of an Albanian organised crime network were arrested between March and May 2012. To achieve this, an Operational Coordination Centre was set up within Eurojust, with the support of its Case Analysis Unit, to exchange information on the arrests, house searches, and seizures in real time and keep all the participants updated on the developments of the actions in different countries. Europol supported the simultaneous actions by cross-matching, analysing, and linking emerging data sent to the Operational Coordination Centre. (CR)

➤eucrim ID=1203022

European Judicial Network (EJN)

Templates for Summary Reports of Contact Points' Activities

The EJN Secretariat has begun to make preparations to draft the second biannual Report on the Operation of the EJN for the period between 24 December 2010 and 24 December 2012. For this purpose, the EJN provides model forms to be downloaded from its website and filled in by the EJN contact points. (CR)

➤eucrim ID=1203023

Turkish National System and EJN Activities

The Turkish Directorate General for International Law and Foreign Relations now offers a list of Turkish EJN contact points, explanations on the Turkish judiciary systems and laws, and information on Turkish activities regarding its cooperation with the EJN on its website. The information is provided in English. (CR)

➤eucrim ID=1203024

Frontex

Eastern Borders Annual Overview 2012 Published

Frontex has published its Eastern Borders Annual Review 2012. Overall, the report concludes that the situation at the common and regional borders between the Eastern Border Risk Analysis Network (EB-RAN) members (Belarus, Moldova, Ukraine), the Russian Federation, and the neighbouring Member States (Poland, Slovakia, Finland, Norway, Lithuania, Romania, Latvia, Hungary, and Estonia) did not change significantly compared to 2010. In detail, the report finds that:

- The main challenges are linked to the growing cross-border movements of regular travellers, due to several Local Border Traffic Agreements and a relatively high demand for EU visas in the EB-RAN countries, as well as to illicit goods, due to price differences between

both sides of the common borders for a wide range of products;

- Price differences and economic disparities in the border zones are the main drivers of smuggling activities which remain the single largest threat to border security at these borders;
- Cigarettes and fuel continue to be smuggled mostly towards the EU, while smuggling of stolen vehicles and household goods moves in the opposite direction,
- Belarus and Ukraine remain markets with significant purchasing power and a high demand for second-hand vehicles;
- The threat of illegal migration is considered to be somewhat smaller in magnitude;
- The two main migration systems are linked, first, to nationals beyond the Commonwealth of Independent States (CIS), mostly Afghans and Somalis, who attempt to migrate to the EU using the EB-RAN countries as transit points and, secondly, to nationals from CIS countries within the Russian Federation;
- At almost 30% of the total detections of illegal border-crossing at the common borders, the Slovakian-Ukrainian border remained the most affected section of the common borders in terms of illegal migration;
- Ukraine remains the main transit country for both CIS and non-CIS illegal migrants aiming to reach the EU as well as for migrants from the Caucasus region and Central Asian countries travelling towards (or from) the Russian Federation;
- Detections of illegal stays upon exit from the EU towards the neighbouring EB-RAN countries more than doubled in 2011 (from around 3300 to around 6900), with Poland and Hungary reporting the biggest increases.

The report includes a statistical annex outlining the total detections reported by EB-RAN countries and to neighbouring land border detections reported by EU Member States. (CR)

➤eucrim ID=1203025

European Ombudsman Launches Consultation

On 19 July 2012, the European Ombudsman opened a consultation concerning his own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations (for details, see eucrim 2/2012, pp. 55-56). Individuals, NGOs, and other organisations active in the area of fundamental rights protection were invited to submit comments to the Ombudsman by 30 September 2012. (CR)

➤eucrim ID=1203026

Memorandum of Understanding with Turkey Signed

On 28 May 2012, Frontex and the Turkish Ministry of Foreign Affairs signed a Memorandum of Understanding establishing practical cooperation between Frontex and Turkish authorities competent in border management.

According to the memorandum, the two parties agree to cooperate in the fields of risk analysis, training, and research and development as well as to exchange experiences and best practices in border control. Furthermore, the memorandum foresees the possibility to deploy Turkish officers to selected border crossing points at the external EU borders under the Focal Points project. The intended cooperation shall be implemented via contact points established in the respective units for each of the areas of cooperation referred to above. (CR)

➤eucrim ID=1203027

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

New Proposal on Protection of Financial Interests by Criminal Law

On 11 July 2012, the Commission adopted a new proposal for a Directive on the fight against fraud to the EU's financial interests by means of criminal law (COM(2012)363). The proposed directive aims at further harmonising the prosecution and sentencing of crimes against the EU budget, so that offenders no longer benefit from differences between Member States' criminal justice systems. Still, many differences remain between offence definitions and periods within which investigation and prosecution can take place. Therefore, the proposal provides common definitions of offences against the EU budget, e.g., fraud or fraud-related crimes such as corruption, the misappropriation of funds, money laundering, or obstruction of public procurement procedures to the detriment of the EU budget. Additionally, the proposed Directive introduces minimum sanctions, e.g., six months of imprisonment for serious cases. Further harmonisation measures included in the proposal concern statutes of limitation that should last at least five years from the time at which the offence was committed.

The proposal is subject to the co-decision procedure and is currently awaiting the EP's first reading. The Commission plans to present two more legal initiatives for the protection of the EU's financial interests by criminal law by 2013 (see also eucrim 2/2012, pp. 63-66). (EDB)

➤eucrim ID=1203028

Commission's Annual Report Shows Fraud against EU Budget Decreased in 2011

On 19 July 2012, the Commission presented its annual report for 2011 on the protection of the EU's financial interests. The most important conclusion is a 35% drop in fraud cases affecting the EU budget in comparison with 2010. The explanation for this significant decrease is stronger measures and better controls but also the closure of a programming period with regard to cohesion policy and more stabilised reporting in the new control system for agriculture.

As far as the recovery of EU funds is concerned, the Commission was able to

reclaim around €2 billion. The Commission calls upon those Member States as well as pre-accession countries that still need to make improvements in this respect to use the legal instruments available to them and to seize assets where money cannot be recovered.

Relevant policy measures already taken by the Commission include the communication on fighting corruption (see eucrim 3/2011, p. 104) and the Commission's amended proposal to reform OLAF (see eucrim 2/2011, p. 54). (EDB)

➤eucrim ID=1203029

Quick Reaction Mechanism to VAT Fraud Proposal Adopted

On 31 July 2012, the Commission adopted a proposal for a Directive amending Directive 2006/112/EC on the common system of value added tax as regards a quick reaction mechanism against VAT fraud. The quick reaction mechanism will enable Member States faced with a serious case of sudden and massive VAT fraud to implement emergency measures, in a way they are currently not allowed to under EU VAT legislation.

At the present time, if Member States wish to use measures currently not allowed under this legislation, they have to formally request a derogation in the form of a proposal by the Commission, which is then sent to the Council for unanimous adoption. This is a very time-consuming procedure ultimately causing higher financial losses from VAT fraud. (EDB)

➤eucrim ID=1203030

Exclusion from EU Funding Is Not a Criminal Penalty

On 5 June 2012, the CJEU ruled in case C-489/10, also known as the Bonda case. In 2005, Mr. Bonda, a Polish farmer, applied to the District Office of the Agricultural Restructuring and Modernisation Agency in Poland for a single area payment for that year. The single area payment system is a transitional subsidy system for the Member States that joined the EU between 2004 and 2007. It is calculated by dividing the country's annual financial support with its utilized agricultural area. Mr. Bonda, however, submitted an incorrect declaration overstating the size of his property by giving a figure of 212.78 hectares instead of 113.49 hectares.

In 2006, he was refused payment by the aforementioned District Office and was sanctioned by losing entitlement to the single area payment, up to the amount of the difference between the real area and the area declared and for the following three years.

On 14 July 2009, Mr. Bonda was convicted by the District Court of Goleniów for subsidy fraud under the Criminal Code. He was sentenced to eight months imprisonment suspended for two years and a fine. When he appealed, the Supreme Court of Poland referred the case to the CJEU for a preliminary ruling on the question of whether the sentence Mr. Bonda received from the District Office of the Agricultural Restructuring and Modernisation Agency constitutes a criminal penalty that could prevent criminal proceedings from being brought against him for the same offence (the *ne bis in idem* principle).

The CJEU based its ruling on its jurisprudence regarding such penalties and also drew upon the so-called Engel criteria of the ECtHR to conclude that the measures in question are of an administrative nature and cannot be considered a criminal penalty. (EDB)

➤eucrim ID=1203031

Market Abuse

Market Abuse Directive – State of Play

On 10 July 2012, the LIBE Committee discussed the proposed Market Abuse Directive (see eucrim 1/2012, p. 8). Since legislation on market abuse is a shared responsibility, the economic and monetary affairs committee also needed to discuss the matter, which was scheduled for a later date.

On 25 July 2012, however, the Commission introduced amendments to the original proposal. The amendments were triggered by recent revelations of alleged rate-fixing by LIBOR (London Interbank Offered Rate) and EURIBOR (Euro Interbank Offered Rate). These are benchmark rates calculated through the submission of interest rates by major (international) banks, generally indicating each bank's creditworthiness. Allegedly, banks had provided estimates of the interest rates at which they would accept offers of funding, which were different from the rates they would have accepted in practice, making them look more creditworthy than they were.

The Commission checked whether such manipulation of benchmarks was covered by the Market Abuse Directive or the related Regulation on insider dealing and market manipulation. As this was not the case, the Commission exercised its right of initiative to make and clarify amendments to the existing proposals. It is considered essential that the manipulation of benchmarks is punishable by criminal sanctions in order to ensure the effective enforcement of EU policy on market integrity. Thus, the Commission's amendments expand the scope of the criminal offence of market manipulation to include the direct manipulation of benchmarks when committed intentionally. Attempted manipulation as well as inciting, aiding and abetting are also covered by the amended proposed Directive. (EDB)

➤eucrim ID=1203032

Fraud

New Concrete Measures to Tackle Tax Fraud and Evasion

The Commission presented concrete measures to reinforce the fight against tax fraud and tax evasion, including relation with third states (COM(2012) 351 final), on 27 June 2012.

Nearly €2 trillion in total is the estimated amount of this type of crime in

the EU. In order to strengthen the fight against tax fraud and evasion, the Commission made proposals on three levels: national, EU, and international.

The Commission will be monitoring national efforts to increase the administrative capacity to collect taxes and will be providing the necessary technical assistance. Voluntary disclosure programmes should also be part of national policies in this respect.

On the EU level, the quick reaction mechanism for VAT fraud has already been developed into a proposal that was recently adopted (see p. 99). Furthermore, the Commission will make an impact assessment on the possibility of introducing an EU Tax Identification Number (TIN). The TIN, which is national so far, will facilitate information exchange between the Member States' authorities if it is replaced by a cross-border TIN.

On an international level, the Commission proposes increasing efforts to deal with the so-called tax havens as well as concluding stronger savings agreements with key neighbouring countries (see also eucrim 2/2012, p. 56).

The Commission will continue working on these ideas and plans to present an action plan on fighting fraud and evasion before the end of 2012. (EDB)

➤eucrim ID=1203033

Money Laundering

Protocol for Supervisory Cooperation in Anti-Money Laundering

On 2 August 2012, the Joint Committee of the three European Supervisory Authorities presented a Protocol for Supervisory Cooperation in the field of anti-money laundering (AML). The three European Supervisory Authorities are the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority. They have been mandated to oversee the regulation of financial services in Europe since January 2011.

The non-binding protocol aims at improving the cooperation and coordination between AML supervisors. It includes guidelines for payment service providers on informing the competent supervisory authority on, e.g., its intention to establish a branch or provide payment services in another Member State and guidelines for taking measures such as on-site inspections in accordance with Directive 2007/64/EC on payment services in the internal market and the Third Anti-Money Laundering Directive (2005/60/EC). (EDB)

➤eucrim ID=1203034

Organised Crime

New EU Strategy towards Eradication of Trafficking in Human Beings

On 16 June 2012, the Commission adopted the EU Strategy towards the Eradication of Trafficking in Human Beings. It includes prevention, protection of, and support of the victims as well as prosecution of the traffickers. Five years are foreseen for implementation.

Actually, hundreds of thousands of people are recruited, transported, or harboured by force through the EU every year under exploitative conditions, most of them for the purpose of sexual or labour exploitation but also for the violent removal of organs, begging, domestic servitude, illegal adoption, and other forms of exploitation. The slavery of the 21st century – trafficking in human beings – is a lucrative form of crime that generates profits of over €25 billion annually for international criminal organisations worldwide. Because of its variety in appearance and rapid developments under changing socio-economic circumstances, this type of trafficking often has implications that individual countries cannot effectively address on their own.

The recently adopted strategy complements the work done by governments, international organisations, and civil society in the EU and in third countries. At the same time, it supports the implementation of EU legislation on trafficking in human beings, which the Council adopted on 21 March 2011 (see eucrim 2/2011, p. 59). It further refers to the Action Plan implementing the Stockholm Programme, the EU Internal Security Strategy in Action, the Global Approach to Migration and Mobility, and the 2009 Action-Oriented Paper on strengthening the EU external dimension against trafficking in human beings.

Focusing on concrete and practical measures, the strategy outlines five priorities and correlating initiatives to fight this type of organised crime:

- **Priority A:** Identifying, protecting, and assisting victims of trafficking

In a first step, victims must be identified as such to offer them safe accommodation, material assistance, medical treatment, psychological assistance, counselling and information, translation and interpretation services, and access to justice. Clear information will be provided to victims on their rights under EU law and under national legislation, in particular their right to assistance and health care, their right to a residence permit, and their labour rights. In addition, public awareness has to be strengthened. Therefore, Member States should ensure that formal, functional national referral mechanisms are established. By 2015, the Commission will develop a model for an EU Transnational Referral Mechanism that is in line with guidelines to better identify victims of trafficking in human beings. Special attention will be given to the development of guidelines for consular services and border guards to identify victims of trafficking. In view of the fact that one in four traded humans is a child, special guidelines on child protection systems have to be established, ensuring safe return and preventing re-trafficking.

- **Priority B:** Stepping up the prevention of trafficking in human beings

In order to understand criminal networks, the Commission will fund research on reducing the demand for and

supply of services and goods by victims of trafficking in human beings. The research includes such specific areas as trading purposes and specific categories of victims such as children. In addition, the Commission is assisting research projects examining the Internet and social networks as increasingly popular recruitment tools for traffickers. An EU platform of civil society organisations and service providers working on victim protection and assistance in Member States and third countries will be funded in 2014. Furthermore, a European Business Coalition against trafficking in human beings shall be established to improve cooperation between companies and stakeholders.

■ **Priority C:** Increased prosecution of traffickers

Preliminary results of recently collected data show that the number of convictions in trafficking cases has decreased. To reverse this trend, the new strategy aims to support an establishment of national law enforcement multidisciplinary units, specialized in human trafficking. Joint investigation teams shall involve Europol and Eurojust in all cross-border trafficking cases. Especially the information exchange shall increase in number and quality so that Member States can make full use of EU agencies sharing information among themselves and with other Member States actively at the level of law enforcement and at the judicial level. On top of that, the EU will found a pilot project to strengthen regional cooperation on trafficking in human beings along routes from the East to the EU using the Instrument for Stability in 2012.

■ **Priority D:** Enhanced coordination and cooperation among key actors and policy coherence

An EU platform of civil society organisations and service providers working on victim protection and assistance in Member States and selected third countries will be set up next year. Further, in this area, the strategy aims to strengthen the EU-wide coordination mechanism to support the informal network of national rapporteurs or equivalent mechanisms. Moreover, a tool to assess fundamental rights in anti-trafficking policy and related actions shall be created.

■ **Priority E:** Increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings

To understand the flows and trends of internal EU trafficking, the Commission, together with the Member States, will develop an EU-wide system for the collection and publication of data that is broken down according to age and gender. In 2013, the Commission will develop knowledge on the gender dimensions of human trafficking in order to increase the understanding of high-risk groups, and it will target actions in a more coherent manner in the future as well as collaborate with the Member States. Research projects will also be launched in areas such as gender dimensions, e.g., by means of case-law studies and data comparison. Finally co-operations with labour, social/health, safety, and fisheries inspectors, will be pursued.

Intending to improve the current situation, the strategy will now be discussed by the EP and Council.

In July, the European Data Protection Supervisor (EDPS) strongly welcomed the recent changes and showed how data protection could be an incentive to benefit an effective cooperation. Especially Priority A and D require significant data, which, according to the EDPS, need to be handled with care. Specifically, the EDPS first commented that data protection is a pre-condition for mutual trust between victims and the authorities. Data protection in this context will help to reassure victims who might be afraid of retaliation by their traffickers if any information leaks out. Information exchange would moreover run more smoothly if law enforcement agencies trust their counterparts in other Member States. The EDPS therefore proposes training programmes for law enforcement units as one possibility to enhance data protection.

Secondly, it was pointed out that data protection is an essential part of victims' rights, in particular the right to information. In practical terms, the information to be given to the victims as foreseen in Priority A should include not only notification that the right to protection of personal data exists but also the content and procedure to be followed. This could encourage victims to cooperate more freely with different authorities. Another point mentioned by the EDPS is the need for data protection in the development of an EU-wide system for data collection. To ensure reliable and comparable data for evidence-based policy on trafficking in human beings, it is recommended that only anonymous data be processed wherever possible. Finally, the EDPS draws attention to the fact that data protection can assist Member States in addressing fundamental rights issues specifically related to anti-trafficking policy and related actions. For the planned tool in this area, it is suggested that the Fundamental Rights Agency should involve the EDPS to find the best way of including data protection. (CK)

➤eucrim ID=1203035

New EU Drugs Strategy for 2013–2020 Planned

The Council presented its ideas on a new drugs strategy for 2013-2020 at the JHA Council of 7-8 June 2012. The previous EU drug policy framework, the Drugs Strategy 2005–2012, provided two three-year plans outlining concrete measures for combating drug trafficking and drug-related crime.

To replace them, the Council announced that a new strategy should be adopted before the end of 2012. According to the Council, this should be a concise document concentrating on five themes: coordination, demand reduction, supply reduction, international cooperation as well as research, information, and evaluation.

The drugs strategy should incorporate innovative approaches and address challenges that have been identified in recent

Basic Training Course on Legal and Technical Aspects of Cybercrime

Focus on Profiling Hackers and Internet Sex Offenders

ERA, Trier, 14-15 February 2013

This training course is being held with the financial support of the Prevention of and Fight against Crime Programme of the European Commission's Directorate-General for Home Affairs. It is part of a project consisting of eight seminars that will take place in Trier at the ERA premises between 2012 and 2015. The project comprises basic training courses on the legal and technical aspects of cybercrime in order to provide approximately 500 judges and prosecutors with the essential skills necessary to cope with Internet-related offences. Key topics are:

- Introduction to cybercrime: definitions, development of computer crime, overview of the most relevant offences and how they are committed;
- Legal challenges and solutions when fighting cybercrime: challenges in applying traditional criminal law instruments, procedural law, jurisdictional issues, and international cooperation;
- Cybercrime case studies (real-life scenarios to be discussed in small working groups);
- Profiling hackers;
- Profiling sex offenders;
- Towards the International Criminal Tribunal for Cyberspace (ICTC)?

The course will be held in English and is primarily aimed at judges and prosecutors.

For further information, please contact Mr. Laviero Buono, Head of European Criminal Law Section, ERA. e-mail: lbuono@era.int

years, including those related to new or ongoing threats to the health and safety of EU citizens, e.g., the spread of new psychoactive substances and the use of the Internet to distribute illegal drugs. As part of the EU internal security agenda, the new strategy should also promote an intelligence- and evidence-based approach to the drug problem, drawing upon the work that has been done under the EU policy for organised and serious international crime. The scientific community and civil society should be involved in drafting this document. (EDB)
➤eucrim ID=1203036

Lone Wolf Terrorists and Safe Havens Most Worrying Terrorism Trends

During the JHA Council of 7-8 June 2012, the EU counter-terrorism coordinator presented his latest discussion paper. In this document, he focuses on the role of the EU agencies such as Europol, Eurojust and, Frontex but also on the EU Intelligence Analysis Centre (IntCen), the Standing Committee for Internal Security (COSI), and the European Network and Information Security Agency (ENISA). Improved cooperation between these agencies as well as setting up more JITs and introducing Eurojust liaison magistrates in specific third states are among the recommendations. Also, in the areas of preventing and countering radicalisation and protecting human rights, the counter-terrorism coordinator has formulated recommendations focused on cooperation with third states. According to the counter-terrorism coordinator, the existence of safe havens outside the EU, such as in northern Mali, Nigeria's request for assistance with counter-terrorism, and piracy in the Horn of Africa are further points to be urgently addressed by the EU institutions. (EDB)
➤eucrim ID=1203037

Cybercrime

EU Citizens Concerned about Cybersecurity

A new Eurobarometer study conducted in March 2012 and published on 9 July 2012 indicates that the biggest concern of EU citizens using the Internet is the misuse of their personal information online and the security of online payments.

After interviewing more than 26,000 persons in all EU Member States, more than half of them say they access the Internet at least once a day. 59% of Internet users say that they do not feel well informed about the risks of cybercrime. However, the majority of those who feel confident in doing online banking or shopping say that they do feel well informed about cybercrime. (EDB)
➤eucrim ID=1203038

Counterfeiting & Piracy

EU Customs' Statistics on Protecting Intellectual Property Rights

The Commission's annual report on customs confiscations of articles suspected of infringing intellectual property rights, such as trademarks, copyrights, and patents, was released on 24 July 2012. In 2011, a total of 115 million products representing a value of nearly € 1.3 billion were intercepted compared to 103 million products in 2010, representing € 1.1 billion. The majority of the detained goods were medicines, packaging material, and cigarettes. Products for daily use and goods causing health and safety concerns accounted for a total of 28.6%, which is almost double the percentage of 2010.

China remains the main source country, supplying 73% of all intercepted products. In 90% of all cases, the confiscated products were destroyed or a court case was initiated by the holder of the intellectual property right. (EDB)
➤eucrim ID=1203039

Sexual Violence

Launch of Global Alliance to Fight Child Sexual Abuse Online

On 21 June 2012, the Commissioner for Home Affairs, Cecilia Malmström, and US Attorney General Eric Holder an-

nounced the launch of a Global Alliance of National Ministers of the Interior and Justice against Child Sexual Abuse Online.

Building on the success of the EU-US Working Group on cybersecurity and cybercrime (see eucrim 1/2011, pp. 10-12 and eucrim 4/2010, p. 136), this new initiative aims at uniting countries to fight child abuse online by:

- Enhancing efforts to identify victims, whose sexual abuse is depicted in child pornography, and ensuring that they receive assistance, support, and protection;
- Reducing the availability of child pornography online and the re-victimization of children;
- Enhancing efforts to investigate cases of child sexual abuse online and to identify and prosecute offenders;
- Increasing public awareness of the risks posed by children's activities online.

The Global Alliance should be formally launched in December 2012. (EDB)

➤eucrim ID=1203040

Procedural Criminal Law

Procedural Safeguards

New Approach on Right of Access to a Lawyer

Precisely one year after the Commission had submitted its proposal on 8 June 2011 (see eucrim 3/2011, p. 108), the Council agreed on a general approach to the Directive on the Right of Access to a Lawyer in criminal proceedings and on the right to communicate upon arrest. The reason why a consensus was not reached before its JHA Meeting on 12 June 2012 can be explained by the nature of the sensitive subject: the directive follows the purpose of approximating the laws of the Member States in a field where substantial differences between the national legal systems exist. Already during and even before the JHA Meeting in September of last year, the scope of the directive dominated the discussion and several Member States expressed their reservations (see eucrim 4/2011, p. 144 ff).

As part of the Roadmap on criminal procedural rights, the proposal aims EU-wide minimum standards at the following. In all cases where the suspect or accused person is deprived of liberty, access to a lawyer must effectively be provided as soon as possible. At the latest, legal assistance must be ensured before questioning by the police or a judge begins. These communications between the lawyer and the suspect or accused person must be treated confidentially. Especially in case of detention under the EAW, additional access to a lawyer in the executing state has to be given. In line with the right to communicate upon arrest, the right of access to a lawyer was a general intention welcomed by the Member States and the European Criminal Bar Association (ECBA). However, it was met with sharp criticism at the same time. Most reservations concern innovations in the draft text. In it, Article 3 and 4 arrange for an exception of the core right:

Article 3 rules that in "exceptional circumstances and in the pre-trial stage" one can temporarily deviate from the application of the above-mentioned, concrete specifications of the right of access to a lawyer if this is justified by "compelling reasons in the light of the particular circumstances of the case."

Article 4 goes even further in limiting the generally guaranteed confidential communication between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations, and any other forms of communication permitted under national law if, "in the light of the particular circumstances," this is justified by one of the following compelling reasons:

- the urgent need to prevent serious crime;
- if there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.

In this context, it is feared that the intended rights exist merely in legal theory and not in the daily practice of criminal proceedings. According to Member States and the ECBA, phrases such as "compelling reasons" or "particular circumstances" are not concrete enough to ensure law enforcement, especially if every public authority is addressed to make use of the limits and not only the authorities involved in criminal prosecution. There is a demand for clear rules for certain problematic areas in daily practice, e.g., at police stations. To ensure a constitutional trial, the right to counsel that applies at any stage of the criminal proceedings was not to be restricted in certain issues. Especially the ECBA pointed out that the Council's general approach was not compliant with the ECtHR standards and would even prevent the application of these rights in practice. It would therefore lead to numerous claims before the Court of Justice and the ECtHR as well as before national courts. According the ECBA, this violation of core rights undermines mutual trust and impedes the effectiveness of criminal justice. Nevertheless, the approach achieved will constitute the basis for upcoming negotiations with the EP. On 10 July 2012, the draft directive was backed by the LIBE Committee (amended by 51 to 2 votes, with 4 abstentions). (CK)

➤eucrim ID=1203041

Data Protection

EDPS Opinion on Establishment of European Cybercrime Centre

On 29 June 2012, the EDPS published his opinion addressing the data protection aspects of setting up a European Cybercrime Centre, also known as EC3 (see eucrim 2/2012, p. 57). Since the EC3 is in accordance with the Commis-

sion's proposal to be part of Europol, it will thus fall under the legal framework of Europol as regards the processing of personal data. The EDPS has asked the Commission for clarity on the distinction between the planned EC3 and the already existing Europol Cybercrime Centre.

With regard to the data processing tasks of the new EC3, the data protection safeguards should be in compliance with those laid down in the 2009 Europol Decision. Especially concerning the EC3's cooperation with the private sector, this can imply serious data protection risks that should be considered. (EDB)
➤eucrim ID=1203042

EDPS Annual Report for 2011 Published

The EDPS published his annual report for 2011 on 20 June 2012. The EDPS achieved a record consultation number in 2011 with 24 opinions, 12 formal comments, and 41 informal comments. Additionally, the EDPS intervened in five cases before the General Court and the Civil Service Tribunal.

Nevertheless, most attention was paid to the opinion on the reform of the EU's data protection legal framework. Since the reform is still in full progress in the EU institutions, it will also remain high on the EDPS' agenda for 2012.

Other priorities for 2012 include raising awareness for data protection in EU institutions and agencies, providing support for the data protection officers in EU institutions, privacy-enhancing technologies, and further developing the area of freedom, security and justice as well as the financial sector reform. (EDB)
➤eucrim ID=1203043

Victim Protection

Victim's Rights Directive Adopted

After reaching a general approach on the proposed Directive establishing minimum standards on the rights, support and protection of victims of crime (see eucrim 1/2012, p. 14 and eucrim 4/2011, p. 147), the EP voted in favour of the proposal on 12 September 2012.

With an estimated 75 million victims of crime in the EU every year, the new directive provides for the same basic rights for these victims across the entire EU. One of the key provisions of the directive is the individual assessment that all victims will undergo to take care of their specific needs at the earliest opportunity. Protection needs should be individually met by taking into consideration characteristics such as the victim's age, gender, race, religion, or sexual orientation as well as the nature and the circumstances of the crime. Free support services such as psychological assistance should be made easily accessible. Furthermore, victims of crime have a right to be informed of their rights and to report the crime and take an active part in the criminal proceedings in a language that they understand.

The Council adopted the directive during the Council Meeting on Employment, Social Policy, Health and Consumer Affairs on 4 October 2012. The EU Member States will have three years after its entry into force (starting on the day after its publication in the Official Journal) to implement the directive. The UK and Ireland have decided to opt-in in the adoption of this directive. Denmark is not taking part and thus will not be bound by it or subject to its application. (EDB)
➤eucrim ID=1203044

Cooperation

Police Cooperation

Prüm Decisions: Statistics and Reports on Automated Data Exchange for 2011

On 20 June 2012, the General Secretariat of the Council of the EU published a compilation of statistics for 2011 concerning the automated exchange of DNA and dactyloscopic reference data as well as of Vehicle Registration Data (VRD) pursuant to Chapter 2 of Decision 2008/615/JHA (Prüm Decision).

According to the statistics, on 31 December 2012, 12 of 14 Member States entitled to exchange DNA data were inter-connected and had started the automated exchange of reference data; ten Member States were interconnected with regard to automated dactyloscopic reference data exchange; and ten Member States were interconnected with regard to the automated exchange of VRD. (CR)
➤eucrim ID=1203045

Proposal for Law Enforcement Access to EURODAC: Recast Version

In September 2009, the Commission proposed to amend the EURODAC Regulation and to introduce the possibility for Member States' law enforcement authorities and Europol to access the EURODAC central database for the purposes of prevention, detection, and investigation of terrorist offences and other serious criminal offences. The proposal was presented at the same time as the "Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes," spelling out the exact modalities of such access.

With the entry into force of the Lisbon Treaty, the proposal for the Council Decision lapsed. In order to make progress on the negotiations regarding the Common European Asylum System package and to facilitate the agreement on the EURODAC Regulation, the Commission withdrew those provisions from the EURODAC Regulation referring to access for law enforcement purposes and presented a new proposal in October 2010.

The current negotiations on the Common European Asylum System package brought back the request for law enforcement access for EURODAC. Hence, the Commission has decided to again present proposals to permit law enforcement access to EURODAC.

The current proposal for a regulation therefore withdraws the 2010 proposal and replaces it with a new one, first, in order to take into account the resolution of the EP and the results of negotiations in the Council. Second, the new proposal introduces the possibility for Member States' law enforcement authorities and Europol to access the EURODAC central database for the purposes of prevention, detection, and investigation of terrorist offences and other serious criminal offences. Third, it introduces the necessary amendments to Regulation (EU) No. 1077/2011.

This aims at enabling law enforcement authorities to request the comparison of fingerprint data with those stored in the EURODAC central database when they seek to establish the exact identity of or obtain further information on a person suspected of a serious crime or on a crime victim. On a hit/no hit basis, the requesting law enforcement authority will be informed if information on the person is available in the national asylum database of another Member States. If this is case, further information on the person can be requested from that Member State by using existing instruments for information exchange, such as Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities.

The comparison of fingerprints in the possession of Member States' designated law enforcement authorities and Europol with those stored in the EURODAC database will only be possible if necessary in a specific case and under well-defined circumstances.

The present amended proposal reinstates all of the provisions proposed in the lapsed draft decision of 2009 (see eucrim 4/2010, p. 147). In addition, it introduces two technical provisions relating to the asylum provisions: one to ensure consistency with the 2003 Dublin Regulation and one to clarify the need for having the system's automated hit replies verified by a fingerprints expert.

The current proposal, as per the 2009 proposal, notes that the comparison of fingerprint data using EURODAC may only be made after national fingerprint databases and the automated fingerprint databases of other Member States under Council Decision 2008/615/JHA (the Prüm Agreements) show negative results.

The elements that were neither in the September 2009 proposal nor in the 2010 proposal are the following:

- Article 2(1) contains further definitions concerning the IT Agency (European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, see eucrim 4/2011, p. 147) and Europol as well as the nature of terrorist and criminal offences;
- Article 2(2) and 2(4) clarifies when and how the applicable data protection legal instruments – Directive 95/46/EC and Framework Decision 2008/977/JHA – apply;
- Article 29 – the wording on the leaflet was enhanced to ensure that it is simple and written in a language the applicant can understand; Chapter VIII (Article 38) makes several amendments to Regulation (EU) No 1077/2011 of the EP and of the Council of 25 October 2011, establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.
- Article 41 – the words "and Europol" have been included into the article on penalties.

Throughout the recast version of the regulation, all references to "Management Authority" were replaced with "Agency." (CR)

➤eucrim ID=1203046

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Second Training Session with the Support of the Human Rights Fund

The setting up of a Training Unit within the ECtHR is the first project to be implemented in the Court with the support of the Human Rights Trust Fund (HRTF; for more detailed information, see eucrim 2/2012 p. 61). The unit aims to provide professional groups with high-quality training in Convention law. The second session for Serbian magistrates and lawyers took place on 15 and 16 May 2012.

➤eucrim ID=1203047

Joint Statement on Special Account for the ECtHR

On 21 June 2012, the Secretary General of the CoE and the President of the ECtHR announced in a joint statement the opening of a special account for the

* If not stated otherwise, the news reported in the following sections cover the period July–September 2012.

Court and called on the MS for voluntary contributions. The aim of the account is to eliminate cases at the top of the priority queue.

Among others, the entry into force of the Single Judge Procedure (see eucrim 3/2011, p. 116) has already proven highly effective in reducing the backlog of inadmissible cases. Other categories of cases, however, are also in need of such efforts. Besides the queue of inadmissible cases, there are currently some 2000 priority applications that have been pending for more than one year without being communicated to the respective governments and another 600 cases that are still pending before the Court, despite having been communicated to the governments more than two years ago.

At the High Level Conference in Brighton (April 2012), several Member States indicated their willingness to provide additional financial support to assist the Court with its backlog cases. The newly opened account will be used to recruit lawyers to deal with the Court's backlog of priority cases: most importantly for cases that have the most impact in terms of identifying and correcting serious human rights abuses and for cases where the victims have been waiting too long for decision.

Member States may stipulate specific purposes for which the sums they contributed should be used (such as dealing with applications against these Member States).

➤eucrim ID=1203048

New Version of HUDOC Database and New Case Law Translation Project

The High Level Conference in Brighton (April 2012) stressed that a more effective national implementation of human rights and freedoms is a key issue in improving human rights protection throughout the Member States and in reducing the Court's heavy case-load. Significant aspects of this issue were identified as the availability of relevant case law to the national courts in a language they understand (translation) as well as an easy-to-use interface for the Court's HUDOC case law database.

Regarding translations, the financial support of the HRTF enabled the Court to launch the project "Bringing Convention standards closer to home." The aim of the project is to translate the Court's key judgments and decisions in order to further disseminate its case law via HUDOC: primarily (recent) cases with significant relevance to those Member States in which the case law has not yet been translated.

The translations will be published in the HUDOC database, which already contains translations in languages other than the official languages and the links of Internet sites hosting further translations. As the new version of HUDOC (see below) also enables searches to be carried out in non-official languages, the Registry welcomes more translations from such host sites, suggestions for cases to be translated, and information on any cases or case summaries that have already been translated. A guideline for the submission of non-official translations was also provided.

➤eucrim ID=1203049

An important step towards the dissemination of the Court's case law was made by introducing the new version of the HUDOC case law database. HUDOC is the main interface between the Court and legal professionals. In recent years, however, the number of documents published had grown, and searches became more difficult because of the large and often unmanageable number of results provided to the users. The new development of the new version was funded entirely by voluntary contributions from the governments of Cyprus, Denmark, Germany, and Norway. It includes new content such as legal summaries of more significant cases. Users are able to focus their searches on cases selected for the Court's official reports.

Online HUDOC manuals and video tutorials have also been made available.

➤eucrim ID=1203050

Thematic Factsheets on the Court's Case-Law Available in Polish

Since September 2010, some 40 factsheets have been published on summaries of key judgments and decisions of the Court, sorted by theme (see also eucrim 4/2011 p. 151; 1/2011 p. 19; and 4/2010 p. 148). The factsheets were first only available in English and French, later in German and Russian (see eucrim 2/2012 p. 61.). A series of factsheets have also been translated into Polish. Further translations will be made available on the Court's website in the future.

➤eucrim ID=1203051

Elections at the Court

The Parliamentary Assembly (PACE) of the CoE elected five new judges for the Czech Republic, the Netherlands, Poland, Sweden, and the United Kingdom for a nine-year term of office.

On 10 September 2012, Mr. Dean Spielmann (recently elected Vice President), was elected as the Court's new President, succeeding Sir Nicolas Bratza.

Therefore a new Vice President (Guido Raimondi, Italy) and two new Section Presidents were elected. All of them have been elected for a three-year term.

➤eucrim ID=1203052

Other Human Rights Issues

Italy Called Upon to Speed Up Court Proceedings and Improve the Treatment of Roma and Migrants

On 18 September 2012, Nils Muižnieks, the CoE Commissioner for Human Rights, released a report regarding serious human rights concerns involving lengthy proceedings and the treatment of Roma and migrants in Italy. The Commissioner stressed that durable solutions have to be found in Italy in order to address the issue of lengthy proceedings, which give rise to the highest numbers for repetitive cases lodged before the ECtHR. The Commissioner stated that only a solution which benefits from the

collaboration of all relevant stakeholders is likely to work.

The report pointed out that, in times of economic crisis, efficient solutions can be found, e.g., the active case management in the First Instance Court of Turin where the backlog of cases was reduced by 26,6 % in five years.

The Commissioner welcomed Italy's first national strategy for the inclusion of Roma and Sinti and stressed that the policies of segregated camps and forced evictions should be discontinued once and for all.

Regarding the treatment of migrants, the Commissioner welcomed the commitment of Italian authorities to no longer pursue the policy of "push-back" of migrants to Libya. The Commissioner emphasised that the announced renegotiation of the bilateral agreement with Libya must include appropriate guarantees to prevent human rights violations resulting from possible interceptions and expulsions.

➤eucrim ID=1203053

Specific Areas of Crime

Corruption

GRECO Third Evaluation Round on the Russian Federation

On 13 August 2012, the CoE's GRECO published its Third Round Evaluation Report on the Russian Federation. As usual, the report focused on two distinct areas in need of improvement: the criminalisation of corruption and the transparency of party funding. The report detected significant deficiencies, in particular with regard to criminal provisions relating to public sector bribery, and stressed more transparency in the sphere of political party and election financing.

The report states that the criminalisation of bribery and trading in influence are substantially deficiencient compared to the standards established by the Crim-

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptation of the provisional application (a)
Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 99)	Malta	29 March 2012 (r)
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)	Armenia	9 May 2012 (r)
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117)	Belgium	13 April 2012 (r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Armenia Finland	9 May 2012 (r) 11 July 2012 (a)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Moldova Malta Austria	13 March 2012 (s) 12 April 2012 (r) 20 September 2012 (s)
Convention on Cybercrime (ETS No. 185)	Switzerland Malta Georgia Austria Japan Belgium	21 September 2011 (r) 12 April 2012 (r) 06 June 2012 (approved) 13 June 2012 (r) 03 July 2012 (a) 20 August 2012 (r)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Turkey Lithuania Azerbaijan	12 April 2012 (s) 26 July 2012 (r) 8 October 2012 (s)
Convention on the Prevention of Terrorism (CETS No. 196)	Turkey Switzerland	23 March 2012 (r) 11 September 2012 (s)
Convention on Action against Trafficking in Human Beings (ETS No. 197)	Finland Lithuania	30 May 2012 (a) 26 July 2012 (r)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Denmark	28 September 2012 (s)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Moldova FYR Macedonia Andorra Portugal Ukraine Iceland Russia	12 March 2012 (r) 11 June 2012 (r) 29 June 2012 (s) 23 August 2012 (r) 27 August 2012 (r) 20 September 2012 (r) 01 October 2012 (s)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Czech Republic Azerbaijan	4 April 2012 (s) 1 May 2012 (entry into force) 14 May 2012 (s)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptation of the provisional application (a)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Netherlands Croatia Greece Hungary Lithuania Romania Ukraine	6 July 2012 (accepted) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s)
Convention on preventing and combating violence against women and domestic violence (CETS No. 210)	Turkey Serbia Malta United Kingdom Belgium Monaco Italy	14 March 2012 (r) 4 April 2012 (r) 21 May 2012 (s) 08 June 2012 (s) 11 September 2012 (s) 20 September 2012 (s) 27 September 2012 (s)
Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211)	Turkey Belgium Ukraine Armenia Moldova Spain Guinea	29 June 2012 (s) 24 July 2012 (s) 20 August 2012 (r) 20 September 2012 (s) 20 September 2012 (s) 8 October 2012 (s) 10 October 2012 (s)
Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)	Albania Armenia Austria Hungary Latvia Luxembourg Poland Romania Serbia Slovenia Sweden Ukraine	20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s) 20 September 2012 (s)

➤eucrim ID=1203058

inal Law Convention on Corruption (ETS No. 173) and its Additional Protocol (ETS No. 191) – the latter has not yet been ratified by the Russian Federation.

The report urged the expansion of criminal provisions on public sector bribery so that they cover non-material gain as well. Trading in influence and public sector bribery shall be fully addressed and improvement is needed on statutes of limitations.

Regarding political financing, the report underlined that the provisions are often in line with the CoE standards, but their enforcement is not stringent or independent enough. The regulations as a whole were regarded as too complex and subject to frequent amendments as well as to divergent interpretations and application. The report pointed out the widespread misuse of public authority in favour of certain candidates. GRECO was also concerned by the alleged existence of financial flows that are not regulated. GRECO therefore recommended widening the range of sanctions applicable to violations of political financing rules and strengthening the independence and effectiveness of supervisory bodies in this field.

GRECO made a total of 20 recommendations to the country and will assess the action taken at the end of 2013.

➤eucrim ID=1203054

Money Laundering

MONEYVAL: First Evaluation Report on the Holy See/Vatican City State

On 18 July 2012, the CoE's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) published its first evaluation report on the Holy See/Vatican City State.

The report evaluates the implementation of international and European standards to combat money laundering and terrorist financing. The on-site visit took place in November 2011, but MONEYVAL takes into account developments up to January 2012 as permissible under its procedures. The report assesses levels of compliance with the Financial Action Task Force (FATF) 40+9 Recommendations, four of which are non-applicable under the unique circumstances of the Holy See/Vatican City State. MONEYVAL made several recommendations to strengthen the Holy See's system of AML and CFT measures.

The report states that the Holy See had to come a long way in a short period of time. Its first AML and CFT law entered into force on 1 April 2011 and was rapidly amended after MONEYVAL's on-site visit. The amended law came into force on 25 January 2012.

The report stressed that no AML/CFT risk assessment has been undertaken, no on-site visits have been conducted, and no sample testing of customer files has taken place. The legislative base for supervision needs further clarity, for instance regarding the role, responsibility, powers, and independence of the financial intelligence unit named Financial

Intelligence Authority (FIA). The FIA receives and analyses suspicious activity reports, but its ability to collect additional information from entities that are obliged to report to the FIA is uncertain in the amended law. Regarding international judicial co-operation, the FIA is limited in its ability to exchange information with other FIUs by the requirements of respective Memoranda of Understanding.

The report further emphasises the absence of the specific criminalisation of financing in respect of certain terrorist acts in relevant UN counter-terrorism conventions.

➤eucrim ID=1203055

Procedural Criminal Law

CEPEJ: Publication of the 4th CEPEJ Evaluation Report on European Judicial Systems

On 20 September 2012, the European Commission for the Efficiency of Justice (CEPEJ) published its 4th evaluation report on European judicial systems, which was adopted by the plenary meeting in Strasbourg on 5-6 July 2012. The report is based on quantitative and qualitative data from 46 Member States. Thus, it provides a detailed picture of the daily operation of national courts in Europe. It contains comparative tables and comments on essential fields such as the amount of public expenditure for judicial systems, legal aid structures, mediation as well as the use of new technologies in judicial procedures and the lengths of procedures.

The report aims to provide a basis for policy makers, the judicial community, and researchers to compile reliable analyses on the development of judicial systems in Europe.

➤eucrim ID=1203056

Legislation

GRETA: 14th Meeting, First Evaluation Reports, and a New Party to the Convention

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its 14th meeting in Strasbourg on 25-29 June 2012. At the meeting, GRETA adopted final evaluation reports on Armenia, Montenegro, and the UK and also approved several draft reports concerning the implementation of the CoE Convention on Action against Trafficking in Human Beings (Convention).

The first evaluation report on the United Kingdom (published on 12 September 2012) welcomed the creation of the UK Human Trafficking Centre and a National Referral Mechanism for identifying and assisting victims as well as the adoption of a four-year strategy on THB. The report suggested strengthening the mechanisms for identifying victims and treating trafficked people primarily as victims. Therefore, GRETA suggested not to prosecute people for offences committed as a result of their being trafficked.

The first evaluation report on Montenegro (published on 13 September 2012) welcomed the signing of a Memorandum of Cooperation defining the responsibilities of the stakeholders in THB cases. Civil society should be more involved, however, in the planning and implementation of national anti-trafficking policy. GRETA suggested improving the identification of victims by reviewing the definition of "victim of trafficking." The definition was deemed as too narrow because it is currently linked to the outcome of criminal proceedings.

The report on Armenia (published on 21 September 2012) welcomed the efforts undertaken by the government to raise public awareness of THB. However, it suggested that awareness-raising should focus more on groups vulnerable to THB, in particular on children. As in the case of Montenegro, GRETA urged Armenian authorities to separate the identification of victims of trafficking from their cooperation with the law enforcement authorities.

Finally, on 31 July 2012, Lithuania became the 37th state to ratify the Convention, which entered into force there on 1 November 2012.

➤eucrim ID=1203057

Unternehmensstrafbarkeit im europäischen und internationalen Recht

Dr. Marc Engelhart

Since the mid-1990s, national corporate criminal liability laws have expanded worldwide. This development can be seen not only in common law countries but also in civil law jurisdictions that had traditionally judged criminal norms to be inapplicable to fictional persons. As on the international level, more and more regulations directly address companies. International treaties in the field of economic criminal law regularly include corporate sanctions. The following contribution analyses the existing international instruments, especially those of the European Union and the Council of Europe. It concentrates on the binding obligations for states to implement corporate criminal liability into their national systems. It compares and evaluates the preconditions for corporate criminal liability and the respective sanctions. The author concludes that the present regulations still follow a simplistic model of corporate liability. Stronger emphasis on preventive measures would help create good corporate structures by means of sanctioning law. Such a new approach could contribute substantially to the prevention of crime in corporate settings.

Der Blick auf nationale Rechtsordnungen insbesondere in Europa zeigt, dass die Kriminalstrafe für Unternehmen immer üblicher wird. Längst haben nicht nur die Länder, die dem *common law* zugerechnet werden,[1] ein Unternehmensstrafrecht, sondern auch zahlreiche *civil law*-Staaten.[2] Die starke Zunahme in den 1990er Jahren[3] setzte sich auch nach der Jahrtausendwende fort.[4] Besonders bemerkenswert ist die Einführung der Unternehmensstrafe in der Schweiz (2003) und in Österreich (2004), da sie dort lange Zeit strafrechtsdogmatisch für nicht möglich gehalten wurde. Die dortigen Reformen zeigen die Entwicklungsoffenheit der Rechtssysteme und machen deutlich, dass selbst klassisch kontinentaleuropäische Strafrechtsordnungen keine unüberwindlichen Hürden sehen, Unternehmen dem Strafrecht zu unterwerfen. In der EU verzichten nur noch Bulgarien, Deutschland, Griechenland und Lettland auf eine Unternehmensstrafbarkeit, allerdings sind dort Verwaltungssanktionen gegen Unternehmen möglich. Die Tendenz zur Einführung einer Unternehmenssanktion ist auch im internationalen Recht zu beobachten. Im Bereich des Wirtschaftsstrafrechts ist sie inzwischen eine Standardmaßnahme. Diese Entwicklung gab wiederum den Impuls für nationale Regelungen. Der vorliegende Beitrag analysiert den Stand der internationalen, insbesondere der europäischen Vorgaben und zeigt Perspektiven für die zukünftige Rolle der Unternehmensstrafe auf.

I. Europäische Union

Auf internationaler Ebene bestehen die umfangreichsten Vorgaben innerhalb der Europäischen Union. Sie entstanden zunächst im Rahmen der Regelungen zum Schutz der finanziellen Interessen der Gemeinschaft und in den Gemeinsamen Maßnahmen, bevor sie Einzug in zahlreiche Rahmenbeschlüsse und Richtlinien hielten. Eine generelle Verantwortlichkeit von Unternehmen kennt das Unionsrecht nicht, vielmehr sieht es sie jeweils sachgebietsbezogen vor. Dies ist der begrenzten Strafrechtskompetenz der Gemeinschaft geschuldet. Jeweils im Einzelfall geregelt ist, ob auch Anstiftung, Beihilfe und Versuch neben einer täterschaftlichen Begehung erfasst sind.[5]

1. Zweites Protokoll zur PIF-Konvention

Von zentraler Bedeutung ist die Unternehmenssanktion in den Regelungen zum Schutz der finanziellen Interessen der Gemeinschaft. Diese beziehen Unternehmen in ein umfassendes Sanktionsregime mit ein und dienten als Vorbild für weitere Regelungen. Das am 19. Mai 2009 in Kraft getretene, aber bereits am 19. Juni 1997 beschlossene Zweite Protokoll zur PIF-Konvention[6] und der erläuternde Bericht[7] enthalten hierzu die grundlegenden Vorgaben.[8]

Das Zweite Protokoll geht von einer eigenständigen Handlungs- und Schuldfähigkeit von Unternehmen aus, die neben der der handelnden natürlichen Person besteht (**parallele Verantwortlichkeit**, Tabelle 1). Erfasst werden alle „juristischen Personen" mit Ausnahme von Staaten, internationalen Organisationen und (anderen) hoheitlich tätigen Körperschaften des öffentlichen Rechts. Damit werden insbesondere wirtschaftlich tätige Unternehmen der öffentlichen Hand miteinbezogen. Die Definition der juristischen Person bleibt dem nationalen Recht überlassen. Fraglich ist dabei, ob auch Unternehmen erfasst werden, die zwar nach nationalem Recht nicht den Status einer juristischen Person haben, gleichwohl aber (teilweise) Träger von Rechten und Pflichten (und Sanktionen) sein können. Versteht man den Begriff autonom gemeinschaftsrechtlich im

Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Verantwortlichkeit
Juristische Person, ohne ■ Staaten ■ hoheitlich tätige Körperschaften des öffentlichen Rechts ■ öffentlich-rechtliche internationale Organisationen	Führungsposition aufgrund ■ Vertretungsbefugnis oder ■ Entscheidungsbefugnis oder ■ Kontrollbefugnis	■ Straftat zugunsten der juristischen Person (Abs. 1) oder ■ Unterlassen ermöglicht Straftat von Unterstellten zugunsten der juristischen Person (Abs. 2)	Parallele Verantwortlichkeit des Unternehmens neben dem handelnden Mitarbeiter (Abs. 3)

Tabelle 1: Zweites Protokoll zur PIF-Konvention (Voraussetzungen der Verantwortlichkeit – Art. 3)

Sinne einer umfassenden Einbeziehung verschiedenster nationaler Ausgestaltungen, so sind auch diese Unternehmen erfasst.[9] Glücklich gewählt ist der Begriff allerdings nicht.

Die Verantwortlichkeitsregelung folgt einem Zurechnungsmodell, bei dem Straftaten von führenden Mitarbeitern dem Unternehmen zugerechnet werden. Es wird jedoch nicht näher definiert, welche Merkmale die Tat des Mitarbeiters aufweisen muss, insbesondere, ob sie schuldhaft begangen sein muss.[10] Außer dem Erfordernis des Handelns zugunsten des Unternehmens werden keine weiteren (einschränkenden und das kollektive Handeln im Unternehmen erfassenden) Bedingungen aufgestellt. Es kann daher als „reines Individualtatmodell" bezeichnet werden.[11] Der Kreis handelnder Führungspersonen wird formal und funktional bestimmt. Formal folgt er der Vertretungsbefugnis, die sich zumeist aus dem Gesellschaftsrecht ergibt. Alternativ kann er funktional über die Befugnis, Entscheidungen für das Unternehmen zu treffen oder Kontrolle auszuüben, bestimmt werden. Damit wird praktisch jede verantwortlich handelnde Führungsperson erfasst.[12] Das Protokoll sieht zwei mögliche Konstellationen vor, in denen das Unternehmen verantwortlich ist: Entweder die unmittelbare Begehung der Tat durch die Führungsperson selbst oder deren unterlassene Aufsicht durch mangelnde Überwachung oder Kontrolle, die eine Tat von Unterstellten ermöglicht hat.

Bei den **Sanktionen** unterscheidet das Zweite Protokoll zwischen den zwei möglichen Tathandlungen (Tabelle 2). Für die Verletzung der Aufsichtspflicht werden allein wirksame, angemessene und abschreckende Sanktionen verlangt, eine Formel, die insbesondere der Rechtsprechung des EuGH entstammt.[13] Damit besteht in der Umsetzung ein großer Spielraum. Insbesondere muss nicht zwingend das Strafrecht, es kann auch das Verwaltungs- oder gar das Zivilrecht gewählt werden. Die in den Entwürfen noch vorgesehene strafrechtliche Lösung konnte sich somit nicht durchsetzen.[14] Die Freiheit in der Wahl der Art der Sanktion gilt grundsätzlich auch für die erste Form der Tatbegehung, der Straftat einer Führungsperson zugunsten des Unternehmens. Allerdings schreibt der Rechtsakt hier nur Geldsanktionen ausdrücklich vor. Optional und lediglich beispielhaft nennt er die Einschränkung der Geschäftstätigkeit (Ausschluss von öffentlichen Zuwendungen, Verbot der Handelstätigkeit und richterliche Aufsicht) sowie eine Auflösung des Unternehmens als mögliche weitergehende Folgen. Konkretere Voraussetzungen für die Verhängung dieser Sanktionen, etwa für den schwerwiegenden Eingriff der Auflösung, sind dabei nicht genannt. Die noch im Entwurf der Kommission vorgesehene Veröffentlichung der Entscheidung wurde nicht aufgenommen.[15]

Das Erfordernis „wirksamer, angemessener und abschreckender" Sanktionen wirft die Frage auf, ob nicht zumindest in bestimmten Fällen – u.a. als Mindestanforderung des Effizienzgebots[16] – allein das Strafrecht ausreichendes Mittel sein kann.[17] Der EuGH lässt sich im Fall „Griechischer Maisskandal"[18] sowie in einer weiteren Entscheidung[19] in diese Richtung interpretieren. Deutlicher wurde das Gericht im Verfahren gegen Frankreich wegen unzureichender Maßnahmen gegen die Blockade von Autobahnen durch Landwirte: Frankreich habe keine ausreichenden und wirksamen Maßnahmen gegen die Rechtsbrüche ergriffen, insbesondere keine strafrechtlichen.[20] Andererseits hat das Gericht in einer Entscheidung von 1991 geurteilt, dass sich aus europäischem Recht grundsätzlich kein Zwang ergebe, strafrechtliche Sanktionen gegen Unternehmen einzuführen.[21] Insoweit kann zwar aus der Rechtsprechung eine Pflicht, natürliche Personen zu bestrafen, abgeleitet werden, jedoch bislang keine gleichartige für die Sanktionierung von Unternehmen.

Art der Sanktionen
Für Straftaten gem. Art. 3 Abs. 1 (Straftat zugunsten der juristischen Person): Wirksame, angemessene und abschreckende Sanktionen, zu denen strafrechtliche oder nichtstrafrechtliche Geldsanktionen gehören und andere Sanktionen gehören können, bspw.: ■ Ausschluss öffentlicher Zuwendungen und Hilfen ■ vorübergehendes oder ständiges Verbot der Ausübung der Handelstätigkeit ■ richterliche Aufsicht ■ richterlich angeordnete Auflösung
Für Straftaten gem. Art. 3 Abs. 2 (Unterlassen der Aufsicht): ■ wirksame, angemessene und abschreckende Sanktionen oder Maßnahmen

Tabelle 2: Zweites Protokoll zur PIF-Konvention (Sanktionen – Art. 4)

2. Gemeinsame Maßnahmen

Im Jahr 1997 wurde die Verantwortlichkeit von Unternehmen nicht nur im Zweiten Protokoll vorgesehen, sondern auch in der Gemeinsamen Maßnahme zur Bekämpfung des Menschenhandels und der sexuellen Ausbeutung von Kindern. 1998 folgten ein Rechtsakt zur Beteiligung an kriminellen Vereinigungen und ein weiterer zur Bestechung im privaten Sektor. Alle Maßnahmen wurden inzwischen durch Rahmenbeschlüsse ersetzt.[22] Wie das Zweite Protokoll sahen die Maßnahmen eine **Verantwortlichkeit des Unternehmens neben der der handelnden natürlichen Person** vor (Tabelle 3). Die beiden ersten Rechtsakte behandelten das Thema noch rudimentär: Weder der Kreis erfasster juristischer Personen noch die Stellung des Mitarbeiters wurde konkretisiert. Unklar blieb das Erfordernis in der Maßnahme zur Bekämpfung des Menschenhandels, die eine Straftat „im Auftrag der juristischen Person" verlangte und damit wohl restriktiver war als das Zweite Protokoll, das ein Handeln zugunsten des Unternehmens verlangt. Die Maßnahme zur Beteiligung an einer kriminellen Vereinigung verzichtete ganz auf eine Differenzierung und sah für natürliche und juristische Personen die gleiche Tathandlung vor.

Erst der Rechtsakt zur Bestechung im privaten Sektor rekurriert auf das Zweite Protokoll: Bei der juristischen Person wurden dieselben Ausnahmen für öffentliche Körperschaften aufgenommen und die Stellung des Mitarbeiters entsprechend der drei vorgesehenen Leitungsbefugnisse definiert. Abweichend wird jedoch nicht von „Führungsperson", sondern von „leitender Stellung" gesprochen. Da die englische Version allerdings in beiden Fällen „leading position" verwendet, ist damit offensichtlich kein inhaltlicher Unterschied gemeint. Als Tathandlung übernimmt die Maßnahme die beiden Fallkonstellationen des Protokolls: die unmittelbare Tatbegehung durch die Leitungsperson sowie die Aufsichtspflichtverletzung, die die Tat eines Untergebenen ermöglicht.

Rechtsakt bzgl.	Regelung in	Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Parallele Verantwortlichkeit *
Menschenhandel und sexuelle Ausbeutung von Kindern GM 97/154/JI v. 24.2.1997 (ABl. L 63 v. 4.3.1997, S. 2)	II.A.c)	Juristische Person	(–)	Straftat im Auftrag der juristischen Person	ja
Beteiligung an einer kriminellen Vereinigung GM 98/733/JI v. 21.12.1998 (ABl. L 351 v. 29.12.1998, S. 1)	Art. 3	Juristische Person	(–)	Kriminelles Verhalten gem. Art. 2	ja
Bestechung im privaten Sektor GM 98/742/JI v. 22.12.1998 (ABl. L 358 v. 31.12.1998, S. 2)	Art. 5	Juristische Person, ohne ■ Staaten ■ hoheitlich tätige Körperschaften des öffentlichen Rechts ■ öffentlich-rechtliche internationale Organisationen	Person mit leitender Stellung aufgrund ■ Vertretungsbefugnis oder ■ Entscheidungsbefugnis oder ■ Kontrollbefugnis	■ Straftat zugunsten der juristischen Person (Abs. 1) oder ■ Unterlassen ermöglicht Straftat von Unterstellten (Abs. 2)	ja

Tabelle 3: Gemeinsame Maßnahmen (Voraussetzungen der Verantwortlichkeit)
* Parallele Verantwortlichkeit des Unternehmens neben dem handelnden Mitarbeiter

Rechtsakt bzgl.	Regelung in	Art der Sanktionen
Menschenhandel und sexuelle Ausbeutung von Kindern	II.A.c),d)	Verwaltungsrechtliche oder strafrechtliche Sanktionen ■ Einziehung der Instrumente und der Erträge dieser Straftaten ■ vorübergehende oder endgültige Schließung von Einrichtungen, die der Begehung dieser Straftaten gedient haben
Beteiligung an einer kriminellen Vereinigung	Art. 3	■ strafrechtlich oder in sonstiger Weise ■ wirksame, verhältnismäßige und abschreckende Sanktionen ■ auch Vermögenssanktionen und sonstige Sanktionen wirtschaftlicher Art
Bestechung im privaten Sektor	Art. 6	Wie Zweites Protokoll

Tabelle 4: Gemeinsame Maßnahmen (Sanktionen)

Auch in den **Sanktionen** spiegelt sich erst in der neuesten Gemeinsamen Maßnahme das Zweite Protokoll wider, aus dem die Sanktionsfolgen mit der Unterscheidung zwischen den beiden Tathandlungen übernommen wurden (Tabelle 4). Die beiden anderen Maßnahmen treffen noch eigenständige Regelungen. Alle zeigen sich jedoch flexibel im Hinblick auf die Verankerung der Sanktion: Diese muss nicht strafrechtlich sein, sondern kann auch in anderen Rechtsgebieten erfolgen.

3. Rahmenbeschlüsse

Die Rahmenbeschlüsse aufgrund der originären Kompetenz der EU zur Strafrechtsharmonisierung enthalten durchweg Regelungen zur **Verantwortlichkeit** von Unternehmen (Tabelle 5). Diese steht jeweils neben der Verantwortlichkeit der handelnden Mitarbeiter. Gleiches gilt für die beiden für nichtig erklärten Rahmenbeschlüsse[23] sowie den nicht umgesetzten deutschen Vorschlag für einen Rahmenbeschluss für die Vergabe öffentlicher Aufträge.[24] Fast alle Rahmenbeschlüsse übernehmen die Regelungen des Zweiten Protokolls (Tabelle 6). Allein die beiden zur Terrorismusbekämpfung bzw. zur unerlaubten Ein- oder Durchreise/zum unerlaubten Aufenthalt sehen bei den erfassten juristischen Personen keine Ausnahmen für öffentlich-rechtliche Körperschaften vor.

Auch im Bereich der **Sanktionen** lehnen sich die Rahmenbeschlüsse in weitem Umfang an das Zweite Protokoll an (Tabelle 7). Besonderheiten weisen insbesondere die Rahmenbeschlüsse zum Terrorismus und zum Menschenhandel auf. Sie übernehmen zwar die beiden Tathandlungen des Zweiten Protokolls in Bezug auf die Verantwortlichkeit, differenzieren hiernach jedoch nicht auf Sanktionsebene und machen somit auch für die Aufsichtspflichtverletzung detaillierte Vorgaben.[25] Zudem führen sie als zusätzliche optionale Maßnahme die vorübergehende oder endgültige Schließung von Einrichtungen ein, die zur Begehung der Straftat genutzt wurden. Dieser Punkt ist in der Folgezeit in weitere Rechtsakte eingeflossen. Eine eigenständige Regelung enthielt der nichtige Rahmenbeschluss zum Schutz vor Verschmutzung der Meere durch Schiffe, indem er Mindestbeträge für das Höchstmaß von Geldsanktionen vorsah.[26] Zudem enthielt er (wie auch der nichtige Rahmenbeschluss zum Schutz der Umwelt) die optionale Vorgabe, eine Verpflichtung zur Beseitigung der Folgen der Tat vorzusehen,[27] was bei Umweltschäden eine einschneidende Maßnahme dargestellt hätte.

Die weiteren Unterschiede zum Zweiten Protokoll sind sprachlicher, nicht inhaltlicher Art. Die Rechtsakte zur Bestechung und zum Angriff auf Informationssysteme sprechen statt von „strafrechtlichen oder nichtstrafrechtlichen Geldsanktionen“ von „Geldstrafen und Geldbußen“. Damit wird die Auswahl des Gesetzgebers jedoch nicht auf öffentlich-rechtliche Sanktionen beschränkt, denn der englische Text lautet durchweg „criminal or non-criminal fine“. Es handelt sich nur um eine „missverständliche“ Übersetzungsvariante.[28] Ähnlich spricht der Rahmenbeschluss zum Angriff auf Informationssysteme nicht von „Auflösung“, sondern von „Eröffnung des Liquidationsverfahrens“. Er wählt damit eine gesellschaftsrechtliche Begrifflichkeit, die die Auflösung nicht als zwangsläufiges Ende impliziert. Im Englischen ist hingegen von der „judicial winding-up order“ die Rede,

Rechtsakt bzgl.	Regelung in	Parallele Verantwortlichkeit
Geldfälschung des Euro RB 2000/383/JI v. 29.5.2000 (ABl. L 140 vom 14.6.2000, S. 1)	Art. 8	Ja (Abs. 3)
Betrug/Fälschung unbarer Zahlungsmittel RB 2001/413/JI v. 28.5.2001 (ABl. L 149 vom 2.6.2001, S. 1)	Art. 7	Ja (Abs. 3)
Terrorismus RB 2002/475/JI v. 13.6.2002 (ABl. L 164 vom 22.6.2002, S. 3)	Art. 7	Ja (Abs. 3)
Menschenhandel* RB 2002/629/JI v. 19.7.2002 (ABl. L 203 vom 1.8.2002, S. 1) ersetzt durch RL 2011/36/EU	Art. 4	Ja (Abs. 3)
Unerlaubte Ein- oder Durchreise/ unerlaubter Aufenthalt RB 2002/946/JI v. 28.11.2002 (ABl. L 328 vom 5.12.2002, S. 1)	Art. 2	Ja (Abs. 3)
Bestechung im privaten Sektor RB 2003/568/JI v. 22.7.2003 (ABl. L 192 vom 31.7.2003, S. 54)	Art. 5	Ja (Abs. 3)
Sexuelle Ausbeutung von Kindern/Kinderpornografie* RB 2004/68/JI v. 22.12.2003 (ABl. L. 13 vom 20.1.2004, S. 44), ersetzt durch RL 2011/93/EU	Art. 6	Ja (Abs. 3)
Illegaler Drogenhandel RB 2004/757/JI v. 25.10.2004 (ABl. L 335 vom 11.11.2004, S. 8)	Art. 6	Ja (Abs. 3)
Angriff auf Informationssysteme RB 2005/222/JI (ABl. L 69 vom 24.2.2005, S. 67)	Art. 8	Ja (Abs. 3)
Organisierte Kriminalität RB 2008/841/JI v. 24.10.2008 (Abl. L 300 v. 11.11.2008, S. 42)	Art. 5	Ja (Abs. 3)
Rassismus/Fremdenfeindlichkeit RB 2008/913/JI v. 28.11.2008 (ABl. L 328 vom 6.12.2008, S. 55)	Art. 5	Ja (Abs. 3)

Tabelle 5: Rahmenbeschlüsse mit Verantwortlichkeit von Unternehmen. * Rechtsakt aufgehoben durch eine neuere Richtlinie

Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung
Juristische Person,* ohne ■ Staaten ■ hoheitlich tätige Körperschaften des öffentlichen Rechts ■ öffentlich-rechtliche internationale Organisationen	Führungsposition** aufgrund ■ Vertretungsbefugnis oder ■ Entscheidungsbefugnis oder ■ Kontrollbefugnis	■ Straftat zugunsten der juristischen Person (Abs. 1) oder ■ Unterlassen ermöglicht Straftat von Unterstellten (Abs. 2)

Tabelle 6: Rahmenbeschlüsse (Voraussetzungen der Verantwortlichkeit). *Der RB zur Terrorismusbekämpfung, zur unerlaubten Ein-/Durchreise usw. sowie der (nichtige) RB bzgl. der Verschmutzung durch Schiffe sehen keine Ausnahmen für Staaten und andere öffentlich-rechtliche Personen vor. **Der RB zum Drogenhandel spricht wie die Gemeinsame Maßnahme zur Bestechung nicht von Führungsperson, sondern von „leitender Stellung"

Rechtsakt bzgl.	Regelung in	Sanktionsregelung
Geldfälschung des Euro	Art. 8	Wie Zweites Protokoll
Betrug/Fälschung unbarer Zahlungsmittel	Art. 7	Wie Zweites Protokoll
Terrorismus	Art. 7	Wirksame, angemessene und abschreckende Sanktionen, zu denen strafrechtliche oder nichtstrafrechtliche Geldsanktionen gehören und andere Sanktionen gehören können, bspw.: ■ Ausschluss öffentlicher Zuwendungen oder Hilfen
Menschenhandel*	Art. 4	■ Verbot der Ausübung einer Handelstätigkeit ■ richterliche Aufsicht ■ richterlich angeordnete Auflösung ■ vorübergehende oder endgültige Schließung von Einrichtungen, die zur Begehung der Straftat genutzt wurden
Unerlaubte Ein- oder Durchreise/ unerlaubter Aufenthalt	Art. 2	Wie Zweites Protokoll
Bestechung im privaten Sektor	Art. 5	Wie Zweites Protokoll, aber ■ anstatt „strafrechtliche oder nichtstrafrechtliche Geldsanktionen": „Geldstrafen und Geldbußen"
Sexuelle Ausbeutung von Kindern/ Kinderpornografie*	Art. 6	Wie Zweites Protokoll, aber ■ anstatt „ angemessene" Sanktion: „verhältnismäßige" Sanktion ■ neu: Schließung von Einrichtungen
Illegaler Drogenhandel	Art. 6	Wie Zweites Protokoll, aber ■ neu: Schließung von Einrichtungen ■ neu: Einziehung der Stoffe (Drogen), Tatwerkzeuge und Erträge ■ anstatt Ausschluss „öffentlicher Zuwendungen oder Hilfen": Ausschluss von steuerlichen oder sonstigen Vorteilen oder Zuwendungen ■ anstatt Verbot der „Handelstätigkeit": Verbot der „gewerblichen Tätigkeit" ■ anstatt „angemessene" Sanktion: „verhältnismäßige" Sanktion
Angriff auf Informationssysteme	Art. 8	Wie Zweites Protokoll, aber ■ anstatt „ angemessene" Sanktion: „verhältnismäßige" Sanktion ■ anstatt „strafrechtliche oder nichtstrafrechtliche Geldsanktionen": „Geldstrafen und Geldbußen ■ anstatt „Auflösung": Eröffnung des Liquidationsverfahrens
Organisierte Kriminalität	Art. 5	Wie Zweites Protokoll, aber ■ anstatt „ angemessene" Sanktion: „verhältnismäßige" Sanktion ■ neu: Schließung von Einrichtungen
Rassismus/ Fremdenfeindlichkeit	Art. 5	Wie Zweites Protokoll, aber ■ anstatt „strafrechtliche oder nichtstrafrechtliche Geldsanktionen": „Geldstrafen und Geldbußen"

Tabelle 7: Rahmenbeschlüsse (Sanktionen). * Rechtsakt aufgehoben durch eine neuere Richtlinie

sodass kein inhaltlicher Unterschied gemeint sein kann. Auch wenn einige Rechtsakte anstatt von „wirksamen, angemessenen und abschreckenden" von „wirksamen, verhältnismäßigen und abschreckenden" Sanktionen sprechen, liegt darin kein inhaltlicher Unterschied, da im Englischen stets „effective, proportionate and dissuasive sanctions" verwendet wird.

4. Richtlinien

Schließlich sehen mehrere Richtlinien Regelungen zur Verantwortlichkeit von Unternehmen vor (Tabelle 8). Nach Inkrafttreten des Lissaboner Vertrags dienen sie gem. Art. 83 AEUV als originäre Kompetenz der EU zur Strafrechtsharmonisierung und lösen die Rahmenbeschlüsse ab. Sie sind daher das Instrument zukünftiger Rechtsetzung in diesem Bereich. Auch vier bislang noch nicht umgesetzte Richtlinienvorschläge sehen die Verantwortlichkeit von Unternehmen vor.[29]

Die **Voraussetzungen für eine Verantwortlichkeit** sind bei den Richtlinien deutlich inhomogener geregelt als bei den Rahmenbeschlüssen (Tabelle 9). Die vier neuesten Richtlinien[30] sowie die drei neuesten Richtlinienvorschläge[31] übernehmen fast vollständig die Regelungen des Zweiten Protokolls.[32] Die Richtlinie bezüglich Geldwäsche und Terrorismusfinanzierung lehnt sich im Hinblick auf die Stellung des Mitarbeiters und die Tathandlung ebenfalls an das Zweite Protokoll an. Sie zieht den Kreis erfasster Unternehmen jedoch deutlich enger und beschränkt ihn auf bestimmte Finanz(dienstleistungs)unternehmen. Eine gänzlich andere Regelungstechnik weist die älteste Richtlinie zu Insider-Geschäften und Marktmanipulationen auf. Sie trifft keine Unterscheidung zwischen juristischen und natürlichen Personen, sondern erfasst alle Personen, die Insiderkenntnisse haben. Dieser Ansatz soll jedoch nach dem neuen Richtlinienvorschlag von 2011 zugunsten des Ansatzes des Zweiten Protokolls aufgegeben und der Kreis der Unternehmen auf die dort angeführten juristischen Personen erweitert werden. Ähnlich wie die Richtlinie zu Insider-Geschäften und Marktmanipulationen knüpft der Vorschlag zum Schutz des geistigen Eigentums allein an die gewerbliche Verletzung an und stellt dadurch natürliche und juristische Personen gleich. Er wurde bislang nicht umgesetzt, wobei neuerdings wieder Bewegung in die Diskussion gekommen ist.[33]

Diese Inhomogenität spiegelt sich auch in den **Sanktionsregelungen** wider (Tabelle 10). Allein die neueste Richtlinie zum Schutz vor sexuellem Missbrauch und der Richtlinienvorschlag bezüglich des Angriffs auf Informationssysteme übernehmen (in leicht modifizierter Form) die differenzierte Regelung des Zweiten Protokolls. Die Richtlinie zur Bekämpfung des Menschenhandels und der Richtlinienvorschlag zum Betrug zulasten der finanziellen Interessen der EU lehnen sich nur insoweit an dieses an, als sie die beiden Tathandlungen übernehmen. Bei den Sanktionen unterscheiden sie jedoch nicht und wenden so auch auf die Aufsichtspflichtverletzung die detaillierten Sanktionsvorgaben mit der Verpflichtung zu einer Geldsanktion an. Damit wird die Regelung aus dem (aufgehobenen) Rahmenbeschluss zum Menschenhandel übernommen. Die anderen Richtlinien sowie der Richtlinienvorschlag zu Insider-Geschäften und Marktmanipulation stellen deutlich allgemeinere Vorgaben als das Zweite Protokoll auf: Sie verlangen allein wirksame, angemessene (bzw. verhältnismäßige) und abschreckende Sanktionen. Damit geben sie den Mitgliedsstaaten mehr Freiheiten als die Rahmenbeschlüsse.

Richtlinie bzgl.	Regelung in	Parallele Verantwortlichkeit
Insider-Geschäfte und Marktmanipulation RL 2003/6/EG vom 28.1.2003 (ABl. L 96 v. 12.4.2003, S. 16).	Art. 1 Nr. 6, Art. 2	–
Geldwäsche und Terrorismusfinanzierung RL 2005/60/EG vom 26.10.2005 (ABl. L 309 v. 25.11.2005, S. 15)	Art. 2, 39	–
Schutz der Umwelt RL 2008/99/EG vom 19.11.2008 (ABl. L 328 v. 6.12.2008, S. 28)	Art. 6	Ja (Abs. 3)
Meeresverschmutzung durch Schiffe RL 2009/123/EG vom 21.10.2009 (Abl. L 280 v. 27.10.2009, S. 52)	Art. 8b	Ja (Abs. 3)
Menschenhandel RL 2011/36/EU v. 5.4.2011 (Abl. L 101 v. 15.4.2011, S. 1)	Art. 5	Ja (Abs. 3)
Sexuellem Missbrauch und Ausbeutung von Kindern/ Kinderpornografie RL 2011/92/EU [berichtigt zu: 2011/93/EU] vom 13.12.2011	Art. 12	Ja (Abs. 3)
Richtlinienvorschlag bzgl.		
Schutz des geistigen Eigentums vom 26.4.2006, KOM(2006) 168	Alle Art.	–
Angriff auf Informationssysteme* vom 30.9.2010, KOM (2010) 517	Art. 11	Ja (Abs. 3)
Insider-Geschäfte und Marktmanipulationen vom 20.10.2011, KOM(2011) 654	Art. 7	Ja (Abs. 3)
Betrug zulasten der finanziellen Interessen der EU vom 11.7.2012, KOM(2012) 363	Art. 6	Ja (Abs. 3)

Tabelle 8: Richtlinien und Richtlinienvorschläge mit Verantwortlichkeit von Unternehmen. *Siehe auch das Ergebnis der Beratung im Rat vom 15.6.2011, Ratsdok.-Nr. 11566/11

Richtlinie bzgl.	Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung
Insider-Geschäfte und Marktmanipulation	Juristische Person	Bei Insider-Information: ■ Mitglied eines Verwaltungs-, Leistungs- oder Aufsichtsorgans ■ Zugang zu Insider-Informationen	■ Erwerb oder Veräußerung von Insider-Information zu ■ Marktmanipulation
Geldwäsche und Terrorismusfinanzierung	■ Kreditinstitute, Finanzinstitute ■ Juristische Personen, die Dienstleister für Trusts und Gesellschafter sind ■ Weitere juristische Personen, u.a. solche, die mit Gütern handeln, soweit Zahlungen in bar in Höhe von 15 000 EUR oder mehr erfolgen	Wie Zweites Protokoll	Wie Zweites Protokoll
Schutz der Umwelt	Wie Zweites Protokoll	Wie Zweites Protokoll*	Wie Zweites Protokoll
Meeresverschmutzung durch Schiffe	Wie Zweites Protokoll	Wie Zweites Protokoll*	Wie Zweites Protokoll
Menschenhandel	Wie Zweites Protokoll	Wie Zweites Protokoll	Wie Zweites Protokoll
Sexuellem Missbrauch und Ausbeutung von Kindern/ Kinderpornografie	Wie Zweites Protokoll	Wie Zweites Protokoll	Wie Zweites Protokoll
Richtlinienvorschlag bzgl.			
Schutz des geistigen Eigentums	Wie Zweites Protokoll	(–)	Gewerbliche Verletzung des Rechts am geistigen Eigentum
Angriff auf Informationssysteme	Wie Zweites Protokoll	Wie Zweites Protokoll	Wie Zweites Protokoll
Insider-Geschäfte und Marktmanipulation	Juristische Person	Wie Zweites Protokoll*	Wie Zweites Protokoll
Betrug zulasten der finanziellen Interessen der EU	Wie Zweites Protokoll	Wie Zweites Protokoll	Wie Zweites Protokoll

Tabelle 9: Richtlinien und Richtlinienvorschläge (Voraussetzungen der Verantwortlichkeit). *Die Richtlinie spricht abweichend nicht von Führungsperson, sondern von „leitender Stellung“

Eine Sonderstellung nimmt nach wie vor der Vorschlag zum Schutz des geistigen Eigentums ein, der explizit Geldstrafen verlangt und als optionale Maßnahme die Veröffentlichung der Entscheidung vorgesehen hatte. Dieser stärker strafrechtlich orientierte Ansatz wurde jedoch bislang nicht weiterverfolgt.

5. Weitere Entwicklungen

Auf Ebene der EU wird von der Strategie des Zweiten Protokolls, eine Verantwortlichkeit von Unternehmen zwar vorzusehen, aber die Wahl der Sanktionen den Mitgliedsstaaten zu überlassen, bislang nicht abgewichen. Weder das Grünbuch zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften[34] noch die neueren Überlegungen der Kommission[35] oder des Rates[36] zur Europäischen Strafrechtspolitik beschreiten hier neue Wege. Allerdings analysiert die Kommission derzeit das Verhältnis strafrechtlicher Sanktionssysteme zu nicht strafrechtlicher wie auch die Auslegung der „wirksamen, verhältnismäßigen und abschreckenden“ Sanktion.[37] Es ist nicht auszuschließen, dass angesichts der starken nationalen Tendenzen zum Unternehmensstrafrecht auch in Europa das Pendel in diese Richtung ausschlägt. Bislang ist die Anwendung des Strafrechts aber wie in den Vorschlägen zum Corpus Juris zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Union eine politische Forderung geblieben.[38]

Bei der Vollstreckung von Geldstrafen bzw. -bußen bereitet der bisherige Ansatz der Sanktionswahlfreiheit keine Probleme, da durch den diesbezüglichen Rahmenbeschluss zur gegenseitigen Anerkennung klargestellt wird, dass die Anerkennung unabhängig von einem Unternehmensstrafrecht ist.[39] Für andere Sanktionen besteht jedoch bislang kein entsprechender Mechanismus.

Richtlinie bzgl.	Regelung in	Sanktionsregelung
Insider-Geschäfte und Marktmanipulation	Art. 14	Unbeschadet des Rechts der Mitgliedsstaaten, strafrechtliche Sanktionen zu verhängen: Verwaltungsmaßnahmen oder im Verwaltungsverfahren zu erlassende wirksame, verhältnismäßige und abschreckende Sanktionen
Geldwäsche und Terrorismusfinanzierung	Art. 39	■ Wirksame, verhältnismäßige und abschreckende Sanktionen und Maßnahmen ■ Geeignete Verwaltungsmaßnahmen oder verwaltungsrechtliche Sanktionen
Schutz der Umwelt	Art. 7	Wirksame, angemessene und abschreckende Sanktionen
Meeresverschmutzung durch Schiffe	Art. 8c	Wirksame, verhältnismäßige und abschreckende Sanktionen
Menschenhandel	Art. 6	Wirksame, verhältnismäßige und abschreckende Sanktionen, zu denen strafrechtliche oder nichtstrafrechtliche Geldsanktionen und andere Sanktionen gehören können, bspw.: ■ Ausschluss öffentlicher Zuwendungen oder Hilfen ■ Verbot der Ausübung einer Handelstätigkeit ■ richterliche Aufsicht ■ richterlich angeordnete Auflösung ■ vorübergehende oder endgültige Schließung von Einrichtungen, die zur Begehung der Straftat genutzt wurden
Sexuelle Missbrauch und Ausbeutung von Kindern/ Kinderpornografie	Art. 13	Wie Zweites Protokoll, aber: ■ neu: Schließung von Einrichtungen
Richtlinienvorschlag bzgl.		
Schutz des geistigen Eigentums	Art. 6	Mitgliedsstaaten sehen folgende Sanktionen vor: Geldstrafe […] Mitgliedsstaaten sehen in geeigneten Fällen vor: ■ Vernichtung der schutzrechtsverletzenden Gegenstände […] ■ Veröffentlichung von Gerichtsentscheidungen
Angriff auf Informationssysteme	Art. 8	Wie Zweites Protokoll, aber ■ anstatt „ angemessene“ Sanktion: „verhältnismäßige“ Sanktion ■ anstatt „strafrechtliche oder nichtstrafrechtliche Geldsanktionen“: „Geldbußen oder Geldstrafen“ ■ anstatt „Auflösung“: „Anordnung des Liquidationsverfahrens“ ■ neu: Schließung von Einrichtungen
Insider-Geschäfte und Marktmanipulation	Art. 5	Wirksame, angemessene und abschreckende Sanktionen
Betrug zulasten der finanziellen Interessen der EU	Art. 5	Wirksame, verhältnismäßige und abschreckende Sanktionen, zu denen Geldstrafen und Geldbußen gehören und die andere Sanktionen einschließen können, darunter: ■ Ausschluss öffentlicher Zuwendungen oder Hilfen ■ vorübergehendes oder ständiges Verbot der Ausübung einer Handelstätigkeit ■ richterliche Aufsicht ■ richterlich angeordnete Eröffnung des Liquidationsverfahrens ■ vorübergehende oder endgültige Schließung von Einrichtungen, die zur Begehung der Straftat genutzt wurden

Tabelle 10: Richtlinien und Richtlinienvorschläge (Sanktionen)

Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Parallele Verantwortlichkeit
Private und Öffentliche Unternehmen mit Rechtspersönlichkeit, die eine wirtschaftliche Tätigkeit ausüben	(–)	Straftat einer natürlichen Person im Rahmen ihrer Tätigkeit	Ja

Tabelle 11: Empfehlung Nr. R (88) 18 (Voraussetzungen der Verantwortlichkeit – Art. I)

II. Europarat

Neben dem Recht der Europäischen Union kennt auch das des Europarats die Sanktionierung von Unternehmen. Zunächst legten mehrere unverbindliche Empfehlungen des Ministerkomitees nahe, die Einführung einer Unternehmensstrafbarkeit zu prüfen.[40] 1988 wurde dem Thema eine eigene Empfehlung gewidmet, nach der Unternehmen für Vorfälle in Ausübung ihrer Tätigkeit sanktionsrechtlich zur Verantwortung gezogen werden sollen (Nr. R (88) 18, Tabelle 11).[41] Sie ist bislang der einzige Akt, der sich allein mit dem Thema Unternehmensstrafbarkeit beschäftigt.

Die Empfehlung richtet sich an alle Unternehmen, ohne die öffentliche Hand auszunehmen, und geht damit weiter als das Zweite Protokoll. Durch das Erfordernis der wirtschaftlichen Tätigkeit sind jedoch hoheitlich handelnde Behörden ausgenommen. Die Zurechnung ist weit gezogen: Taten aller Mitarbeiter und nicht nur solche von Führungspersonen sind erfasst. Allerdings wird die Verantwortlichkeit ausgeschlossen, wenn das Management nicht an der Straftat beteiligt war und alle nötigen Maßnahmen ergriffen hat, um die Taten zu verhindern. Dieser auf Prävention ausgerichtete Ansatz ist bislang einmalig geblieben. Die Empfehlung betont, dass eine strafrechtliche Verantwortlichkeit vorgesehen werden soll, wenn dies die Art und Schwere der Tat sowie die Schuld des Unternehmens und die Generalprävention gebieten. Allerdings legt sich die Empfehlung nicht allein auf das Strafrecht fest, sondern lässt nichtstrafrechtliche Alternativen zu. Neben dieser Empfehlung sehen mehrere Abkommen verpflichtend die Sanktionierung von Unternehmen vor (Tabelle 12).

Diese Abkommen richten sich durchweg an juristische Personen, ohne bestimmte öffentlich-rechtliche Einrichtungen auszunehmen und ziehen damit den Anwendungskreis weiter als das Zweite Protokoll. Allein das Übereinkommen zur Korruption übernimmt dessen Ausnahmen. Im Übrigen sehen die Verträge entsprechend dem Zweiten Protokoll eine parallele Verantwortlichkeit der Unternehmen neben den Mitarbeitern vor. Auch die Stellung des Mitarbeiters wird entsprechend den Vorgaben des Zweiten Protokolls definiert, ebenso wie die beiden Möglichkeiten der Tathandlung (Tatbegehung durch das Management bzw. Aufsichtspflichtverletzung des Managements). Eine Ausnahme stellt zum einen das Übereinkommen zum Terrorismus dar, das die Stellung der Mitarbeiter gar nicht definiert und allein die „Beteiligung" des Unternehmens an der Tat des Mitarbeiters sanktionieren möchte, ohne diese aber näher zu bestimmen. Die andere Ausnahme ist das Abkommen zum Schutz der Umwelt, das die Tat eines Organs, Organteils oder anderen Vertreters „für" das Unternehmen (im englischen deutlicher: „on behalf of") verlangt. Diese unpräzise Formulierung wurde zu Recht in der Folgezeit durch das Erforder-

Rechtsakt bzgl.	Regelung in	Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Parallele Verantwortlichkeit
Schutz der Umwelt* vom 4.11.1998 (SEV Nr. 172)	Art. 9	Juristische Person	■ Organ(mitglied) ■ anderer Vertreter	Straftat „für" die Juristische Person (engl. „on behalf of")	Ja (Abs. 2)
Korruption vom 27.1.1999 (SEV Nr. 173)	Art. 18	Wie Zweites Protokoll	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 3)
Computerkriminalität vom 23.11.2001 (SEV Nr. 185)	Art. 12	Juristische Person	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 4)
Terrorismus vom 16.5.2005 (SEV Nr. 196)	Art. 10	Juristische Person**	(–)	„Beteiligung an" Straftaten	Ja (Abs. 3)
Menschenhandel vom 16.5.2005 (SEV Nr. 197)	Art. 22	Juristische Person	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 4)
Geldwäsche/Terrorismusfinanzierung vom 16.5.2005 (SEV Nr. 198)	Art. 10	Juristische Person	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 3)
Schutz von Kindern vom 25.10.2007 (SEV Nr. 201)	Art. 26	Juristische Person	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 4)
Fälschung von Arzneimittelprodukten*** vom 28.10.2011 (SEV Nr. 211)	Art. 11	Juristische Person	Wie Zweites Protokoll	Wie Zweites Protokoll	Ja (Abs. 4)

Tabelle 12: Verträge des Europarats (Voraussetzungen der Verantwortlichkeit); * Noch nicht in Kraft getreten; ** Im englischen Text ist abweichend von der sonstigen Bezeichnung „legal person" von „legal entity" die Rede, siehe hierzu unter dem Punkt „Vereinte Nationen"; *** Noch nicht in Kraft getreten

nis des Handelns „zugunsten“ des Unternehmens aufgegeben. Mehrere Verträge betonen explizit, die Verantwortlichkeit könne straf-, zivil- oder verwaltungsrechtlicher Art sein,[42] sodass keine klare Festlegung auf ein Unternehmensstrafrecht getroffen wird.

Im Bereich der **Sanktionen** sah die Empfehlung des Ministerkomitees von 1988 ein ganzes Bündel an spezifisch auf Unternehmen zugeschnittenenen Maßnahmen vor (Tabelle 13). Diese Liste ist bislang einmalig geblieben und hat im Wesentlichen keinen Eingang in die späteren Abkommen gefunden.

Bei den Abkommen des Europarats orientieren sich allein die beiden neuesten zum Schutz von Kindern und zur Fälschung von Arzneimittelprodukten an den Regelungen des Zweiten Protokolls (Tabelle 14). Allerdings übernehmen sie dessen Unterscheidung bei den Sanktionen nicht und sehen somit auch für die Aufsichtspflichtverletzung ein differenziertes Sanktionsspektrum vor. Die früheren Abkommen lassen dagegen einen weiten Umsetzungsspielraum zu, indem sie nur „wirksame, verhältnismäßige und abschreckende“ Sanktionen verlangen, die strafrechtlicher Natur sein können, aber nicht müssen. Das erste Abkommen zum Schutz der Umwelt verzichtet sogar auf diese Erfordernisse, klammert allerdings eine zivilrechtliche Lösung aus. Damit ergibt sich auch aus dem Recht des Europarats keine Verpflichtung, national das Institut der Unternehmensstrafbarkeit zu schaffen. Relevant ist allein, dass überhaupt Maßnahmen gegen Unternehmen ergriffen werden.

Art der Sanktion
Einführung von speziell auf Unternehmen zugeschnittenen Sanktionen und Maßnahmen:
■ Warnung, Verweis, Anerkenntnis
■ Feststellung der Verantwortlichkeit ohne Sanktion
■ Geldstrafe oder eine andere finanzielle Sanktion
■ Einziehung von zur Begehung der Straftat genutzten Vermögensgegenständen oder von illegalen Gewinnen
■ Verbot bestimmter Aktivitäten, insbesondere Ausschluss von Geschäften mit der öffentlichen Hand
■ Ausschluss von steuerlichen Vorteilen und Subventionen
■ Verbot, Waren oder Dienstleistungen zu bewerben
■ Entzug von Lizenzen
■ Entfernung von Managern
■ Gerichtliche Bestellung eines Übergangsverwalters
■ Schließung des Unternehmens
■ Wiedergutmachung und / oder Entschädigung für das Opfer
■ Wiederherstellung des früheren Zustandes
■ Veröffentlichung der Entscheidung über die Verhängung einer Sanktion oder Maßnahme

Tabelle 13: Empfehlung Nr. R (88) 18 (Sanktionen – Art. II)

III. Vereinte Nationen

Außerhalb der europäischen Institutionen haben sich die Vereinten Nationen des Themas von Rechtsverstößen in Unternehmen angenommen. Von großer Bedeutung sind soft law-Initiativen wie die des Global Compact[43] oder der Prinzipien zu Unternehmen und Menschenrechten.[44] Allerdings setzen mehrere Abkommen der Vereinten Nationen auch auf die Sanktionierung von Unternehmen (Tabelle 15).

Die erfassten Unternehmen werden einmal als „legal person“, ein anderes Mal als „legal entity“ bezeichnet. Begrifflich scheint „legal entity“ auf den ersten Blick umfassender zu sein. Da beide Begriffe jedoch möglichst umfassend die nationalen Unternehmensformen erfassen wollen, dürfte materiell kein Unterschied bestehen. Ausnahmen für öffentlich-rechtliche Unternehmen sind nicht vorgesehen. Wie beim Zweiten Protokoll ist das Unternehmen neben der handelnden natürlichen Person verantwortlich. Allein das Abkommen zur Terrorismusfinanzierung regelt die Verantwortlichkeit insofern näher, als ein leitender Mitarbeiter eine Straftat begehen muss. Die beiden anderen Abkommen sprechen nur von einer „Teilnahme“ des Unternehmens an einer Straftat, ohne konzeptionell zu klären, wie diese aussehen soll. Da die Verantwortlichkeit straf-, zivil- oder verwaltungsrechtlicher Natur sein kann, sind die Anforderungen an eine nationale Umsetzung insgesamt niedrig. Auch im Rahmen der **Sanktionen** ist die Flexibilität groß. Ähnlich wie in den meisten Abkommen des Europarats genügt jede straf- oder nichtstrafrechtliche Sanktion, solange sie „wirksam, angemessen und abschreckend“ ist (Tabelle 16).

IV. OECD

Die OECD setzt wie die Vereinten Nationen auf weiche Mechanismen, beispielsweise mit den unverbindlichen „Leitsätzen für multinationale Unternehmen“.[45] Im Zentrum der Arbeit im Bereich Korruption steht jedoch das Übereinkommen zur Bekämpfung der Bestechung ausländischer Amtsträger von 1997 und damit eine „harte“ Maßnahme (Tabelle 17).[46] Diese sieht auch die Verantwortlichkeit von Unternehmen vor. Allerdings fordern die Vorgaben allein, dass juristische Personen für die Bestechung eines ausländischen Amtsträgers verantwortlich gemacht werden sollen. Konkretere Vorgaben enthalten die (unverbindlichen) Empfehlungen zur Implementierung.[47] Diese betonen die parallele Verantwortlichkeit des Unternehmens neben dem handelnden Mitarbeiter. Zudem soll eine Regelung entweder umfassend die Position und Einflussnahme des Mitarbeiters widerspiegeln oder – soweit nur bestimmte leitende

Rechtsakt bzgl.	Regelung in	Art der Sanktionen
Schutz der Umwelt	Art. 9	Straf- oder verwaltungsrechtliche Sanktionen oder Maßnahmen
Korruption	Art. 19 Abs. 2	Wirksame, verhältnismäßige und abschreckende strafrechtliche oder nichtstrafrechtliche Sanktionen, einschließlich Geldsanktionen
Computerkriminalität	Art. 13 Abs. 2	
Terrorismus	Art. 11 Abs. 3	
Menschenhandel	Art. 23 Abs. 2	
Geldwäsche/Terrorismusfinanzierung	Art. 10 Abs. 4	
Schutz von Kindern	Art. 27 Abs. 2	Wie Zweites Protokoll, aber ■ anstatt „Verbot der Ausübung der Handelstätigkeit“: „Verbot der Ausübung einer gewerblichen Tätigkeit“ ■ anstatt „Auflösung“: „Liquidation“ ■ neu: Schließung von Einrichtungen
Fälschung von Arzneimittelprodukten	Art. 12 Abs. 2	Wie Zweites Protokoll, aber ■ ohne: Ausschluss öffentlicher Zuwendungen und Hilfen ■ anstatt „Verbot der Ausübung der Handelstätigkeit“: „Verbot der Ausübung einer gewerblichen Tätigkeit“ ■ anstatt „Auflösung“: „Liquidation“

Tabelle 14: Verträge des Europarats (Sanktionen)

Rechtsakt	Regelung in	Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Parallele Verantwortlichkeit
Internationales Abkommen zur Bekämpfung der Finanzierung des Terrorismus vom 9.12.1999	Art. 5	Juristische Person (legal entity)	Natürliche Person, die für das Management oder die Kontrolle der juristischen Person verantwortlich ist	Straftat eines Mitarbeiters	Ja (Abs. 2)
UN-Konvention gegen die grenzüberschreitende Kriminalität vom 15.11.2000	Art. 10	Juristische Person (legal person)	(–)	Teilnahme der juristischen Person an Straftaten	Ja (Abs. 3)
UN-Konvention gegen Korruption vom 31.10.2003	Art. 26	Juristische Person (legal person)	(–)	Teilnahme der juristischen Person an Straftaten	Ja (Abs. 3)

Tabelle 15: Vereinte Nationen (Voraussetzungen der Verantwortlichkeit)

Rechtsakt bzgl.	Regelung in	Art der Sanktionen
Terrorismusfinanzierung	Art. 5 Abs. 3	Wirksame, angemessene und abschreckende zivilrechtliche, strafrechtliche oder verwaltungsrechtliche Sanktionen, die Geldsanktionen umfassen können
Grenzüberschreitende Kriminalität	Art. 10 Abs. 4	Wirksame, verhältnismäßige und abschreckende strafrechtliche oder nichtstrafrechtliche Sanktionen, einschließlich Geldsanktionen
Korruption	Art. 26 Abs. 4	Wirksame, verhältnismäßige und abschreckende strafrechtliche oder nichtstrafrechtliche Sanktionen, einschließlich Geldsanktionen

Tabelle 16: Vereinte Nationen (Sanktionen)

Art.	Erfasste Unternehmen	Stellung des Mitarbeiters	Tathandlung	Parallele Verantwortlichkeit
Art. 2	Juristische Person	(–)	Bestechung eines ausländischen Amtsträgers	(–)

Tabelle 17: OECD (Voraussetzungen der Verantwortlichkeit)

Mitarbeiter die Unternehmensstrafe auslösen – insbesondere Aufsichtspflichtverletzungen erfassen. Eine Verantwortlichkeit für Handlungen unterstellter Mitarbeiter kann dabei auch auf mangelnden „internen Kontrollen, Ethik- und Compliance-Programmen oder Maßnahmen" beruhen.

Hinsichtlich der Sanktionen fordert das Abkommen grundsätzlich „wirksame, angemessene und abschreckende" strafrechtliche Sanktionen, die durch zivil- oder verwaltungsrechtliche Maßnahmen ergänzt werden können.[48] Soweit ein Land jedoch keine Unternehmensstrafbarkeit kennt, werden nur „wirksame, angemessene und abschreckende nichtstrafrechtliche Sanktionen, einschließlich Geldsanktionen" verlangt.[49]

V. Weitere internationale Maßnahmen

Neben den vorgenannten internationalen Verträgen gibt es einige regionale Abkommen, die allgemein gehaltene Bestimmungen für eine Unternehmensverantwortlichkeit vor allem im Bereich der Korruptionsbekämpfung vorsehen.[50] Der wichtigste Vertrag zum Völkerstrafrecht, das IStGH-Statut, sieht keine Bestrafung von Unternehmen vor, auch wenn die Frage in den Vertragsverhandlungen erörtert wurde.[51] Von den Maßnahmen, die zum „soft law"-Bereich zählen, sind die Empfehlungen der Financial Action Task Force (FATF) mit am bedeutendsten. Diese sehen zur Bekämpfung von Geldwäsche und Terrorismusfinanzierung gegen Unternehmen „wirksame, verhältnismäßige und abschreckende" Sanktionen vor.[52] Die Sanktionen können grundsätzlich straf-, zivil- oder verwaltungsrechtlicher Natur sein, wobei allerdings ein klarer Schwerpunkt auf eine Unternehmensstrafbarkeit gelegt wird.[53]

VI. Ergebnis

Wie der vorgehende Überblick zeigt, ist die Sanktionierung von Unternehmen im supranationalen Recht inzwischen fest verankert. Auffällig ist allerdings, dass die Vorgaben sehr flexibel und damit wenig konkret sind. Insbesondere hinsichtlich der rechtlichen Umsetzung im nationalen Recht ist der Anwendungsbereich mit der Möglichkeit straf-, zivil- oder verwaltungsrechtlicher Maßnahmen so weit gefasst, dass man kaum von Vorgaben sprechen kann. Natürlich ist dies den verschiedenen nationalen Ansätzen geschuldet. Es zeigt aber auch, dass den Ansätzen kaum ein kohärentes Konzept der Steuerung von Unternehmen durch Sanktionsrecht zugrunde liegt. Selbst wenn wie im europäischen Recht aufgrund der begrenzten Kompetenz nur die Schaffung von Mindestvorgaben möglich ist, könnte hier ein Ansatz entwickelt werden, der Unternehmen insbesondere im Bereich der Prävention stärker einbezieht.

Die Regelungen zur Verantwortlichkeit des Unternehmens knüpfen durchweg an der Tat eines Mitarbeiters an. Verbreitet ist dabei insbesondere das Modell des Zweiten Protokolls, das die Verantwortlichkeit auf Führungspersonen begrenzt und fast „standardisiert" in den zahlreichen Rechtsakten des europäischen Unionsrechts wie auch des Europarats übernommen wird.[54] Zumeist ist explizit klargestellt, dass das Unternehmen neben dem handelnden Mitarbeiter belangt werden kann. Über die Tat des Mitarbeiters hinaus gibt es kaum zusätzliche Erfordernisse. Diese dienen allenfalls zur Ausgrenzung von Taten gegen das Unternehmen, wie das häufig vorzufindende Erfordernis des Handelns „zugunsten" der juristischen Person. Damit wird nur bedingt auf *die* Besonderheit von Taten im Unternehmen abgestellt: das Handeln im Rahmen eines spezifischen Unternehmensklimas. Dieses wird allein von den unverbindlichen OECD Vorgaben angesprochen, wenn sie die Bedeutung von unternehmensinternen Maßnahmen zur Verhinderung von Straftaten (oft als Compliance-Maßnahmen bezeichnet) hervorheben. Dabei bestehen mit der Empfehlung Nr. R (88) 18 des Europarats und der Anknüpfung der Unternehmenssanktion an der Aufsichtspflichtverletzung wie im Zweiten Protokoll bereits Ansatzpunkte für die Entwicklung eines modernen Unternehmenssanktionsrechts. Neuere nationale Regelungen[55] und die Forschung[56] zeigen, dass das Sanktionsrecht durch die Einbeziehung von Strukturvorgaben für Unternehmen eine eigenständige regulative Funktion übernehmen kann.

Im Einzelnen sind die internationalen Vorgaben oft uneinheitlich, so beispielsweise, welche Unternehmen wegen ihrer öffentlich-rechtlichen Funktion von einer Verantwortlichkeit ausgenommen werden sollen. Ebenso bleibt etwa unklar, welche Elemente einer Anknüpfungstat vorliegen müssen.[57] Soll die Schuld des Mitarbeiters dem Unternehmen zugerechnet werden, dann bedarf es einer schuldhaften Tat. Ist dies nicht der Fall, kann auch das Vorliegen der objektiven Tatbestandsmerkmale ausreichen. Diese vermeintliche Flexibilität offenbart sich hier als konzeptionelle Schwäche, da kein klares Konzept der Unternehmenssanktion erkennbar ist.

Auf Seite der Sanktionen setzen die bestehenden Regelungen, soweit sie über das kaum weiterführende Erfordernis der „wirksamen, angemessenen und abschreckenden" Sanktion hinausgehen, vor allem auf eine Geldsanktion. Andere Maßnahmen sind allenfalls optional vorgesehen und richten sich zudem nicht auf die Beseitigung des Mangels, der zur Straftat des Mitarbeiters geführt hat. Gerade das Recht der USA zeigt aber, dass Sanktionen möglich sind, mit denen das Unternehmen tatsächlich gebessert wird, weil der interne Strukturmangel beseitigt wird.[58] Diese besondere Art der Sanktion, die nicht nur repressiv, sondern auch präventiv wirkt und besonders der „Resozialisierung" des Unternehmens zum „good corporate citizen" dient, sollte in ein Gesamtkonzept einfließen.

Ein solches Gesamtkonzept mit einem Schwerpunkt auf der Kriminalprävention könnte insbesondere im Rahmen der Europäischen Union umgesetzt werden. Hier könnte eine Richtlinie für grenzüberschreitende Unternehmenskriminalität entwickelt werden, die die einzelnen bestehenden Regelungen ersetzt. Diese würde ermöglichen, eine systematische Steuerung von Unternehmen auf langfristiger Basis zu schaffen. Die Liste der einbezogenen Tatbestände (also der von Mitarbeitern verwirklichbaren Straftaten), die sich nach der Reichweite der Kompetenz der Union richtet, kann dann in Zukunft bei der Erschließung neuer Sachmaterien unproblematisch erweitert werden, ohne das einheitliche Konzept einer Unternehmensverantwortlichkeit neu regeln zu müssen. Die nationale Entwicklung hin zum Strafrecht spricht dafür, (auch) eine strafrechtliche Regelung zu schaffen. Letztlich ist aber die „Deklaration" der Sanktion nicht so entscheidend, wie die Schaffung eines schlüssigen Ansatzes, der die Rechtseinhaltung durch Sanktionen sichert. Der Ansatz der Kommission, das Skelett der „wirksamen, angemessenen und abschreckenden" Sanktion mit Leben zu füllen, ist daher zu begrüßen, um umsetzbare und letztlich auch justiziable Kriterien zu erhalten.

1 So haben insbesondere das Vereinigte Königreich, Indien, Südafrika, Australien, Neuseeland, Kanada und die USA eine längere Tradition der Bestrafung von Unternehmen.

2 Einen aktuellen Überblick bieten: *J. Gobert/A.-M. Pascal* (Hrsg.), European Developments in Corporate Criminal Liability, London u.a. 2011; *M. Pieth/R. Ivory* (Hrsg.), Corporate Criminal Liability, Dordrecht/Heidelberg u.a. 2011; *G. Vermeulen/W. De Bondt/C. Ryckman* (Hrsg.), Liability of legal persons for offenses in the EU, Antwerpen u.a. 2012.

3 So bspw. Norwegen (1991), Island (1993), Frankreich (1994), Finnland (1995), Slowenien (1995/1999), Dänemark (1996), Belgien (1999) und Polen (1999).

4 So Estland (2001), Ungarn (2001), Litauen (2002), Polen (2002), Spanien (2003, mit einer umfangreichen Reform 2010), Rumänien (2004), Luxemburg (2010). Umfangreiche Reformen haben Portugal (2007) und das Vereinigte Königreich (2007 und 2010) vorgenommen. Eine strafrechtsähnliche Lösung hat Italien (2001) gewählt.

5 Da im Folgenden nicht alle Tatbestandsvarianten erfasst werden, wird auf eine detaillierte Darstellung dieses Punktes verzichtet.

6 Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften vom 26.07.1995, ABl. C 315 v. 27.11.1995.

7 Erläuternder Bericht zu dem Zweiten Protokoll zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, ABl. C 91 v. 31.3.1999, S. 8.

8 Zweites Protokoll aufgrund von Artikel K 3 des Vertrages der Europäischen Union vom 19.06.1997, ABl. C 221 v. 19.7.1997, S. 11 ff. (Art. 3, 4). Siehe *E. v. Bubnoff*, Ein eigenständiges Verbandsstrafrecht. Europäische Gestaltungsvorgaben, Ansätze und Anregungen, Zeitschrift für europarechtliche Studien (ZEuS) 2004, 447 (465); *M. Korte*, Der Schutz der finanziellen Interessen der Europäischen Gemeinschaften mit den Mitteln des Strafrechts – Das ‚Zweite Protokoll', Neue Juristische Wochenschrift (NJW) 1998, 1464 (1465); *P. Lewisch/J. Parker*, Strafbarkeit der Juristischen Person?, Wien 2001, S. 18. Siehe auch die Entschließung des Rates vom 6.12.1994 über den Schutz der finanziellen Interessen der Gemeinschaften, ABl. C 355/2 v. 14.12.1994; den Vorschlag der Kommission für das Protokoll v. 19.1.1996, KOM (95) 693 endg. (ABl. C 83 v. 20.3.1996), S. 10. Art. 9, 11 des (nicht umgesetzten) Vorschlags für eine Richtlinie über den strafrechtlichen Schutz der finanziellen Interessen der Gemeinschaft vom 25.5.2001, KOM (2001) 272 endg. (ABl. C 240/E/19 v. 23.05.2001) sahen für Unternehmen die gleichen Regelungen wie das Zweite Protokoll vor.

9 Siehe auch *M. Bahnmüller*, Strafrechtliche Unternehmensverantwortlichkeit im europäischen Gemeinschafts- und Unionsrecht, Frankfurt a.M. 2004, S. 163 f.

10 Siehe auch unter VI. Ergebnis.

11 Siehe zu möglichen Zurechnungsmodellen *M. Engelhart*, Sanktionierung von Unternehmen und Compliance, 2. Aufl., Berlin 2012, S. 361 ff.

12 Siehe *M. Korte* (Anm. 8) 1464 (1465); so auch der deutsche Gesetzgeber, siehe BT-Drs. 14/8998, S. 10 f.

13 Erläuternder Bericht zu dem Zweiten Protokoll zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, ABl. C 91 v. 31.3.1999, S. 8 (11).

14 Siehe Nr. 7 f der Entschließung des Rates v. 6.12.1994 über den Schutz der finanziellen Interessen der Gemeinschaften, ABl. C 355/2 v. 14.12.1994 („neben strafrechtlichen Sanktionen gegen natürliche Personen für eine einschlägige Straftat auch gegen juristische Personen unter noch zu bestimmenden Voraussetzungen strafrechtliche oder andere Sanktionen zu verhängen") sowie Art. 2–5 des Vorschlags der Kommission für das Zweite Protokoll v. 19.1.1996, KOM (95) 693 endg. (ABl. C 83 v. 20.3.1996), S. 10.

15 Siehe Art. 5 des Vorschlags (oben Anm. 8).

16 Siehe *H. Satzger*, Europäisierung des Strafrechts, Köln u.a. 2001, S. 340 ff.

17 Siehe *B. Hecker*, Europäisches Strafrecht, 3. Aufl., Berlin/Heidelberg u.a. 2010, § 7 Rn. 28; *G. Heine*, Unternehmen, Strafrecht und europäische Entwicklung, Österreichische Juristen-Zeitung (ÖJZ) 2000, 872; *P. Lewisch/J. Parker* (Anm. 8) S. 24 ff.; *H. Satzger* (Anm. 16) S. 331 ff., 368 ff.; *K. Tiedemann*, EuGH: Strafrechtlicher Schutz der Finanzmittel der EG, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1990, 99; *F. Zeder*, Ein Strafrecht juristischer Personen: Grundzüge einer Regelung in Österreich, ÖJZ 2001, 633.

18 Kommission gegen Griechenland, Rs. 68/88; EuGH, Urt. v. 21.9.1989, Slg. 1989, S. 2965 ff. Siehe dazu *Tiedemann*, EuZW 1990, 99.

19 *Zwartveld* u.a., Rs. 2/88, EuGH, Beschl. v. 14.7.1990, Slg. 1990 I, 3365 (3372), in der „alle geeigneten Maßnahmen, soweit erforderlich einschließlich strafrechtlicher Schritte," zu treffen seien.

20 Kommission gegen Frankreich, Rs. C-265/95, EuGH, Urt. v. 9.12.1997, Slg. 1997 I, 6959. Noch deutlicher der Schlussantrag von Generalanwalt *Lenz* v. 9.7.1997, Slg. 1997 I-6959, der explizit den Mangel an notwendig gebotenen strafrechtlichen Maßnahmen betonte.

21 Siehe den „belgischen LKW-Fahrer-Fall": Strafverfahren gegen Paul Vandevenne, Marc Wilms, Jozef Mesotten und Wilms Transport NV, EuGH, Urt. v. 2.10.1991, Slg. 1991 I, S. 4371 ff. Das Gericht prüfte dabei eine Verpflichtung zum Erlass der Unternehmensstrafbarkeit aufgrund der Verordnung 3820/85 bzw. Art. 5 EWG-Vertrag. Dazu S. *Gröblinghoff*, Verpflichtung des Strafgesetzgebers, Heidelberg 1996, S. 17 ff.

22 Siehe nachfolgend unter 3. Rahmenbeschlüsse.

23 Siehe Art. 6 des RB 2003/80/JI v. 27.1.2003 über den Schutz der Umwelt durch Strafrecht (ABl. L 29 vom 5.2.2003, S. 55) sowie Art. 5 des RB 2005/667/JI v. 12.7.2005 zur Verstärkung des strafrechtlichen Rahmens zur Bekämpfung der Verschmutzung durch Schiffe (ABl. L 255 v. 30.9.2005, S. 164).

24 Siehe Art. 4, 5 des deutschen Vorschlags für einen RB über den strafrechtlichen Schutz gegen betrügerisches oder sonstiges unlauteres wettbewerbswidriges Verhalten im Zusammenhang mit der Vergabe von öffentlichen Aufträgen im Gemeinsamen Markt, ABl. C 253 v. 4.9.2000, S. 3.

25 Diese Regelungstechnik wählte auch der nichtige Rahmenbeschluss zum Schutz der Umwelt.

26 Art. 6 des RB zur Bekämpfung der Verschmutzung durch Schiffe.

27 Art. 7 des RB über den Schutz der Umwelt sowie Art. 6 des RB zur Bekämpfung der Verschmutzung durch Schiffe.

28 Siehe auch *P. Lewisch/J. Parker* (Anm. 8) S. 25.

29 Zum Richtlinienvorschlag zum Schutz der finanziellen Interessen der EU von 2001 siehe oben Anm. 8.
30 Richtlinie zum Schutz der Umwelt, zum Schutz vor Meeresverschmutzung, zur Bekämpfung des Menschenhandels und zur Bekämpfung des sexuellen Missbrauchs von Kindern.
31 Vorschläge bzgl. Angriffe auf Informationssysteme, Insidergeschäfte und Marktmanipulation sowie Betrugs zu Lasten der finanziellen Interessen der EU.
32 Abweichend sprechen allerdings die Rechtsakte zum Schutz der Umwelt und der Meeresverschmutzung sowie der Vorschlag bzgl. Insidergeschäfte und Marktmanipulation nicht von „Führungsperson", sondern von „leitender Stellung". Die beiden letztgenannten Rechtsakte erfassen alle juristischen Personen ohne die Einschränkungen des Zweiten Protokolls.
33 Siehe Ratsdok. 18259/19 sowie *D. Brodowski*, Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2011, 940 (946); siehe auch *B. Böxler*, Europäisches Immaterialgüterstrafrecht? – Zugleich ein Beitrag zu Art. 83 II AEUV als strafrechtliche Kompetenznorm und zur Reichweite des Art. 118 AEUV, Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra) 2011, 11.
34 Grünbuch zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Gemeinschaften und zur Schaffung einer Europäischen Staatsanwaltschaft v. 11.12.2001, KOM (2001) 715 endg., S. 44.
35 Siehe „Auf dem Weg zu einer europäischen Strafrechtspolitik: Gewährleistung der wirksamen Durchführung der EU-Politik durch das Strafrecht" v. 20.9.2011, KOM (2011) 573 endg.
36 Siehe den „Entwurf von Schlussfolgerungen des Rates über Musterbestimmungen als Orientierungspunkte für die Beratungen im Bereich des Strafrechts" v. 27.11.2009, Ratsdok. 16542/09 REV 2, S. 9, der die Bestimmungen des Zweiten Protokolls weitgehend übernimmt.
37 Siehe die Kommission (oben Anm. 62), S. 13.
38 Siehe das Corpus Juris 1998 (Art. 9, 14), abgedruckt in: *M. Delmas-Marty* (Hrsg.), Corpus Juris (Köln u.a. 1998), S. 44. Unverändert das Corpus Juris 2000 (Art. 13, 14), abgedruckt in: *M. Delmas-Marty/J. Vervaele* (Hrsg.), Corpus Juris, Antwerpen u.a. 2000, Bd. 1, S. 196.
39 Siehe Art. 9 Abs. 3 des RB 2005/214/JI v. 24.2.2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen (ABl. L 76 v. 22.3.2005, S. 16).
40 So die Empfehlungen Nr. R (77) 28 bzgl. des Beitrags des Strafrechts zum Schutz der Umwelt, Nr. R (81) 12 bzgl. der Wirtschaftskriminalität und Nr. R (82) 15 bzgl. Rolle des Strafrechts im Verbraucherschutz.
41 Siehe Empfehlung Nr. R (88) 18 betreffend die Verantwortlichkeit von Unternehmen mit Rechtspersönlichkeit für Delikte, die in Ausübung ihrer Tätigkeiten begangen wurden vom 20.10.1988.
42 So die Übereinkommen bzgl. Computerkriminalität, Terrorismus, Menschenhandel, Schutz von Kindern und Fälschung von Arzneimittelprodukten.
43 Siehe die Webseite unter http://www.unglobalcompact.org sowie *C. Hillemanns*, UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 4 German Law Journal (2003), 1065 (1066); *D. Weissbrodt/M. Kruger*, Norms of the Responsibility of Transnational Corporations and Other Bussines Enterprises with Regard to Human Rights, 97 The American Journal of International Law (2003) 901 ff.
44 Siehe die Resolution des UN-Menschenrechtsrats v. 6.7.2011, UN Dok. A/HRC/Res/17/4 und den zugehörigen Bericht (UN Dok. A/HRC/17/31).
45 Siehe die Vorgaben in der Neufassung von 2011 auf der Webseite der OECD: http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48808708.pdf.
46 OECD, Konvention gegen die Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr v. 17.12.1997.

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47 Siehe OECD Working Group on Bribery in International Business Transactions, Recommendation of the Council on Further Combating Bribery of Foreign Bribery in International Business Transactions (2009), Annex I, B).
48 Siehe Art. 3 Abs. 1, 4.
49 Siehe Art. 3 Abs. 2. Ebenso der offizielle Kommentar zur Konvention, Rn. 20.
50 Siehe Inter-American Convention against Corruption v. 29.3.1996, Art. 8 Abs. 1; Southern African Development Community (SADC) Protocol against corruption v. 14.8.2001, Art. 4 Abs. 2; African Union Convention on preventing and combating corruption v. 11.6.2003; Art. 11 Nr. 1.
51 Siehe *M. Engelhart*, International Criminal Responsibility of Corporations, in: C. Burchard/O. Triffterer/J. Vogel (Hrsg.), The Review Conference and the Future of the International Criminal Court, Köln u.a. 2010, S. 175 (178, 180 f.).
52 Siehe FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations (Februar 2012), S. 26.
53 Siehe die Empfehlung S. 34 (Nr. 7c.), 37 (Nr. 8).
54 Siehe *E. v. Bubnoff* (Anm. 8) 447 (458 f.); *G. Dannecker*, Zur Notwendigkeit der Einführung kriminalrechtlicher Sanktionen gegen Verbände, Archiv für Strafrecht (GA) 2001, 101 (106 f.); *J. Vogel*, Harmonisierung des Strafrechts in der Europäischen Union, GA 2003, 314ff.
55 Siehe etwa die Regelungen in Italien (*M. Rübenstahl*, Strafrechtliche Unternehmenshaftung in Italien – das Legislativdekret Nr. 231 vom 8.6.2001, Recht der internationalen Wirtschaft (RIW) 2012, 505) und Spanien (*J. Carbonell Mateu*, Die strafrechtliche Verantwortlichkeit juristischer Personen: Überlegungen zur „Dogmatik" und zum System der Reform des spanischen Strafgesetzbuchs 2010, Zeitschrift für die gesamte Strafrechtwissenschaft (ZStW) 123 (2011), S. 331 ff.), aber vor allem auch in Großbritannien (UK Manslaughter Act, dazu *M. Welham*, Corporate Manslaughter and Corporate Homicide (Haywards Heath 2008); UK Bribery Act, dazu *J. Klengel/S. Dymek*, Criminal Compliance in Zeiten des UK Bribery Act, Online-Zeitschrift für höchstrichterliche Rechtsprechung im Strafrecht (HRRS) 2011, 22; *M. Pieth*, Anti-Korruptions-Compliance (Zürich St. Gallen 2011), S. 45 ff.) und den USA (United Sentencing Guidelines – *Engelhart* (Anm. 11) S. 162 ff.).
56 *M. Engelhart* (Anm. 11), S. 649 ff., *T. Rotsch*, Compliance und Strafrecht – Konsequenzen einer Neuentdeckung, in: W. Joecks u.a. (Hrsg.), Recht – Wirtschaft – Strafe, Festschrift für Erich Samson, Heidelberg u.a. 2010, S. 141 ff.; *U. Sieber*, Compliance-Programme im Unternehmensstrafrecht. Ein neues Konzept zur Kontrolle von Wirtschaftskriminalität, in: U. Sieber u.a. (Hrsg.), Festschrift für Klaus Tiedemann zum 70. Geburtstag, Köln/München 2008, , S. 475; *U. Sieber*, Rechtliche Ordnung in einer globalen Welt, Rechtstheorie 41 (2010), S. 151 (189).
57 Siehe die Diskussion in Österreich bzgl. der Vorgaben des Zweiten Protokolls bei Einführung des VbVG, Gesetzesmaterialien, RV 994 BlgNR 22 GP XII (unter Besonderer Teil, Zu Art. 1, 2. Abschnitt, § 3, Ziff. 1); siehe auch *P. Lewisch/J. Parker* (Anm. 8) S. 17.
58 *M. Engelhart* (Anm. 11) S. 185 ff.

Cosmetic Use and Lack of Precision in Compliance Programs: Any Solution?*

Prof. Dr. Adán Nieto Martín

I. Compliance and Criminal Law

Compliance is a technique of self-regulation, which developed independent of criminal law. The complex origins of compliance combine different approaches in business management and administrative law. In the latter field, through regulated self-regulation, the lawmaker requires companies to create prevention programmes on occupational risks, money laundering, infringement against the securities market, etc. With regard to business management, compliance is connected with such trends as business ethics, corporate social responsibility, and the certification and development of internal audits.

As is already known, the integration of compliance into the criminal law is related to the criminal liability – and administrative sanctions – of legal entities. The Guidelines for Sentencing started this process which, in the past two decades, has been followed in Chile,[1] Italy,[2] UK,[3] Austria,[4] Australia,[5] Switzerland,[6] Canada,[7] and, recently, Spain,[8] too. Logically, there are several models in order to integrate compliance into criminal law. Compliance programmes in the USA are relevant in order to determine punishment but not imputation; in Australia, Austria, Italy, and the UK, organisational fault and compliance programmes constitute respectively the essential core of the offence committed by the legal person or a defense. Beyond imputation systems, in countries where the opportunity principle is recognised (instead of mandatory prosecution), the existence of a compliance programme can be decisive for initiating prosecution against the legal person or not.

Beyond this variety of scenarios, compliance programmes present two serious problems with regard to criminal law. On the one hand, companies complain about the lack of legal certainty. They do not know what exactly criminal law requires of them. In countries where compliance programmes exist, there are few acquittals and, therefore, the case law does not clearly indicate the necessary requirements in a compliance programme to exclude liability.

On the other hand, public prosecutors do not trust compliance programmes, considering them an invention of the business sector.[9] The second problem of the compliance programmes in criminal law is the risk of their cosmetic use. The companies may be tempted to consider their compliance programmes a "papal bull" which lets them "sin" safely. When the public prosecutors appear, it is enough to show the "bull," appoint an employee as a scapegoat, and avoid liability.[10]

II. Remedies against Legal Uncertainty and Cosmetic Use

In the field of law, the usual way to ensure legal certainty and minimise vague language is to ask the lawmaker to intervene and specify the terms of the criminal infringement. In many countries where compliance systems play an important role in corporate criminal liability, their basic elements and characteristics have been established (Italy, Chile, Australia, UK, etc.). It can be seen, however, that this working method does not solve much. In Australia,[11] Italy,[12] and the USA,[13] companies complain before the courts about the lack of effectiveness of compliance programmes, even if they have been implemented by following the provisions. Compliance programmes are not considered sufficient by the courts. Therefore, regulations are not usually innovative in this matter. They more or less repeat what was already contained in the guidelines in the early nineties.

Likely, the way forward here is not the regulation of the general aspects of compliance but as a first proposal the definition – by the lawmaker or the administrative authorities – of the aims and basic elements that a compliance programme must fulfil with regard to each infringement. That is the case for the models of regulation already being used in fields such as money laundering, the securities market, occupational risk prevention, etc. The determination by the lawmaker of the required elements of a compliance programme in a specific field should work – with regard to corporate criminal liability – like a *Blankettstrafgesetz*.[14] When it has been well adapted, it can be affirmed that there is an efficient compliance programme in place. This is a solution that respects principle of *ultima ratio*. Criminal law cannot be more demanding than administrative law.

A second proposal, in order to reduce the lack of certainty in compliance programmes, is the certification system. The Chilean law foresees the certification of the compliance programme's correctness by independent auditing companies.[15] This has already been proposed in Italy.[16] In Australia, the

Australian Standard of Compliance Programs AS 3806-2006 is a well-known ISO norm that provides principles for the development, implementation, and maintenance of effective compliance programmes within both public and private organisations.[17] In Germany, the account auditors have also published common guidelines to audit the programmes.[18]

The problem of the certification system is that, although it can help with the problem of the lack of legal certainty, it can at the same time compound the other problem: cosmetic use. There is a danger of creating a certification market, where an entire industrial sector would be interested in offering "certificates of good conduct" to companies that see in them an "anti-fines" insurance. This is why, in the long run, certification does not mitigate the lack of legal certainty. The judge is free to assess it in each case.

A third option, complementary to the previous ones, is standardisation. The Italian law foresees a very interesting system. Professional associations are encouraged to establish organisational models, and the public administration would participate in their final configuration.[19] Furthermore, in Italy, in the field of corporate criminal liability for offences against the environment[20] and occupational safety,[21] private rules of standardisation play a very important role. In the field of environmental offences and environmental safety, prevention systems that are adapted to these standards are presumed to be correct. In some business sectors, such as the pharmaceutical industry, common policies have been developed in the fight against corruption.[22]

Besides not completely solving the cosmetics issue, the problem of standardisation, like that of the certification system, is that, although the design and implementation of the model can be proven to be correct, this is not relevant with regard to the concrete case. If what is decisive for imputation is only the link between the offence committed and the functioning of the prevention programme with regard to this offence, having certification affirming – in general terms – the correctness of the compliance programme does not matter much.[23]

III. Independent, Professional, and Participatory Compliance Bodies

The above-mentioned solutions are mainly focused on solving the problem of legal certainty, but they do not address the other problem: cosmetic use. The suspicion remains that – to put it in biblical terms – companies with compliance programmes are "white sepulchers." Likely, this suspicion is what makes judges and public prosecutors distrust the compliance programmes of companies where an offence has been committed. That is, the problem of compliance programmes in the criminal law is not their lack of precision but the image that many judges have of them: compliance programmes are seen as a tool in the hands of administrators that increase their power in the company and help avoid liability.

From such a negative point of view, a compliance programme would thwart the strategy of criminal policy which authorities have tried to develop through corporate criminal liability, the commitment of administrators in the prevention and detection of crimes committed in their business activity.[24] The creation of "safe harbours," through certifications or standards, frustrates this aim. It reduces and makes predictable the crime costs. Eventually, it works as an insurance and increases moral hazards. Those who have power in the company will come through the crisis unscathed. They just need to increase production costs up to the level indicated by the standard or the certification. Further, compliance programmes reinforce their power. Compliance programmes ultimately lead to justification of the establishment of a security system within the company to handle complaints, investigations, disciplinary sanctions, communications interceptions, etc.

In response to this criticism – which leads compliance programmes to be held ineffective before the courts – the way forward is to make them more credible through a greater legitimacy, professionalisation, and independence of the people in charge of their implementation, management, and supervision.[25]

The idea that those responsible for the compliance programme be independent from the centres of power in the company is far from revolutionary. This is the basis of corporate governance. Compliance programmes must be a new tool to provide counterweight in the companies, namely a system of checks and balances. To achieve this, independent third parties must be allowed to exercise some control.[26] In Italy, legislative decree No. 231 approaches the problem properly by creating a supervisory body and establishing that its members must be independent and autonomous (Art. 6.1 b) D. Legs. 231).[27]

A way to deepen the effect of compliance programmes would be to link them to proposals such as the stakeholder's democracy,[28] deliberative ethics,[29] or the open-society model.[30] Accepting these proposals as to the design, implementation, and supervision of the compliance programmes would mean, for instance, the involvement of the employees and unions in these tasks. It could also mean the active participation of organisations which were outstanding in their fight against corruption in the execution of the company's anticorruption policy. This is not an absolutely new idea. For example, Spanish regulation on occupational risk prevention – which is actually a specific compliance programme – enforces the ongoing participation of employees and their representatives.[31]

The formula is easy: greater participation means greater legitimacy of any system of rules. And legitimacy increases the efficiency and credibility of any control system. Hence, an increase in the legitimacy of compliance programmes is the key to avoiding their cosmetic use.

An additional way to increase credibility is to outsource some of the elements of the compliance programme, e.g., the complaint channels or internal investigations. The management of these tools by people who are independent of the company lends compliance programmes more credibility. However, to this effect, it is necessary to carefully regulate the external whistle-blowing channel and the investigation procedure. It is very important to make clear that the external lawyer managing the complaint channel can ensure the whistle-blower's confidentiality in the company[32]. This likely involves the rights of the person under investigation, the means of investigation allowed, the non-interference of the managers, etc.[33] Outsourcing some aspects of the compliance programme without paying attention to the status of independence or autonomy solves neither the problem of cosmetic use nor the lack of certainty. Indeed, these problems can get worse.

Reviewing and auditing the compliance programme also means an opportunity to increase its credibility. With regard to internal audits, special care must be taken to ensure the independent position of the auditors in relation to the people managing the programme. It is important to prevent internal auditors from becoming both judges and defendants in terms of compliance. To this end, it is also useful to have an internal regulation guaranteeing autonomy. With regard to external audits, the strategy must be similar to the globally widespread American Sarbanes-Oxley Act of 2002. Conflicts of interest must be avoided; it should be prohibited, for example, that the person (or the body) in charge of compliance may also choose the external auditors.

Another interesting approach is for the administrative authorities to participate more actively in the design of the compliance programme, cooperating in its implementation or providing counseling. Reinforcing the role of "counsellor" within the administrative authorities could be very useful for small companies.[34] If an infringement has been committed, the compliance monitor – that is, an external person appointed by the judge or the prosecutor to monitor and advise on the implementation of the programme – could also lend credibility to the system through the intervention of a third party.[35]

IV. Independence Is the Key

In sum, the conclusion can be drawn that, in the debate on improving the effectiveness of compliance programmes as an element in the company's defense, the main problem is not so much the lack of standards but the prevention of disrepute. If we do not improve this aspect, in a few years, the confidence that the lawmaker and the business and academic sectors are placing in compliance today as a tool in the prevention of economic crime will disappear. As we have attempted to argue, the best way is to ensure that compliance programmes as a whole, or at least some essential parts of them, e.g., review, the monitoring of internal investigations or the complaint channel – are managed by people who are independent of those holding power in the company.

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1 Law No. 20.393 provides for the criminal liability of legal entities. Art. 4, model on crime prevention.

2 D. legs. 231, Disciplina della responsabilitá amministrativa della persona giuridica. Art. 6, Soggetti in posicione apicale e modelli di organizzaioni dell'ente.

3 Bribery Act 2010, Section 7, Failure of commercial organisations to prevent bribery.

4 Verbandsverantwortlichkeitsgesetz, 14.2.2011, § 3 (3) 2: "... die Begehung der Tat dadurch ermöglicht oder wesentlich erleichtert wurde, dass Entscheidungsträger die nach den Umständen gebotene und zumutbare Sorgfalt außer acht gelassen haben, insbesondere indem sie wesentliche technische, organisatorische oder personelle Maßnahmen zur Verhinderung solcher Taten unterlassen haben"

5 Commonwealth Criminal Code Act, Sec. 12.3.2 (c) y (d) (Corporate culture).

6 Swiss Criminal Code, Art. 100 *quater*.

7 Canadian Criminal Code, Section 22.2 (c), Section 718.21, vid. Bill C-45 Amending the Canadian Code (March 2004).

8 Art. 31 bis. 4 d): "Medidas eficaces para prevenir y descubrir delitos que en el futuro puedan cometerse con los medios o bajo cobertura de la organización".

9 In Spain, Fiscalía General del Estado, Circular 1/2011, Relativa a la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por la LO 5/2010, Madrid, 1 de Junio, 2011.

10 See *W.S. Laufer,* Corporate Liability, Risk Shifting and the Paradox of Compliance, Vanderbilt Law Rev., No. 52, 1999; *W.S. Laufer*, Corporate Body and Guilty Minds. The Failure of Corporate Criminal Liability, The University of Chicago Press, 2006.

11 *C. Parker*, "Is there a reliable way to evaluate organisational compliance programs?", Paper presented at the Current Issues In Regulation: Enforcement and Compliance Conference, Melbourne, 2-3 September 2002.

12 In Italy, at the moment, a compliance programme has been considered effective only in one judicial decision in order to achieve the exculpation of the firm, Corte d'Apello di Milano, Sezione Seconda Penale, 21-3-2012, Impreligo Spa.

13 *R.S. Gruner*, Preventive Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities, Ponthell/Geis, (eds.), International Handbook of white collar and corporate crime, Springer, 2007, p. 299-308.

14 In Italy Art. 30 of Dlgs 81/2008 su salute e sicurezza nei luoghi di lavoro is based on this relation between administrative self-regulation and criminal law.

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Compliance Programmes and "Organisational Faults" in Italian Legislation

An Overview of Ten Years of Experience with Legislative Decree 231/2001

Nicola Selvaggi

Several years ago, in a broad analysis on the nature and causes of corporate crime and the patterns by which corporations can be held responsible for economic crime, Italian legislation was at the centre of attention − to the point that, in exposing the essential features of Legislative Decree 231/2001 (hereinafter Decree), there was talk of "lessons from Italy."[1] This focus certainly fits in with the international trend that has, over time, been paying special attention to those national laws, such as the Italian one, which have built models of responsibility of entities for offences committed for their benefit by giving relevance to organisational failures as a pre-requisite for liability itself. But the emphasis attributed to the Italian legislation

probably depends on the fact that the Decree seems to represent one of the sets of rules in which the connection between crime and organisation becomes apparent in a more specific way.

I. Organisational Failure and Culpability in the Italian Liability System

According to Italian law, a legal entity can be held responsible when an offence has been committed by an individual acting in a prominent position within the corporate body (according to Art. 5 lett. a: "persons who represent, manage or direct the entity or a sub-unit with financial and functional autonomy; or persons who exercise, also de facto, the management and control thereof") or by a subject subordinate to him (Art. 5 lett. b) in the interest of or to the advantage of the entity (Art. 5) and deriving from organisational failure (Arts. 6 and 7)." Even though provisions distinguish whether the offence has been committed by an agent in a leading position or a subordinate of the corporation, in both cases, due diligence in crime prevention can insulate the entity from responsibility; what changes is the burden of proof (provision is made for a reversal if the offender is in a top position) and some requirements to establish due diligence on the part of the corporation (Arts. 6 and 7).

The roots of the Italian legislation may be certainly found in the fundamental patterns, which systems of liability ex crimine of legal entities generally turn around: the identification doctrine, where the perpetrator acts in a particular position and also for the corporation's benefit,[2] or the vicarious scheme, where a crime committed by a subordinate may trigger the entity's liability if its commission was made possible by a lack of supervision and control. In this context, a step forward has been made by expressly regulating the organisational failures to prevent crimes, as a fundamental tool to ensure a more significant and complete relationship between the offence and the entity, in accordance with the principle of personality enshrined in Art. 27 of the Italian Constitution.

Suffice it to briefly consider the different levels, within the legal provisions on liability, in which organisational failure may gather relevance. Undoubtedly, a lack of organisation shall be the cause of the crime committed: Art. 7, par. 1, clearly establishes that, in order to hold an entity liable, it is necessary that the conduct of its employee was caused by management failure or a lack of supervision; also, Art. 17 refers to "organizational shortcomings that have led to the offence." In addition, the regulation could lead one to believe that the offence should be the expression of an "unpermitted business risk," since the Decree requires that the adequacy of a preventive model be evaluated with reference to crimes similar to the one committed. Ultimately, as the analysis of the organisation with respect to crime prevention goals and the specific crime itself reflects the attitude and policies of the collective body, the law seems to build up a blameworthiness of the entity as such. In this latter context, one could speak of structural negligence, in the sense that "(…) a company needs to have established guidelines and control systems that take into account the risk of an offence being committed. If it has not, then it will be found to be 'structurally negligent."[3] However, the "disallowed risk," due to violation of the precautionary measures, should certainly not be identified with the subjective element of the wrongdoing by the entity; otherwise, the ascertainment of guilt would lose any autonomous meaning. In fact, if it is true that the Italian legal system is focused on the violation of the rules of good preventive organisation (violations of rules, in other words, generically and specifically pre-established for the prevention of crimes within organised activities), the analysis of the rules does not leave room for doubts on an actual subjectivisation of the liability statute and, consequently, on the need for a personalised assessment.

In particular, it is worth noting that the Decree does mention the entity's will; furthermore, it provides that liability may be excluded only if the breach of preventive measures by an individual offender was fraudulent, which leads one to conclude that "the entity's will ought to have been swindled, with a specific assessment"[4] on this point. In other words, by making reference to the offence committed by fraudulently evading the guidelines and control system established by the company, the Italian law requires "a further investigation on any possible illegal policies pursued covertly by the entity despite the presence of a theoretically proper organization."[5]

II. Possible Advantages of the Italian Liability Statute

It is generally believed that a system oriented towards giving relevance to the aforementioned aspects is more reasonable. In fact, by considering an entity responsible, whether a link between offence and organisation exists or not, it seems possible to:

- Preserve the element of "fault" and thus address the theoretical, constitutional, and policy objections to liability of legal entities that it would be only strict. These objections are traditionally raised by arguing that, other than proper behaviour, a collective entity would not have a guilty mind ("no soul to be damned"), and these objections have introduced, at a first stage, the idea of identification of agent and entity: actus reus and mens rea of individuals acting within a prominent position for the company would be transferred to the entity. The experience of the English legal system has shown that, for various reasons, patterns of imputation based on this theory can

sometimes present insurmountable limits. This explains the reasons why recent UK legislation has introduced models of responsibility for the crime of manslaughter and the offence of corruption, in which reference is made to the violation of due diligence and prudence within the organisation;[6]

- Create a proportionate sanctionary system against entities, since an evaluation of the degree of real involvement of a corporation leads to better sentencing;
- Ensure the goal of prevention of crimes typically associated with collective activities, especially entrepreneurial ones, based on their structural causes. By being exonerated from liability, corporations are encouraged to set up controls over their own activities and organisations and to adopt procedures aimed at preventing the commission, for their benefit, of any offence;
- Provide fair notice to companies practising crime prevention about what they must set up so as to be compliant and exonerated from liability, by providing the essential content of compliance programmes (see Arts. 6 and 7; Art. 6 also provides for a possibility for the Minister of Justice to formulate observations concerning compliance programmes elaborated by representative associations of corporations; also, a recent legislative proposal would introduce a system of pre-validation of the above-mentioned programmes);
- Permit entities to effectively defend themselves in trial and prove that they have nothing to do with the offence committed;
- Support judges in their ascertaining activities.

Moreover, at this stage of legislative development in these matters in the EU area, directives provide other options than a mere imputation system grounded on the leading position of the individual acting for the legal person (based on a power of representation, an authority to take decisions on behalf of the legal person, or an authority to exercise control over the legal person). Apart from this, each Member State will take the necessary measures to ensure that a legal person can be held responsible where the lack of supervision or control has made the commission of an offence possible. To this extent, various initiatives are also underway to promote an improvement of the current imputation criteria in order to more fully accomplish the directing principles of effectiveness, proportionality, and dissuasiveness, by giving relevance to the existence of compliance programmes.

It is clear that these parameters can certainly be of permanent relevance in an accountability system that does not disregard the verification of the connections between the crime committed and the organisational structures, procedures, and policies of a firm. Also, it should be underscored that, as most recently emphasised by the 2009 Stockholm Programme, economic and financial crime prevention is at the top of the European criminal policy agenda.

III. Complying with the Rules: Italian Companies on the Way to "Good Citizenship"

Is Italy, in practice, really giving lessons in this matter? If the innovative advantages of the Italian legislation are theoretically clear, ten years (and more) after its entry into force, it is time to examine, on the one hand, whether enterprises are really on their way to being "good citizens" and, on the other hand, whether case law is effectively meeting the standards of the liability statute, according to the above considerations. On the companies' side, this means verifying the overall degree of compliance with the legislative requirements of enterprises and, at the same time, the degree of confidence that companies seem to have in a law like the Italian one, which promises exemption from liability if organisational fault is lacking.

The first years after entry into force of the Decree were dominated by a strong scepticism, probably due to the prevailing characteristics of Italian economy, where the most active and productive companies are often small or medium in size, and for whom setting up a comprehensive preventive system could appear a too expensive effort. Also, the patriarchal model that is still common − especially in small entities − certainly did not help. On the contrary, recent research carried out by the Waseda University of Tokyo, Max Planck Institute, and Roma Tre University, in partnership with other universities and institutions, shows a different trend in Italy. The Italian trend is towards the build-up of compliance programmes and general prevention systems, with regard to large-sized companies performing their activity within the main economic sectors and representing, alone, more than 10% of the Gross Domestic Product. In this development, strong efforts were made especially in the period between 2003–2005, with a particular focus on corporate crime and bribery (almost 98% of companies included these offences in the mapping of risks).

IV. Effectiveness vs. Window-Dressing: Compliance Programmes and Case Law

As far as case law practice is concerned,[7] it goes without saying that the main issue is the adequacy of preventive models set up by corporations and their evaluation by the courts. In this respect, it must be highlighted that, as a general feature, adequacy concerns preventive systems existing before the commission of the offence. In addition, adequacy has to be evaluated with reference to crimes of the same kind as the one committed (and not to the one crime itself). Furthermore, following the longstanding US experience, the Italian Decree provides for compliance programme requirements; according to which they shall:

- Identify the activities in which offences might be committed;
- Provide for specific protocols aimed at planning and implementing decisions concerning the prevention of crimes;
- Find ways to manage financial resources in order to prevent the commission of crimes;
- Allocate the supervision and updating of the model to a body with autonomous powers of control;
- Introduce a disciplinary system suitable for sanctioning the violations of compliance programme rules.

Practical experience, nonetheless, shows an increasing punitive trend, and cases where preventive models (i.e., compliance programmes) have insulated a corporate body from liability are still rare. This generally depends on the poor attitude of companies in this matter, which treat preventive models as a sort of "window-dressing" instead of promoting effective adoption and implementation of a preventive model tailored to their specific risks. Sometimes the approach followed by the judiciary seems to be connected to the idea that the commission of the offence in itself displays the inadequacy of the model after all. Only in a few cases have judges acquitted companies of the offence after having found a company's organisational model to be adequate. In a recent case, for instance, the court found that the company's organisational model was not only consistent with the general requirements of the Decree but that it also included specific measures aimed at reducing or eliminating the risk of the particular offence the entity was charged with. In addition, the model was in line with Confindustria[8] Guidelines. Furthermore, the internal procedures of the model specifically required the approval by two or more individuals to perform the high-risk activities. The court explained that the illegal conduct that had formed the basis of the trial was not caused by an incorrect organisational model but by abnormal behaviour by high-level management that violated the internal rules of the said model.[9]

As stated by this and other decisions, compliance programmes can be taken into account in so far as the culture of prevention is deeply rooted and exceeds the intentions declared in the compliance documents. In order to exempt a corporate body, a preventive model must be adapted to suit its specific needs and characteristics and, of course, it has to be duly and effectively applied. Compliance programmes need not be just a paper tiger but rather a "tailor-made solution."

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1 *J.J. Gobert/M.Punch*, Rethinking Corporate Crime, London, 2003, p. 108 ff.
2 This is the case, according to the provisions of the French *Code Pénal* and of the English experience before the recent Manslaughter Act (2006) and Bribery Act (2010).
3 *J.J. Gobert/M.Punch*, Rethinking Corporate Crime (fn. 1), p. 111.
4 *A. Fiorella*, Concluding Remarks, in *A. Fiorella* (ed.), Corporate Criminal Liability and Compliance Programs, Vol. I. Liability 'ex Crimine' in Member States, Napels, 2012, p. 636.
5 *E. Villani*, Liability 'ex Crimine' of Collective Entities in Italian Legal System. An Overview, in: Corporate Criminal Liability and Compliance Programs, Vol. I (fn. 3), p. 19.
6 See Corporate Manslaughter Act of 2006 and Bribery Act of 2010.
7 This is already very significant: around 270 decisions by the Supreme Court until 2009. (Sources: "Materials for the Comparative Study on Compliance Programs of Corporations and Their Legal Effects" – Criminal Law Group of Waseda University of Tokyo, Febr. 2012); 18 legal persons were sanctioned for foreign bribery in Italy, including 17 through plea agreements *(patteggiamento)* since the entry into force of Decree 231/2001 in December 2010 (Source: OECD; http://www.oecd.org/corruption/briberyininternationalbusiness/anti-briberyconvention/49377261.pdf).
8 The most important Italian entrepreneurial association.
9 *C. Milan*, Office of the Judge for Preliminary Investigations, 17 November 2009, Beta S.p.A.

Liability of Legal Persons and Collective Entities for Environmental Crimes in Italian Law

Grazia Maria Vagliasindi

In Italy, Leg. Dec. no. 121 of 7 July 2011 extends to some listed environmental crimes the system of "administrative liability" of legal persons and collective entities for crimes committed in their own interest or to their advantage, as provided by Leg. Dec. no. 231 dated 8 June 2001. After a long time and having been advocated by many,[1] since it is deemed an essential instrument to tackle environmental crime, such an extension was finally carried out, following the need to implement obligations established by Directives 2008/99/EC on protection of the environment through criminal law and 2009/123/EC on pollution caused by ships (hereinafter, "the directives").

The need to comply with the obligations imposed by the directives was therefore crucial. Art. 19 of the Law of 4 June 2010, no. 96 (the so-called "Community law 2009"), in fact, has delegated to the government the transposition of the directives, providing for the criminalisation of conduct contemplated by the directives and the extension of the provisions of Leg. Dec. no. 231/2001 to environmental crimes covered by the same directives. In exercising this authority, the Italian legislator enacted Leg. Dec. no. 121/2011, which introduces a new Art. 25-*undecies* on environmental crimes into the structure of Leg. Dec. no. 231/2001. The new discipline raised several objections relating to its adequacy of fulfilling the obligation imposed by the directives and to its compatibility with the principles governing the delegation set by Law no. 96/2010 as well as with the general criteria for the attribution of responsibility outlined by Leg. Dec. no. 231/2001.

These objections are linked to the different interpretations concerning the general pattern of liability of collective entities and to the conflicting indications emanating, respectively, from the directives and Law no. 96/2010; on top of that, they are expressions of divergent conceptual options on the structure of environmental crimes as well as on interpretation of the obligations established by the directives.

II. Italian Legislation on Environmental Crimes

When facing such matters, it seems necessary to first list the main characteristics common to environmental crimes, which collective entities are today called upon to answer for.[2] Even though the obligations of criminal protection established by the directives would have implied an in-depth reform of the Italian legislation on environmental crimes, the lack of thought when formulating the delegation Law no. 96/2010 of the specific needs of transposition related to the directives and the consequent limits put in place for the delegated legislator has led to problems. They are such that legislation on environmental crimes in Italy remains basically unchanged because the delegated legislator was forced to act within the narrow confines of the criminal sanctions for misdemeanours ("contravvenzioni").

Therefore, criminal protection of the environment is still almost entirely left to a series of misdemeanours ("contravvenzioni") that fall outside of the Criminal Code. The choice of not qualifying the most serious environmental offences as felonies ("delitti") is deemed to cause the ineffectiveness of environmental criminal law. In fact, significant structural effects accompany this legislative approach. On the one hand, criminal conduct is relevant if committed both intentionally and negligently. On the other hand and more relevantly, the misdemeanour model implies modest sanctions and, from a structural perspective, results in a restriction of the concrete application of criminal sanctions, which negatively affects their deterrent effect. The misdemeanour nature of environmental crimes, in fact, implies a limitation of the investigation methods available to the investigators (use of wire-tapping is not allowed) as well as the inapplicability of individual precautionary measures. It involves short limitation periods; moreover, the frequent possibility to dismiss the crime through the payment of an amount of money ("oblazione comune" or "oblazione speciale", depending on the case) and to conditionally suspend the sentence[3] must be kept in mind.

Few rare felonies ("delitti") exist. For instance, Art. 260, Leg. Dec. of 3 April 2006, no. 152 (the so-called "Environmental Code") provides for the felony of "Organized activities for the illegal trafficking of waste." Courts also increasingly make use of the general criminal provisions referred to in Arts. 434 and 449 of the Criminal Code (respectively, "Collapse of buildings or other malicious disasters" and "Crimes of negligent damage"), contesting the Code for "environmental disaster."

With regard to sanctions, environmental criminal legislation provides for custodial sanctions that, in the matter of waste, do not normally exceed two years of imprisonment; in the matter of protection of air and reduction of emissions into the atmosphere, they do not exceed one year of imprisonment; in the matter of protection of water, they consist of two years of imprisonment on average (however, imprisonment of up to three years is more frequent). As for the fines – sometimes provided exclusively and sometimes alternatively or cumulatively in combination with imprisonment – they are in effect of a relevant nature: in the matter of waste, for example, the highest fine provided by Leg. Dec. no. 152/2006 is for the realisation and handling of illegal dumping of harmful waste, and it consists of a fine of up to € 52,000. For the remaining types of criminal acts, the maximum fine does not exceed € 26,000. Environmental legislation then foresees a particular type of confiscation. The above-mentioned general criminal law principles governing misdemeanours affect the effectiveness of both custodial and pecuniary criminal sanctions.

As for the structure of the criminal offence, all environmental crimes consist of abstract endangerment offences that, for the most part, punish the performance of a given activity without the required authorisation or exceeding certain "thresholds" or upon failure to meet reporting requirements and other administrative duties. In the light of these considerations, Italian environmental criminal law today is still, in some respects, "hypertrophic," to the extent that there is a multitude of sector offences, sometimes focused on formal violations as far away from the idea of criminal law as an "ultima ratio." In other respects, today's Italian environmental criminal law is inadequate and ineffective: individual criminal conduct that is very harmful to the environment cannot be adequately sanctioned in terms of having a deterrent effect. Moreover, Italian environmental criminal law today still appears to lack those "effective, proportionate and dissuasive" criminal penalties required by the directives for unlawful conduct, which causes a concrete endangerment or concrete harm to the various components of the environment or to the life and health of persons.

III. Liability of Collective Entities for Environmental Crimes: Catalogue of Offences, Sanctions, Rules on Liability

In this context, the absence of liability of collective entities for environmental crimes represented a further element of inadequacy within the punitive system. Such a gap has, at least partially, been filled by Leg. Decree no. 121/2011.[4] Art. 25-*undecies* of Leg. Dec. no. 231/2001 provides for the liability of collective entities in relation to some of the crimes referred to in Leg. Dec. no. 152/2006. This means, in particular, almost all crimes therein relating to waste management and the remediation of contaminated sites,[5] some crimes concerning the protection of waters against pollution,[6] and only one crime concerning air protection and the reduction of emissions into the atmosphere.[7] Art. 25-*undecies*, Leg. Dec. no. 231/2001 also provides for the liability of collective entities in relation to those environmental crimes already provided for by Italian law and deemed to meet the additional obligations imposed by the directives with regard to the protection of the ozone layer,[8] trade in protected species,[9] and pollution caused by ships.[10] To such cases, Art. 25-*undecies*, Leg. Dec. no. 231/2001 adds, finally, those crimes that Leg. Dec. no. 121/2011 introduced into the Criminal Code in order to comply with the obligations of criminal protection imposed by Directive 2008/99/EC on protected wild animals and plant species[11] and protected habitats.[12]

With regard to sanctions, Art. 25-*undecies*, Leg. Dec. no. 231/2001 provides for the fine ("pecuniary sanctions") in relation to all predicate offences listed therein. The sentencing ranges prescribed by law are diversified according to the seriousness of such offences. It can be observed that, for the most part, the highest sanctions provided in relation to offences covered by Art. 25-*undecies* are between 150 and 250 "shares." In the light of the general criteria for the determination of each share (Art. 10, Leg. Dec. no. 231/2001), the shares imply the applicability of sanctions, at a maximum between € 232,350 and € 387,250. Much more effective is the range from a minimum of four hundred to a maximum of eight hundred shares, provided for the most serious crime listed in Art. 25-*undecies*, namely the crime of organised activities for the illegal trafficking of radioactive waste (Art. 260, para. 2 of Leg. Dec. no. 152/2006): it involves the applicability of a maximum fine of € 1,239,200.

Besides the fine, interdicting sanctions are provided, for a period not exceeding six months, in case of conviction for the crimes of unauthorised discharge of industrial wastewater containing dangerous substances; crossing the thresholds given in Table 3/A of Annex 5 of part III of Leg. Dec. no. 152/2006 when discharging industrial wastewater; violation of the prohibition on discharge into the soil, groundwater, and underground; construction and management of an unauthorised landfill for dangerous waste; organised activities for trafficking of illegal waste; intentional spills of pollutants at sea by vessels causing harm to the sea and negligent spills of pollutants at sea by vessels causing harm to the sea. Definitive interdiction from carrying out the activity is provided when the collective entity or one of its units are permanently used for the sole or main purpose of enabling or facilitating the commission of the offences of organised activities for the illegal trafficking of waste and intentional spills of pollutants at sea by vessels.

Those provisions described so far are the only ones introduced by Leg. Dec. no. 121/2011 with specific reference to the liability of collective entities for environmental crimes. Numerous other aspects of this liability are therefore governed by the general provisions of Leg. Dec. no. 231/2001. It therefore seems appropriate to recall those provisions that appear likely to assume greater importance in the field of environmental crimes.

Starting from the sanctions and, in particular, the interdicting ones, it should be noted that, based on Art. 15 of Leg. Dec. no. 231/2001, when a disqualification that determines the interruption of the collective entity's activity is applicable, the court, in lieu of such sanction, may establish the activity to be continued by a designated person for a period of time. The period is equal to the duration of the disqualification that would be applied. This provision applies if the entity performs a public service whose interruption may cause serious harm to the community or if the interruption of the entity's activity may, taking account its size and the economic conditions of the area in which it is located, significantly affect employment; the profit deriving from continuing the activity is confiscated. Regarding sanctions, it should further be noted that, even in relation to the offences referred to in Art. 25-*undecies*, if the sentence is passed against the collective entity, the proceeds and profit from the crime are confiscated, possibly even by equivalent (Art. 19, Leg. Dec. no. 231/2001). Leg. Dec. no. 231/2001 provides for a reduction of the fine (Art. 12) and the exclusion of disqualification (Art. 17) if, prior to the opening of the trial of first instance, the collective entity puts in motion remediation of the damage and the dangerous consequences of the offence or adopts and makes operational a suitable organisational model or (but only with reference to the disqualification sanctions) provides for the purpose of confiscation the profit gained.

As regards the objective criteria for attribution of responsibility, the collective entity will be held "administratively responsible" for environmental crimes listed in Art. 25-*undecies*, Leg. Dec. no. 231/2001 if these crimes are committed in the interest of or to the advantage of the collective entity itself by a person in a management position or by a person subject to the direction or supervision of the latter (Art. 5). With respect to the subjective criteria of attribution of responsibility, the existence of a "guilty organization" has to be established. The entity may obtain the exclusion of liability if it adopted and effectively implemented, prior to the commission of the offence, organisational models specifically designed to prevent the commission of crimes listed in Art. 25-*undecies*.

In particular, in the case of crimes committed by senior officers of the collective entity, the latter is not liable if it proves that it has adopted and effectively implemented organisational and management models designed to prevent offences of the kind that occurred. It must also prove that it has entrusted to a body with autonomous powers of initiative and control the task of supervising the functioning and monitoring of the models and their updating; the collective entity must also demonstrate that the perpetrators acted by fraudulently evading the models of organisation and that there has been no lack of or insufficient supervision by the supervisory authority (Art. 6, Leg. Dec. no. 231/2001).

In the case of offences committed by subordinates, the entity is liable if the commission of the offence was made possible by non-compliance with management or supervision obligations. In any case, this non-compliance is excluded if the entity, prior to the commission of the offence, has adopted and effectively implemented a model of organisation, management, and control to prevent offences of the type that occurred. Depending on the nature and size of the organisation and its activity, the model must provide suitable measures to ensure that its activity is carried out in compliance with the law and to discover and quickly eliminate risk situations. Effective implementation of the model requires periodic review and possible amendment of the same when there are significant violations of regulations or changes in the organisation or business; successful implementation also requires an adequate disciplinary system to sanction non-compliance with the measures specified in the model (Art. 7, Leg. Dec. no. 231/2001).

The principle of autonomy of the entity's liability should be borne in mind: under Art. 8 Leg. Dec. no. 231/2001, the liability of the entity, in fact, exists even if the offender has not been identified or is not eligible and if the offence is ruled out for a reason other than amnesty.

It should finally be noted that, according to Art. 22, Leg. Dec. no. 231/2001, "administrative penalties" elapse for the collective entity within a period of five years from the date of commission of the crime; the period of limitation is interrupted by a request for precautionary disqualification measures and contestation by the entity of the administrative offence, depending on the commission of the crime (pursuant to Art. 59, Leg. Dec. no. 231/2001). Due to the interruption, a new period of limitation begins. If the interruption occurs through the contestation of the administrative offence, depending on the commission of a crime, the period of limitation does not begin until final judgment against the accused person is given. According to Art. 60, Leg. Dec. no. 231/2001, it is not possible to proceed with contestation if the crime that the entity should be liable for is eliminated by limitation with regard to the physical person who actually committed it.

IV. Problematic Issues, Interpretative Solutions, and Insights

It seems appropriate to highlight some problematic aspects of the rules on liability of collective entities for environmental crimes and, where possible, to envisage interpretative solutions and, at the same time, point out the potential underpinning of the rules in question.

With regard to the list of environmental offences, which the liability of the collective entity depends on, legal scholars have noted the limitations in the catalogue outlined in Art. 25-*undecies*, Leg. Dec. no. 231/2001, compared with Art. 2 of the original legislative decree draft. This is a cut, as noted in the literature, due to the opinions on the draft legislative decree expressed by the competent parliamentary committees. This advice - relying on provisions of the directives requiring the criminalisation of concrete harmful or concrete endangerment conduct - considered the liability of collective entities for some of the abstract endangerment environmental crimes, as covered by the legislative decree draft, to be exorbitant in the provisions of the directives and therefore urged the legislator towards a more limited selection of offences.[13] With this in mind, in practice, emphasis should be placed on the exclusion from Art. 25-*undecies*, Leg. Dec. no. 231/2001 of criminal offences in the field of integrated environmental authorisation (introduced in implementing Directive 2008/1/EC on IPPC, hereinafter "IEA") provided for by Art. 29-*quattuodecies*, para. 1, 2, and 3, Leg. Dec. no. 152/2006. The consequence, therefore, seems to be that of a virtual impunity for corporate bodies whose activities are subject to IEA.[14] Furthermore, excluding EIA-related crimes in Art. 25-*undecies*, Leg. Dec. no. 231/2001, infringes Directive 2008/99/EC: Directive 2008/1/EC on IPPC is, in fact, listed in Annex 1 of Directive 2008/99/EC.

Corrective action intended for the case at issue in Art. 25-*undecies*, Leg. Dec. no. 231/2001 is then desirable. Such action is also appropriate in relation to further authorisation-based crimes and to those crimes based on passing the "threshold limits" currently not covered by Art. 25-*undecies*, Leg. Dec. no. 231/2001. At present, in fact, the criminal protection of the environment is entrusted almost exclusively to such crimes in the Italian law; the absence of collective entity liability for such offences would result in ineffectiveness of the legislation. The same can be said for the infringement of uncontrolled depositing or abandonment of waste, subject to prosecution under Art. 256, para. 2, of Leg. Dec. no. 152/2006.

Part of the literature, moreover, criticised the choice not to include in Art. 25-*undecies* the crimes provided in the Criminal Code, which Courts tend to make use of in environmental matters.[15] This argument seems to be shared in substance; on a formal level, however, it clashes with the fact that the cases at issue are general in scope and not limited to the environment, therefore providing for the liability of collective entities for the crimes in the above-mentioned Code would surely have entailed an unlawful exceeding of powers established by Law no. 96/2010. As for the penalties and fines, it should be noted that they have not been considered of an irrelevant amount[16] in the literature. The real deterrent effect of such penalties should also be compared to the specific characteristics of the entity whose liability is being discussed. From this perspective, the sanctions might seem to be severe for small- and medium-sized enterprises, which make up the most important part of the productive system in Italy. The same is not the case for bodies with large economic capabilities for which, despite the general criteria for compliance with the economic conditions of the entity under Leg. Dec. no. 231/2001, the amount of such fines may have no real deterrent effect and therefore be inadequate in the preventive purpose underlying Leg. Dec. no. 231/2001. It should be recalled, however, that Leg. Dec. no. 231/2001 provides for a reduction of the fine and the exclusion of disqualification in the event of remediation of the damage and the harmful consequences of the offence.

These considerations tend to emphasise the central role that confiscation may be called upon to play. Obviously guarantees need to be imposed to apply the confiscation so that the necessary link between the sum confiscated and the offence is assured. In relation to environmental crimes, identifying proceeds of the offence to be submitted to confiscation might be complex.[17]

With regard to disqualification sanctions, it should be noted that Art. 15 of Leg. Dec. no. 231/2001, for circumstances in which significant effects on employment preclude the suspension of activities, provides for the appointment of a designated person to perform the activity. This provision seems to be of particular importance, as corporate liability for environmental crimes quite plainly discloses the complex interplay between environmental protection needs and employment and, more generally, economic interests. From this viewpoint, Art. 15, Leg. Dec. no. 231/2001 may play the role that has, in general, been potentially recognised in the literature: "the protection of collective interests is pursued without sacrificing a content that, for the collective entity, remains in practice of a punitive nature."[18]

As to the objective criteria of attribution of responsibility, the misdemeanours nature of most environmental crimes listed in Art. 25-*undecies* and the consequent punishment of these crimes when committed intentionally or negligently raise questions concerning the consistency of the approach of act-

ing "in the interest or to the advantage" of the collective entity with negligence by a natural person. Here, it has to be noted that, unlike the offences relating to health and safety in the workplace listed in Art. 25-*septies*, Leg. Dec. no. 231/2001, the crimes listed in Art. 25-*undecies* are, for the most part, crimes not requiring the causation of an unlawful result (conduct crime). This would seem, at least at first sight, to further facilitate acceptance of the view that, in cases of negligent crimes, the wording used in Art. 5, Leg. Dec. no. 231/2001 should refer to the criminal conduct as infringing the duty of care, that the individual has come to assume in the course of his activity for the entity and, for example, could be for cost savings for the same entity.[19]

As for the subjective criteria of attribution of responsibility, according to the general principles established by Leg. Dec. no. 231/2001, it becomes crucial for the collective entities to develop and effectively implement organisational models specifically calibrated to the environmental crime risk.[20] The minimum content of an appropriate model of crime prevention should include a correct and complete detection of risk situations for crime, the preparation of measures and rules of conduct to appropriately address the identified risk, adjustment of the assessments and measures to changing situations and, finally, adequate tools to ensure the effective implementation of the model, e.g., including a supervisory body with appropriate autonomous powers, regulating the flow of information and providing for disciplinary sanctions. The extension of the system of corporate liability to environmental crimes is thus not a simple task, as it involves adapting the system of organisation, management, and control to these crimes, which constitutes the true "heart of the prevention project"[21] pursued by Leg. Dec. no. 231/2001.

However, collective entities might find a useful point of reference in so-called "environmental management systems," e.g., adoption and implementation of Regulation (EC) no. 1221/2009 is subject to obtaining Eco-Management and Audit Scheme (EMAS) certification. It should indeed be noted that the conscious commitment of the adopting organisation to compliance with environmental legislation is promoted through the implementation of the environmental management and audit system: such compliance is, in fact, explicitly required by Regulation (EC) no. 1221/2009 as a condition for obtaining certification. To this end, the organisation, after a preliminary analysis of all environmental aspects characterizing its activity, develops procedures to improve its environmental performance and to carry out an audit that is a systematic, periodic, and objective evaluation of the efficiency of the environmental management system. Although there is no full correspondence between these models and the organisational model of Leg. Dec. no. 231/2001,[22] the practice gained in relation to environmental management systems seems to be a useful parameter in the development of organisational models to prevent environmental crime risk under Leg. Dec. no. 231/2001.

Beyond this potential value, the need should also be stressed to further promote the use of internal monitoring schemes in companies and organisations. Keeping in line with EU environmental policy now based not only on so-called command and control but also on the growing relevance of consensual tools, a further commitment of the legislator aimed at increasing the use of such systems could then play a very significant role in the prevention of environmental violations, while reducing the risk of criminal offences in connection with economic activities.

Some insights emerge, ultimately, with regard to the effects produced by the principle of autonomy of the liability of collective entities when combined with the rules on limitation of the administrative offence related to the crime. Misdemeanors listed in Art. 25-*undecies*, Leg. Dec. no. 231/2001 shall be barred for individuals after four years, unless increased by a quarter in the event that the period is interrupted pursuant to Art. 161 Criminal Code. For the collective entities, the "administrative offences" are barred for a longer period. This means that, in some cases (e.g., offences exempt from the payment of an amount of money; contestation before barring the predicate crime for limitation, non-identification of the individual), the regime of liability of legal entities will result with overall greater effectiveness.[23]

From a procedural point of view, it should be noted that the peculiar nature of the environment as a collective and super-individual interest may imply an increase in requests to file a civil action against the collective entities in order to represent the collective interests of; this is a much debated issue in case law with reference to the trials against individuals for environmental crimes.[24] What is debated much more generally is the issue of a civil action for damages in the criminal trial against the collective entity.[25] Courts will therefore be called upon to develop specific solutions that, from this vantage point, may remedy the current lack of protection for the "victim" of environmental crime.

V. Concluding Remarks

The analysis conducted so far has, in fact, revealed some limits of the rules on liability of collective entities for environmental crimes. The selection of environmental crimes on which liability of the collective entity depends, the effective deterrence of sanctions, compliance with the obligations

imposed by the European legislator are all aspects with the opportunity for corrective action.

In terms of overall protection of the "environment," the real significance generated by the provisions relating to the liability of collective entities for environmental crimes is also influenced by the more general, and still unsatisfactory, framework of environmental crime for individuals.

This might affect the overall rationality of the environmental punitive system: from the absence of a corporate liability for environmental crimes, therefore, it has come to a system in which the mechanism of corporate liability has a potentially greater effectiveness than the criminal responsibility of individuals, and therefore may result in relying on the liability of collective entities rather than on the punishment of individuals. However, the extension of the liability system outlined by Leg. Dec. no. 231/2001 to environmental crimes still seems to be positively evaluated. This extension, in fact, begins to fill a gap which, rightly, had long been considered a significant deficiency in the effectiveness of the punitive Italian system on environmental crimes: in developing a first, albeit partial, response to the needs of shared responsibility among collective entities in deterring crimes that are mostly an expression of corporate criminality.

The system of liability for environmental crimes provided for in Leg. Dec. no. 231/2001 also appears to have potential that transcends the boundaries of the system itself: the need to adopt and implement effective organisational models of prevention of environmental crime risk could lead to a further enhancement of consensual instruments of environmental protection (such as EMAS). In this context, the preventive aim pursued is not attached to the threat of sanctions but instead to the benefits that acting compatibly with the environment is able to generate and, further, to the establishment of a renewed and broader concept of corporate responsibility.

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1 See, e.g., *D. Pulitanò*, La responsabilità "da reato" degli enti nell'ordinamento italiano, in Cassazione penale, 2003, No. 6 (special supplement), pp. 7-29, 13; *L. Siracusa*, La tutela penale dell'ambiente, Milano: Giuffrè, 2007, p. 526. It should be noted that several bills aimed at introducing environmental offences ("*delitti*") into the Criminal Code and the related liability of collective entities but, for the most part, they were stopped by the early termination of the legislatures.

2 Regarding such characteristics, among the vast literature, see, e.g., *M. Catenacci*, La tutela penale dell'ambiente, Padova: Cedam, 1996; *L. Siracusa*, La tutela penale dell'ambiente; *C. Bernasconi*, Il reato ambientale. Tipicità, offensività, antigiuridicità, colpevolezza, Pisa: ETS, 2008 and references therein.

3 It is also important to emphasise that a special regulation is at times provided for the conditional suspension of sentences for environmental crimes, which is subordinate to the effective environmental restoration.

4 On Leg. Dec. no. 121/2011, see, e.g., *L. Pistorelli/A. Scarcella*, Relazione dell'ufficio del Massimario presso la Corte suprema di cassazione, in http://www.penalecontemporaneo.it (4 August 2011), pp. 1-37; *C. Ruga Riva*, Il decreto legislativo di recepimento delle direttive comunitarie sulla tutela penale dell'ambiente: nuovi reati, nuova responsabilità degli enti da reato ambientale, in http://www.penalecontemporaneo.it (8 August 2011), pp. 1-18; *G. Casartelli*, La responsabilità degli enti per i reati ambientali, in http://www.penalecontemporaneo.it (23 March 2012), pp. 1-23; *A. Madeo*, Un recepimento solo parziale della direttiva 2008/99/CE sulla tutela penale dell'ambiente, in Diritto penale e processo, 2011, No. 9, pp. 1055-1065; *C. Manduchi*, La riforma dei reati ambientali e il D.Lgs. 231/2001: prime riflessioni, in Ambiente & Sviluppo, 2011, No. 8-9, pp. 731-735; *V. Plantamura*, Responsabilità individuali e degli enti nel d. lgs. 2 luglio 2011 No. 121 di attuazione delle direttive europee sulla tutela penale dell'ambiente, in Rivista trimestrale di diritto penale dell'economia, 2011, No. 3, pp. 477-503; *M. Scoletta*, Obblighi di criminalizzazione e responsabilità degli Enti per i reati ambientali, in Rivista giuridica dell'ambiente, 2012, No. 1, pp. 17-48 and references therein.

5 Collection, transport, recovery, disposal, trade, and brokerage of waste in the absence of the required authorisation, registration, or communication (Art. 256, para. 1, lett. a) and b), Leg. Dec. no. 152/2006), construction or operation of an unauthorised landfill (Art. 256, para. 3, first and second sentences, Leg. Dec. no. 152/2006), inobservance of the requirements contained in the permit to operate a landfill or other waste activities (Art. 256, para. 4, of Legislative Decree No. 152/2006), unauthorised mixing of waste (Art. 256, para. 5, of Leg. Dec. no. 152/2006); temporary deposit of hazardous medical waste at the place of production (Art. 256, para. 6, of Leg. Dec. no. 152/2006); pollution of the soil, subsoil, surface water, and groundwater with remediation failure and lack of prescribed communication to the competent authorities (Art. 257, para. 1 and 2, Leg. Dec. no. 152/2006); creation or use of a false certificate of waste analysis (Art. 258, para. 4 and Art. 260-bis, para. 6 and 7, Leg. Dec. no.152/2006); illegal waste trafficking (Art. 259, para. 1, Leg. Dec. no. 152/2006); organised activities for the illegal trafficking of waste (Art. 260, Legislative Decree No. 152/2006), violations of the control system on the traceability of waste (Art. 260-*bis*, para. 8, of Leg. Dec. no. 152/2006).

6 Unauthorised discharge of industrial wastewater containing dangerous substances (Art. 137, para. 2, Leg. Dec. no. 152/2006), discharge of industrial wastewater containing dangerous substances contrary to the requirements imposed by the authorisation (Art. 137, para. 3, of Leg. Dec. no. 152/2006), discharge of industrial wastewater in violation of tabled "thresholds limits" (Art. 137, para. 5, first and second period, Leg. Dec. no. 152/2006); violation of the prohibitions of discharge to the soil, groundwater, and underground (Art. 137, para. 11. Leg. Dec. no. 152/2006); discharge into the sea by ships and aircraft of substances prohibited from being spilled (Art. 137, subsection 13, Leg. Dec. no. 152/2006).

7 Exceeded the emission limit values that also determines the limit values of air quality (Art. 279, para. 5, Leg. Dec. no. 152/2006).

8 Violation of the provisions on the use of substances harmful to the ozone layer (Art. 3, para. 6, of Law 28 December 1993, n. 549).

9 Import, export, transport, and use of animals and illegal trade in artificially propagated plants (Art. 1, para. s 1 and 2 and Art. 2, para. 1 and 2 of the Law no. 150/1992),

falsification or alteration of certification and licensing and use of forged or altered certifications and licenses for the importation of animals (Art. 3-*bis*, Law No. 150/1992).
10 Intentional spill at sea of pollutants by vessels (Art. 8, para. 1 and 2, Leg. Dec. 6 November 2007, no. 202); negligent spilling of pollutants at sea by vessels (Art. 9, para. 1 and 2, Leg. Dec. no. 202/2007).
11 Killing, destruction, catching, taking, possession of specimens of protected wild fauna and flora (Art. 727-*bis* of the Criminal Code).
12 Destruction or deterioration of habitats within a protected site (Art. 733-*bis* of the Criminal Code).
13 See, e.g., *L. Pistorelli/A. Scarcella*, Relazione, p. 27; *G. Casartelli*, La responsabilità, p. 11.
14 See, e.g., *L. Pistorelli/A. Scarcella*, Relazione, p. 28; *C. Ruga Riva*, Il decreto legislativo, p. 11.
15 See, e.g., *L. Pistorelli/A. Scarcella*, Relazione, p. 28; *G. Casartelli*, La responsabilità, p. 12.
16 See, e.g., *C. Ruga Riva*, Il decreto legislativo, p. 16.
17 See, e.g., *L. Pistorelli/A. Scarcella*, Relazione, p. 32 .
18 See *D. Pulitanò* (fn. 1), p. 26.
19 See, in general, *D. Pulitanò*, La responsabilità «da reato», p. 15. With reference to Art. 25-*undecies*, Leg. Dec. no. 231/2001, see *L. Pistorelli/A. Scarcella*, Relazione, p. 30; *C. Ruga Riva*, Il decreto legislativo, p. 17; for a partially different solution, see *G. Casartelli*, La responsabilità, p. 13; for a different solution, see *M. Scoletta*, Obblighi di criminalizzazione, p. 41.
20 See, e.g., *C. Ruga Riva*, Il decreto legislativo, p. 17; *G. Casartelli*, La responsabilità, p. 15.
21 *E.M. Ambrosetti/E. Mezzetti/M. Ronco*, Diritto penale dell'impresa, Bologna: Zanichelli 2009, pp. 38-39.
22 See *G. Casartelli*, La responsabilità, p. 18.
23 See, e.g., *C. Ruga Riva*, Il decreto legislativo, p. 16.; *G. Casartelli*, La responsabilità, p. 15.
24 See, e.g., *F.P. Garzone*, La legittimazione a costituirsi parte civile in materia di reati ambientali dopo l'entrata in vigore del D.Lvo n. 152/2006, in Rivista penale, 2010, No. 1, p. 80.
25 See, e.g., *A. Valsecchi/F. Viganò*, Costituzione di parte civile contro l'ente imputato: le conclusioni dell'Avvocato generale presso la Corte di giustizia UE nel caso Giovanardi, in http://www.penalecontemporaneo.it (7 June 2012).

Investigations on Social Networks

A German Perspective

Klaus Hoffmann*

Social networks are of growing importance, not only for the young generation. Throughout the world, hundreds of millions of people are using Facebook and other social networks on a daily basis to communicate with each other. At the same time, communication via phone or email is used less and less for daily communication. In this context, it becomes obvious that the police and prosecutors are keen to use social networks for their investigations. A number of recent court decisions addressed various questions in relation to online investigations. This article will examine the different scenarios and their legal background.

Social networks not only contain communication between two or more users, but also various personal information (date of birth, employer, residence, friends, hobbies, information about daily activities, photos, etc.). All this information may be of relevance for criminal investigations. Unknown perpetrators or witnesses may be identified, alibis may be confirmed or rejected, the current place of residence of perpetrators or witnesses may be established, incriminating messages or photos may be found. The scope of possibly interesting information is as broad as that posted by the users.

I. Investigative Measures

1. Open Measures

There are different scenarios that need to be clearly distinguished for a proper legal examination. The main question is always whether the right to privacy of one's own data and of the telecommunication is concerned at all. Under Art. 2 (1) of the German Constitution[1] the general personal freedom of all citizens is protected. Any investigative measure on social networks needs to be founded on a solid legal basis if this general right to freedom of personal development is to be limited.

The German Constitutional Court[2] found that information made public on the Internet cannot be categorised as private and hence is not protected as such against access by the police or prosecution.[3] Based upon Art. 2 (1) GG, the Constitutional Court established in its jurisprudence that everyone has the right to determine how one's own private data is made public and disseminated *(„Recht auf informationelle Selbstbestimmung")*.[4] This general personal freedom also entails the right to protection of privacy and integrity of IT-systems.[5] These

rights are intended to protect each citizen against secret or hidden access to his data.[6] It seems only consistent that any information made available to a wider public is not protected against official access.

The Constitutional Court further found that online communication services (including social networks) usually do not offer any form of verification of the real identity of the communication partner. Under these circumstances, every user should be aware that he cannot trust the other side's identity. The user is therefore not protected under constitutional law in his – unfounded – expectation that he is not communicating with the police.[7]

a) First Scenario:

A user is posting news and messages on his open account. His account is generally open to all users of the social network. Taking the example of Facebook, this means that the posted information is available to more than 800 million users. Such information is voluntarily shared with the public and therefore in no way private. It is hard to see how the police and prosecution could violate any right to privacy while scrolling through such public information. The same applies in this context to the list of "friends" and other information made public by the user. As no specific right is infringed, the general legal basis for investigative measures in the German code of criminal procedure is sufficient (sections 161 and 163 StPO[8]). The same applies if the police collect such online information in a systematic way.

b) Second Scenario:

The user is keeping his profile on the social network restricted to his "friends". In this case, one can again distinguish between two situations. In most cases, users of Facebook and other social networks are proud to have many "friends" online. Often there is even competition as to the numbers of (Facebook) friends. These users will often accept any "friend request" whether they know the requesting person or not. If a user accepts the request of a "John Smith" without knowing such a person, he clearly gives away his right to privacy. This is even more obvious if a user has hundreds of so-called friends with whom he shares all his information and data. In such a case, the police do not deceive the user as he is not discriminating about the identity or choice of new "friends".

In this context, the police may use a fake account and send a friend request (or respond to such requests). After being accepted as a friend online, the police may access any information that is posted by the user and is visible to all his friends. Therefore, such investigative measures can be carried out upon the general legal basis, sections 161 and 163 StPO. If however the police want to seize specific information or messages, a seizure order by the court may be needed to use such material as evidence in court.

It is not convincing when some authors claim that no legal basis for such investigative measures exists and hence such measures would be illegal.[9] Such a very restrictive view does not reflect the actual situation of social networks. If a user is genuinely interested in keeping his profile private, he will do so and not allow anyone to enter the close circle of "friends," especially if he does not know the requesting "friend". In reality, most users do not care about privacy and publish all personal information online and publicly. They make their personal information available to an audience much wider than they would by shouting it out at a central market place. Under these circumstances, one cannot rely on the assumption that there would be no police officer among the audience.[10] Some point to the practice of Facebook adopting new tools like automatic face recognition without the consent of users,[11] and one will have to follow this development very closely. At the same time, due to a wide public discussion of these matters, the user is aware of these tools and their "risks" and accepts them when further using such networks.

If the user is stricter when it comes to accepting friend requests and, as a result, a fake profile and identity is needed, the police may need to apply undercover operations (see below at I.2.b).

c) Third Scenario:

In some cases, a suspect or witness makes his own account available to the police. Upon his own initiative or upon request of the police, the user may get in touch with another suspect. The police will then follow the communication and use it as evidence. As the police is following the communication with the consent of one communication partner, the constitutional right to privacy of telecommunication (Art. 10 GG) is not infringed.[12]

The situation is similar during a house search when the police encounter a computer that is up and running and connected to the Internet, with open chat rooms and mailboxes.

In some cases, witnesses, victims, or suspects present the police with communication data (e.g., online conversation or Facebook chat protocols). If the one presenting the material is one of the communication partners, it can be obviously used as evidence. As the concept of the "fruit of the poisonous tree" does not apply in Germany, material can also be used if it is handed over by a third person, no matter how it was obtained and as long as the police was in no way involved or instigating the third person.

2. Undercover Measures

a) Online Search?

The secret online searching of a network or personal computer is not allowed under German criminal law. The current code of criminal procedure does not foresee such online searches, and they cannot be based on the rules permitting general investigations. Consequently, the Constitutional Court has decided that an online search is unconstitutional.[13] Following this decision, new rules have been set up in federal police law[14] as well as in the police laws for some German federal states, e.g., Bavaria. A new draft for the code of criminal procedure, adopting section 111k StPO, was discussed and then rejected.[15] As police and prosecutorial measures are clearly distinguished, information gathered by the police through hidden online access cannot be used as evidence in a criminal case due to the lack of a specific legal basis in the code of criminal procedure.[16]

It is a different situation, however, if a normal search warrant is openly executed and computers and networks are found and then confiscated and examined. If a network connection is open, the police may also examine and save data that is available through the network connection during the course of the search.[17]

b) Online Undercover Agents?

The creation and use of a fake account without using personal details of an existing person, maybe even without using any core personal details and without deceiving the other side, does not fulfill the criteria for the use of an undercover agent, pursuant to section 110a StPO. Such a fake account will most likely – especially in the scenarios above – not be used for a long period, another condition under section 110a StPO.

The police in this scenario operates as a non-public investigating police officer, a situation that has been based upon the general investigative competence for a long time (section 161, 163 StPO) and is accepted by the jurisprudence.[18]

However, if a police officer is using a fake account with a full cover, including many personal details created for a long-term use and to specifically deceive a specific person (or group of persons) in order to gain his trust, the rules for an undercover agent will apply.[19] Undercover agents may only be used to investigate and prosecute serious crimes and only as last resort (section 110a StPO). There is no reason not to use undercover agents in online chat rooms and social networks if and when their use in the "real" world would be equally permissible.[20]

In practice, however, the use of an undercover agent online will prove very difficult due to the amount of information available online and the high risk of being uncovered. It is therefore not surprising that the German Federal Police (BKA) only used undercover agents online in six cases within a two-year period.[21]

II. Summary

The actual use of social networks has to be clearly examined before rendering a decision on the legal framework. As many users openly post their private messages and details or communicate with "online friends" without verifying their true identity, no right to privacy could be infringed in these cases. Only if and when the police create a specific fake account with the aim of deceiving a suspect and to gain his trust over a long period of time, do specific legal requirements for the use of undercover agents need to be fulfilled. In all other cases, the general legal basis for police and judicial investigative measures is sufficient. More and more criminals are using social networks, chatrooms, Skype, and other encrypted means of communication to avoid former communication channels like telephone and (e)mail. Under these circumstances, it is the right and the duty of the police and judiciary to use all legally available means to investigate and prosecute crimes. This includes the different ways to obtain and collect information and pieces of evidence that is available online.

Under German constitutional law and the law of criminal procedure, a covert online search of networks is illegal, as there is no specific legal basis for such a measure at this point in time. However, the federal police and, in some German federal states, the local police may use such measures, but purely for police purposes.

It should be added that the cooperation of social networks like Facebook with the police and judiciary is not satisfactory. Although Facebook and other networks are operating within Europe, using offices in European countries and using the existing public and private infrastructure to run their networks (and to make profit), they normally point to their "main" offices in the USA when it comes to investigative measures, especially when the prosecution requests telecommunication data. Unfortunately, requests for mutual legal assistance with the USA in such cases take very long. As a consequence, many colleagues do not even send such a request for legal assistance to the USA.

A completely different question is if and when social networks can be held (criminally) liable for crimes committed in and through social networks. Possible scenarios are the dissemination of hate speech and child porn or illegally downloaded products. A new phenomenon are so-called Facebook parties. They attract hundreds, if not thousands of mostly young (quickly drunk) people, with all the consequences of such big gatherings in the public. Mass destruction, violence, and the

deployment of dozens or hundreds of policemen cost a lot of money. Many cities are currently reviewing the question of who to charge with these costs. Some are already calling for a way to make Facebook liable, aside from the users who invite to those parties. However, it seems doubtful that a legal basis for such claims does exist at this time.

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* The views expressed in this article are only the author's personal views and not those of the Office of the Prosecutor. Mr. Hoffmann works in the department for drugs and organised crime and international legal assistance. He is also the office contact person for cybercrime.

1 „Grundgesetz" (GG).
2 Bundesverfassungsgericht (BVerfG).
3 BVerfG, 1 BvR 370/07, NJW 2008, 822 (836, para. 308).
4 See BVerfGE 65, 1 (43); BverfG, 1 BvR 370/07, NJW 2008, 822 (826; para. 198)
5 BverfG, 1 BvR 370/07, NJW 2008, 822 (827, para. 201).
6 Ibid. (para. 205).
7 Ibid. (para. 311). See also *B. Müller,* Einsatzmöglichkeiten virtueller Vertrauenspersonen, verdeckter Ermittler und nicht öffentlich ermittelnder Polizeibeamter Kriminalistik 5/2012, pp. 295 (301).
8 Strafprozessordnung (StPO).
9 E.g., *S. Drackert*, Die Verwendung fiktiver Identitäten für strafprozessuale Ermittlungen in sozialen Netzwerken, eucrim 2011, pp. 122 (125).
10 See BVerfG (fn. 5, para. 311).
11 *S. Drackert* (fn. 9), pp. 123 (124).
12 BVerfG, Decision 27.02.2008, NJW 2008, 822 (835; para. 293). See also *B. Müller*, Kriminalistik, 5/2012, 295 (298). In earlier decisions, the Constitutional Court was stricter and found that the consent of only one user would not be sufficient under Art. 10 GG; BVerfG NJW 1992, 1875/ 1876; similarly also *W. Bär*, TK-Überwachung, §100a Rn. 5.
13 BVerfG, at fn. 13.
14 Gesetz über das Bundeskriminalamt (BKAG), § 20k.
15 BR-Drs. 365/08.
16 See *W. Bär*, TK-Überwachung, §100a Rn. 69 et seq.
17 See section 110 (III) StPO which was adopted to enforce Art. 19 (2) of the Cybercrime Convention. For a more detailed commentary, see *W. Bär*, TK-Überwachung, § 100a Rn. 72.
18 "Nicht öffentlich ermittelnder Polizeibeamter (NoeP)"; Bundesgerichtshof (BGH), NJW 1997, 1516; *L. Meyer-Goßner*, Strafprozessordnung, 55th Edition, § 110a, Rn 4.
19 See *C. Rosengarten/S. Römer*, Der „virtuelle verdeckte Ermittler" in sozialen Netzwerken und Internetboards, NJW 2012, 1764/1765. See also an official response of the Federal Government, 14.07.2011, BT-Drs. 17/6587, pp. 3/4.
20 See *M. Soiné*, Verdeckte Ermittler als Instrument zur Bekämpfung der Kinderpornographie im Internet, NStZ 2003, 225, for a more specific review of the dissemination of child porn on the Internet and the use of undercover agents, especially in closed chat rooms (IRC).
21 See official response (fn. 19), p. 5.

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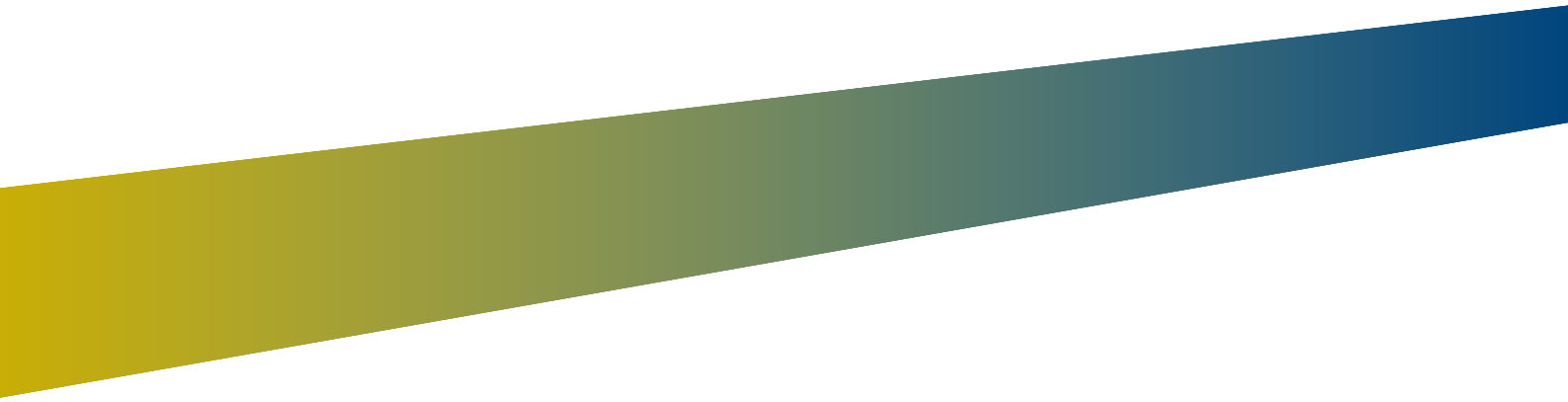

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