

SUCCESSOR TO AGON



Focus on National Implementation of International Criminal Law Standards

Dossier particulier sur la mise en œuvre nationale des standards internationaux en matière pénale

Schwerpunktthema: Nationale Umsetzung internationaler strafrechtlicher Standards

Criminal Law Protection of the EU's Financial Interests in Croatia
Prof. Dr. Zlata Đurđević

The Effective Implementation of International Anti-Corruption Conventions
Bryane Michael and Habit Hajredin

The Implementation of the European Arrest Warrant in the Republic of Slovenia
Dr. Katja Šugman Stubbs

The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant
Prof. Dr. Asbjørn Strandbakken

Contents

Editorial

News*

European Union

The Enlargement of the Schengen Area

Foundations

- 73 Reform of the European Union
- 75 Proclamation of the Charter of Fundamental Rights
- 76 Community Powers in Criminal Matters
- 78 The Hague Programme Review
- 79 Legislation
- 81 Better Regulation in the EU

Institutions

- 82 OLAF
- 83 Europol
- 84 Eurojust
- 84 Eurojust/European Judicial Network (EJN)
- 86 European Union Agency for Fundamental Rights (FRA)

Specific Areas of Crime / Substantive Criminal Law

- 87 Protection of Financial Interests
- 91 Tax Fraud/VAT
- 95 Cigarette Smuggling
- 97 Corruption
- 97 Money Laundering
- 98 Money Counterfeiting
- 98 Non-Cash Means of Payment
- 99 Counterfeiting and Piracy
- 99 Organised Crime
- 100 Illegal Employment
- 100 Racism and Xenophobia

Procedural Criminal Law

- 100 Procedural Safeguards
- 101 Data Protection

- 104 Ne bis in idem
- 104 Victim Protection
- 105 Freezing of Assets

Cooperation

- 108 Law Enforcement Cooperation
- 109 Customs Cooperation
- 109 Police Cooperation
- 110 European Arrest Warrant
- 110 European Supervision Order/ Transfer of Sentenced Persons
- 111 E-Justice
- 111 External Dimension

Council of Europe

Foundations

- 112 Relations between the Council of Europe and the EU
- 112 Reform of the European Court of Human Rights
- 113 Execution of Judgments of the European Court of Human Rights

Specific Areas of Crime

- 115 Corruption
- 115 Money Laundering
- 117 Cybercrime

Procedural Criminal Law

- 118 Justice Organisation

Cooperation

Legislation

Articles

National Implementation of International Criminal Law Standards

- 120 Criminal Law Protection of the EU's Financial Interests in Croatia
Prof. Dr. Zlata Đurđević
- 128 The Effective Implementation of International Anti-Corruption Conventions
Bryane Michael and Habit Hajredin
- 133 The Implementation of the European Arrest Warrant in the Republic of Slovenia
Dr. Katja Šugman Stubbs
- 138 The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant
Prof. Dr. Asbjørn Strandbakken

Imprint

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

Editorial

Dear readers,

I am very pleased to write an editorial for eucrim. This review is an excellent forum for specialists to exchange views on the dynamic area of European criminal law. This edition will focus on the national implementation of European and international penal standards. As Vice-President of the Commission responsible for administrative affairs, audit and anti-fraud (OLAF), this topic is of direct interest in two areas: the fight against fraud and integrity policy for civil servants.

Over the last decade, the protection of the financial interests of the EU acted as a motor for criminal law activities at the level of the EU. This is, to use an economist's term, a "European good". Only around 20 % of the EU budget is managed directly by the Commission, the majority is managed by Member States. Revenue comes from taxpayers across Europe. It should be equally well protected against fraud across the EU. However, even though the budget is central to its executive role, the Commission depends essentially on Member States' authorities for sanctions other than those of an administrative or financial nature. For criminal offences against EU financial interests, both penal law investigations and prosecution are in their competence.

Sadly, our experience with cases shows that different Member States have given the same case widely differing treatment. It is in fact a typical EU dilemma: the Commission has a great interest in the effective fight against fraud, but lacks the required competences. The Member States have the competences, but often do not give it the same priority. This is nobody's fault: the national judicial authorities must continually arbitrate between the numerous and competing priorities while resources are scarce. In circumstances of increasingly complex work, it is sometimes difficult for them to take on the protection of the Community's financial interests as a top priority. Integration and the free movement across the EU, which unfortunately are also exploited by criminals, increase the need for cooperation and coordination against crime and fraud. The trend of organised crime towards defrauding EU must lead us to reflect on how to develop robust structures at the European level to effectively counter this criminal conduct.

Several instruments have already strengthened the framework and unified application for the protection of the EU's financial interests. It is worth mentioning that the Commission just adopted a second report on the implementation of the EU instruments on the protection of its financial interests in the Member States which pointed out where the situation is still far from perfect. Against this background, the Commission will further develop the project of the European Public

Prosecutor's Office as a means to give emphasis to its commitment towards a better protection of European financial interests and its public administration. With regard to the European public administration and its civil service, I am keenly following international discussions on standards concerning ethics, integrity and better governance. The Commission, of course, strives to spearhead international standards. The UN Convention against Corruption is a landmark.

It is in various ways intertwined with past and future European efforts as regards preventing and combating corruption and other criminal activities in public administration. Amongst the instruments that the negotiators at the UN took into account is the EU Convention on the protection of the European Communities' financial interests and its protocols, as well as the EU Convention on the fight against corruption. Due to this influence, some of the obligations imposed on Member States in the penal law sphere derive from both, the UN standard and the EU standard. The Commission has proposed the signature and subsequent conclusion, on behalf of the European Community, of the UN Convention, which would make it a party.

Ethics and integrity are crucial for maintaining and improving trust in the European institutions and projects. Civil servants' actions determine the reputation and performance of the institutions. Within its own house, the European Commission does not tolerate fraud or corrupt practices of any kind. The Commission promotes transparent governance and a high level of accountability well beyond the work environment of its own house.

Of course, and given the acknowledged constraints, at the European level our focus is on prevention and detection. However, criminal law is needed for sanctions to act as a strong deterrent and criminal liability is needed for an effective incentive to play by the rules.

We count on your qualified advice and contribution as experts on European criminal law to offer all European citizens the protection guarantees which they deserve!

Siim Kallas
Vice-President of the European Commission
responsible for administration, audit and anti-fraud



Siim Kallas



European Union

The Enlargement of the Schengen Area

By Thomas Wahl and Sarah Schultz

Europe Steps Up to Extended Border-Free Area

As of 21 December 2007, Estonia, the Czech Republic, Lithuania, Hungary, Latvia, Malta, Poland, Slovakia, and Slovenia have become part of the Schengen area. Controls at internal land and sea borders between these countries and the current 15 Schengen Member States have been lifted. On 30 March 2008, with the change in flight schedules, checks were also lifted at air borders. This development results in a very tangible expression of the free movement ideal: Now, around 400 million European citizens are able to move freely, without checks, within an area encompassing 3.6 million km² – the “Schengen area”.

Member States which accede to the EU are bound by the entire Schengen acquis – a set of rules and subsequent decisions governing the Schengen cooperation. However, the implementation takes place in two steps: Some of the Schengen rules, mainly those on police and judicial cooperation and external border control, apply from the day of accession to the EU onwards. A second part, i.e., rules relating to the abolishment of internal borders, such as issuance of the Schengen visas or the operation of the Schengen Information System, applies later if further conditions are met. In particular, the Council must – after consultation with the European Parliament – unanimously decide on when the Member States are ready to fully apply the rules.

The decision concerning the readiness of the above-mentioned Member States was taken by the Justice and Home Affairs Council on 6 December 2007 after

the European Parliament had delivered its supporting opinion on 15 November 2007. For the preparations of the decisions of the Council and the European Parliament, a detailed evaluation was carried out in those Member States which wish to join the free border area. For more background information on the Schengen cooperation, the evaluation procedure, and the Schengen Information System, see the news items below.

► [eucrim ID=0703001](#)

Reactions to the Enlargement of the Schengen Area

The vast majority of politicians reacted positively to the recent enlargement of the Schengen area. Commission President José Manuel Barroso congratulated the nine new Schengen members, the Portuguese presidency, and all EU Member States for their efforts and said: “Together we have overcome border controls as man-made obstacles to peace, freedom and unity in Europe, while creating the conditions for increased security”. Vice-President Franco Frattini, Commissioner responsible for Freedom, Justice, and Security added: “The extension of Schengen demonstrates the EU’s commitment to facilitating legitimate travelling within and into the EU whilst at the same time reinforcing the security of our external borders and thereby strengthening the safety of all EU citizens.”

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On the occasion of the first 100 days after the Schengen enlargement, Germany’s Minister of the Interior Dr. Wolfgang Schäuble, on 1 April 2008, evaluated the enlargement of the Schengen zone positively. “The Schengen enlargement was an important step forward towards a unified Europe”, Mr. Schäuble said. The enlargement particularly meant, for Germany, that barriers at its borders with

Poland and the Czech Republic were removed. Together with these two countries, Germany installed common centres for police and customs cooperation in Swiecko (for the German-Polish border) and Schwandorf (for the German-Czech border) which allow a far quicker exchange of information, the establishment of situation reports, and coordinated action along the joint border area. The German-Polish and the German-Czech border services centres were inspired by the model of the Franco-German centre in Kehl/Germany near Strasbourg.

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Background: What is “Schengen”?

In the context of the European integration process, “Schengen” stands for the realisation of the concept of free movements of persons and the creation of a citizens’ Europe. In 1985, five European countries – Belgium, France, Germany, Luxembourg, and the Netherlands – signed an agreement “on the gradual abolition of checks at their common borders” in Schengen – a small village in Luxembourg at the geographical nexus of these countries. The agreement aims at establishing a common travel area without internal borders and with common external borders. This became known as the “Schengen area”. Schengen countries normally do not require citizens to show their passports when crossing borders between one Schengen country and another. A common “Schengen visa” allows tourist or visitor access to the area as a whole.

In 1990, the countries signed in Schengen the Convention Implementing the Schengen Agreement of 1985 (in short: the Schengen (Implementing) Convention, CISA). The Convention lays down detailed rules and measures necessary for the lifting of checks at internal borders (i.e. land, sea, and air borders) between the Schengen states and sets out measures which should compensate the perceived loss of security after the removal of such barriers.

It should be mentioned that the Schengen Agreement and the Schengen Convention were concluded outside the structure of the European Union/European Communities. Although linked closely with the policy of the European Union,

they originally represent conventional multilateral treaties concluded under the rules of international public law. Later however, in 1999, the Schengen rules were incorporated into the EU framework (see below). Today, the Schengen Agreement, the Schengen Convention, and the subsequent decisions and measures thereupon are implemented by 29 European countries which leads to the abolition of systematic border controls between these participating countries. Among these countries are also countries which are not members of the European Union.

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What Is Contained in the Schengen Agreement of 1985?

With the Schengen agreement, Germany, France, and the Benelux countries wanted first to relax mutual border controls. To this end, the agreement contains a number of so-called *short-term measures*, such as the reduction of controls to simple visual surveillance of private vehicles. Furthermore, the Schengen Agreement includes common policy provisions concerning the temporary entry of persons and cross-border police cooperation. Article 9 states the following:

“The Parties shall reinforce cooperation between their customs and police authorities, notably in combating crime, particularly illicit trafficking in narcotic drugs and arms, the unauthorised entry and residence of persons, customs and tax fraud and smuggling. To that end and in accordance with their national laws, the Parties shall endeavour to improve the exchange of information and to reinforce that exchange where information which could be useful to the other Parties in combating crime is concerned.”

Second, the Agreement also deals with *measures applicable in the long-term* which support the complete abolition of internal border controls and their transfer to the external borders of the signatory states. The agreement restricts itself to giving political guidelines for a second treaty which was to be negotiated and lay down more concrete rules (this treaty became the Schengen Implementing Convention of 1990; see next news item).

Article 17 of the Schengen Agreement provides that “the Parties shall endeav-

our to harmonise the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the border checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Community”. Furthermore, in Article 18, the participating countries are required to open discussions concerning arrangements for police cooperation on crime prevention and investigation and seek means to combat crime jointly, *inter alia*, by studying the possibility of introducing the right of hot pursuit for police officers. According to Article 19, the parties shall also seek to harmonise laws and regulations, particularly on narcotic drugs, arms and explosives, and the registrations of travellers in hotels.

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What Is Contained in the Schengen Implementing Convention of 1990?

The 1990 Schengen Convention Implementing the Schengen Agreement of 1985 (CISA) fulfils the resolve of abolishing checks at the common borders of the Schengen states. To this end, the CISA finally abolishes checks at the common land borders of the Schengen states, their airports for internal flights, and their sea ports for regular ferry connections between the Schengen states (i.e., internal borders). However, as an exception, it also allows *reinstating controls* at the internal borders for a short period of time if a Schengen State deems it necessary for reasons of public policy or national security (details are laid down in Art. 23-31 of the Schengen Border Code). This is often used in the event of major sport tournaments (e.g., the European Football Championship in Portugal in 2004 or World Football Championship in Germany in 2006) or sensitive political meetings. In 2007, for instance, Germany made use of the exception for the G8 summit in Heiligendamm.

The CISA attempts to reconcile freedom of movement with security concerns by setting up a wide range of so-called “*compensatory measures*”. The CISA includes, for example, concrete regulations on (1) the abolition of checks at the common land, sea, and air borders;

(2) a common definition of conditions for crossing external borders as well as uniform rules and procedures for checks there; (3) harmonization of the conditions of entry and visas for short stays; (4) the definition of the role of carriers in measures to combat illegal immigration; and (5) the drawing up of rules governing responsibility for examining applications from asylum seekers (meanwhile replaced by the Dublin II Regulation No. 343/2003).

Of interest for criminal law is that the CISA also contains detailed rules on enhanced *police and judicial cooperation*. It foresees, for instance, that the police may cooperate through central bodies or, in case of urgency, also directly with each other. Likewise, a direct exchange of rogatory letters between the judicial authorities is possible, thus avoiding the use of diplomatic channels. Articles 54-58 contain the renowned conditions which prohibit citizens from being sentenced twice in the Schengen area. These rules can be regarded as the birth of a European-wide *ne bis in idem* principle (see also past issues of eucrim for the recent case law of the European Court of Justice in this matter).

Articles 120 to 125 of the CISA deal with the *cooperation of the customs authorities*: The Schengen States must jointly ensure that their laws, regulations, or administrative provisions do not unjustifiably impede the movement of goods at internal borders (Article 120). In order to control this movement, Article 125 requires arrangements on the secondment of liaison officers from their customs administrations. The secondment of liaison officers is intended for the general purpose of promoting and accelerating cooperation between the Member States, particularly within the framework of existing Conventions and Community acts on mutual assistance. Lastly, the Schengen Convention provides for the legal framework of the Schengen Information System (SIS) which is a joint computerised information system for the exchange of information on wanted persons or wanted objects.

For more details on the compensatory measures, see below: “Does the Implementation of the Schengen Agreement Endanger the Security of the Citizens?”

As mentioned above, the CISA was signed on 19 June 1990. It entered into force on 1 September 1993. However, the full application of the single rules in practice only took effect on 26 March 1995 after the necessary technical and legal prerequisites had been established (e.g., the installation of appropriate infrastructures at the borders, setting up of databases, formation of data control authorities, etc.). In this context, it is worth mentioning that, as a general rule, the Schengen cooperation distinguishes between entry into force (of an agreement, decision, etc.) and the *putting into force*, i.e., the date when the Schengen rules fully apply. The full application in 1995 covered the five founding countries (Germany, France, Benelux) as well as Spain and Portugal which have joined the Schengen cooperation in the meantime.

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What Is the Schengen Acquis?

The *Schengen acquis* comprises all the acts which were adopted in the framework of the Schengen cooperation till the incorporation of the rules governing the Schengen cooperation into the EU framework by the Treaty of Amsterdam (see the following news item). The Schengen acquis is legally defined by Council Decision 1999/453/EC of 20 May 1999 (see following link).

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Accordingly, it is composed of:

- (1) the Schengen Agreement, signed on 14 June 1985, between Belgium, France, Germany, Luxembourg, and the Netherlands on the gradual abolition of checks at their common borders (see above);
- (2) the Schengen Convention, signed on 19 June 1990, between Belgium, France, Germany, Luxembourg, and the Netherlands, implementing the 1985 Agreement (CISA, see above) with related Final Acts and declarations;
- (3) the Accession Protocols and Agreements to the 1985 Agreement and the 1990 implementing Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) as well as Denmark, Finland and Sweden (signed in Luxembourg on 19 December

1996), with related Final Acts and declarations;

(4) decisions and declarations of the Schengen Executive Committee which was the administrative body of the Schengen cooperation and generally mandated by the CISA “to ensure that this Convention [CISA] is implemented correctly”;

(5) further implementing acts and decisions taken by subgroups to which respective powers were conferred by the Executive Committee.

The latter two points regarding the Schengen acquis refer to further decisions and declarations which were made in order to implement the 1990 Implementing Convention itself.

The Schengen acquis was published in the Official Journal L 239 of 22 September 2000. This document comprises 473 pages and can be retrieved by means of the following link:

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How Do the Schengen Rules Fit into the EU's Legal and Institutional Framework?

In order to reconcile the overlap between the Schengen cooperation and Justice and Home Affairs cooperation as introduced by the 1992 Maastricht Treaty, the Member States decided to integrate the Schengen acquis into the legal framework of the European Union. This was achieved in 1997 by means of a Protocol attached to the Treaty of Amsterdam (see the following link).

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The Council had the important task of allocating each provision or measure taken to date under the Schengen cooperation to the corresponding legal basis in the EC Treaty and EU Treaty as amended by the Treaty of Amsterdam. Since the Amsterdam Treaty newly arranged the European Union's pillar structure by introducing a new Title IV of the EC Treaty (first pillar) – now dealing with visa, asylum, immigration, and borders – and maintaining the rules on judicial and police cooperation in criminal matters in Title VI of the EU Treaty (the third pillar), the task was not an easy one because, as mentioned above, the Schengen acquis consists of rules both on visa, asylum and border management as well

as on policing and judicial cooperation. The Council adopted a respective decision on 20 May 1999 which sets out the corresponding legal basis for each of the elements of the Schengen acquis in the EC Treaty and EU Treaty (see following link). However, the Council failed to agree on the allocation of the provisions relating to the Schengen Information System although the system is of a mixed nature (since it contains data relating to Title IV TEC and data relating to Title VI TEU). Therefore, they became part of the third pillar entirely due to a “default” clause in the Protocol (see Article 2). Naturally, any new proposal in the areas of visas, right of asylum, checks at external borders and cooperation between police and judicial authorities will rely on one of the above-mentioned new bases of the EC Treaty or EU Treaty.

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The incorporation of the Schengen acquis in 1999 into the legal and institutional framework of the EU can be considered the first concrete example of enhanced cooperation between 13 out of the then 15 EU Member States. As a result, the Schengen area has now come under the scrutiny of the European Parliament and the European Court of Justice, even though their powers remain partially limited, especially as regards the items of the third pillar. However, this ensures democratic parliamentary control and gives citizens accessible legal remedies when their rights are challenged. Furthermore, the decision-making procedures of the European Union apply, thus the Schengen acquis may be altered by EU legislation without such amendments having to be ratified by all signatory states. Conditions for entry into the Schengen area, for instance, may now be enacted by the European Parliament and the Council under the co-decision procedure, meaning, above all, that, in the Council, a qualified majority of the Member States' votes is enough. Other effects are that the Council substituted the Schengen Executive Committee and new working groups had to be established in order to support the further technical implementation of the Schengen rules.

As a further result of the incorporation, the Schengen acquis is binding on and

applicable in the new Member States from the date of accession onwards (Article 3 Act of Accession, OJ L 236 of 23 September 2003, p. 33). For those countries which are not part of the European Union, such as Iceland, Norway, and Switzerland, special association agreements concerning the implementation of the Schengen acquis and its further development still need to be concluded.

Will the Treaty of Lisbon Change the Legal Basis of the Schengen Acquis?

The abolishment of the pillar structure by the new Treaty of Lisbon will also have a considerable impact on the future development of the Schengen acquis. Title VI of the EU Treaty will merge with Title IV of the EC Treaty. The Treaty of Lisbon will substantially amend the provisions of the former Title IV; it will rename the title to “Area of freedom, security and justice” and divide it into five chapters called “General provisions”, “Policies on border checks, asylum and immigration”, “Judicial cooperation in civil matters”, “Judicial cooperation in criminal matters”, and “Police cooperation”.

Matters of the Schengen cooperation will then be dealt with according to the new provisions, including the remaining special rules for judicial cooperation and policing (for further information on the amendments of the Lisbon Treaty, see eucrim 1-2/2007, p. 2-4). The Lisbon Treaty will also adapt certain provisions of the Schengen protocol of the Amsterdam Treaty by way of declarations.

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Who Belongs to Schengen?

Originally, in 1985, the Schengen Area was created by France, Germany, Belgium, Luxembourg, and the Netherlands. The area was then gradually expanded to other European countries which wanted to take advantage of the passport-free travel zone. These countries also include states which are not members of the European Union. Later, Italy (1990); Spain, Portugal (both 1991); Greece (1992); Austria (1995); and Denmark, Finland, Sweden, Iceland, Norway (all 1996) also joined the five founding countries.

Since 2004, the new EU Member States – the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slova-

kia, Slovenia, and Cyprus – have also implemented the Schengen acquis. As mentioned above, the rules became fully applicable in these countries (except Cyprus) on 21 December 2007/30 March 2008. In 2004, Switzerland also signed an association agreement; on 28 February 2008 its neighbour, the principality of Liechtenstein, followed.

With the accession to the EU in 2007, Bulgaria and Romania have also begun to implement the Schengen rules. Cyprus, Bulgaria, Romania, Switzerland, and Liechtenstein are still not full-fledged members of the Schengen area. Switzerland is expected to join on 1 November 2008. The others are expected to play a full part in the years to come. In sum, a total of 29 European states, even including four non-EU members, have signed the agreement and 24 are fully applying it so far. The United Kingdom and Ireland have a special status. They have not signed the Schengen agreement/convention, but are allowed to take part in some aspects of the Schengen cooperation, namely police and judicial cooperation in criminal matters as well as the fight against drugs trafficking; they do not take part in common border controls and visa provisions.

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What Is the Procedure for the Schengen Acquis' Implementation in New Member States?

The extension of the Schengen area is dependent upon two conditions: the new Member States must fulfill the safety requirements for their European Union external borders and the Schengen Information System must be operative in all new Member States. In order to check whether these conditions are fulfilled, the Schengen Member States created the “*Schengen Evaluation*”. This evaluation consists particularly of verifying that the accompanying measures allowing for the lifting of internal border controls are being correctly and efficiently applied by the new Member States. Evaluation visits were carried out in the field of external border controls, visa scheme, data protection, police cooperation, and the Schengen Information System.

Schengen evaluations of EU Member States that are candidates for the lift-

ing of internal border controls are initiated upon request by each Member State concerned once it considers that it meets all preconditions. It is the responsibility of the States that are already Schengen members to determine that all preconditions have been met and the Council is responsible for carrying out the relevant evaluation. The Schengen evaluation of 2006 to 2007 has been completed, and it has become evident that Estonia, the Czech Republic, Lithuania, Hungary, Latvia, Malta, Poland, Slovakia, and Slovenia are regarded as applying the Schengen acquis correctly in all fields. For the “big bang” enlargement of the new EU Member States, experts have carried out 58 evaluation missions on the ground in 2006, and additional 15 re-evaluation visits in 2007. Currently, monitoring missions are also being carried out in Switzerland to test the country’s readiness for its envisaged participation at the end of 2008.

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Does the Implementation of the Schengen Agreement Endanger the Security of the Citizens?

The concept of the Schengen cooperation with its goal to visibly realize the free movement of persons has always been ambivalent: the abolition of border controls has been nourished by the fear that criminals may exploit the removal of these barriers. In other words, the governments believed that the abolition of border controls is accompanied by increased risks for internal security due to an increase in crime and illegal immigration. In order to reconcile freedom and security, this freedom of movement has been accompanied by so-called “compensatory measures” which were laid down in the 1990 Schengen Implementing Convention. These measures involve setting a common visa regime, improving coordination between the police, customs and the judiciary, and taking additional steps to combat problems of cross-border crime in order to effectively safeguard internal security.

The most important measures in relation to criminal law are as follows:

- In the range of *police cooperation*, the Schengen Convention assures administrative assistance, according to which

police administrations in the Schengen States are required to grant each other administrative assistance in the course of the prevention and detection of criminal offences in accordance with the relevant national laws and within the scope of their relevant powers. Limits: (1) national law does not stipulate that the request is to be made to the legal authorities and (2) the request or the implementation thereof does not involve the application of coercive measures by the requested Member State (Article 39).

- In addition, Articles 40 and 41 include the police rights to cross-border observation (where police continue the surveillance of perpetrators) and hot pursuit (where police pursue a criminal who is on the run). Consequently, these measures – within certain limits – allow police officers of one Schengen country to act on the territory of another Schengen country.

- In the field of *judicial cooperation*, the Schengen States are obliged to grant each other legal assistance in criminal justice with respect to all types of offences and misdemeanours (Article 49), also including tax and other fiscal offences (Article 50). This represents an extended scheme of mutual legal assistance in criminal matters in comparison to the Council of Europe assistance scheme.

- Furthermore, judicial cooperation entails faster extradition procedures (Articles 69 to 66) and more rapid distribution of information about the enforcement of criminal judgments (Articles 67 to 69).

- Lastly, one of the most important compensatory measures is the establishment of the Schengen Information System (see following news item).

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What Is the Schengen Information System (SIS)?

The Schengen Information System (SIS) is called the “core”/“centerpiece” of the compensatory measures. SIS was set up by Articles 92 to 119 of the Schengen Convention. It is a sophisticated database used by the authorities of the Schengen member countries to exchange data on specific individuals (i.e., criminals wanted for arrest or extradition, missing persons, third-country nationals to be refused entry, etc.) and on goods which have been lost or stolen. Its

purpose is to allow checks on persons to be made at border controls or within a territory in order to detect criminals and illegal immigrants moving to and from one Schengen country to another.

The data are supplied by the Member States via national sections (N-SIS) that are connected to a central technical function (C-SIS) located in Strasbourg. The establishment of SIS is accompanied by a set of data protection rules which were considered “a milestone” in the international data protection regime of police cooperation. SIS has been operational since 26 March 1995, the date on which checks at internal borders were abolished between the initial Schengen countries. SIS is the largest European centralised database: since 1995, more than 15 million records have been created in the system and approximately 125,000 access terminals exist within the participating states.

SIS, as introduced by the 1990 Implementing Convention, is also called the Schengen Information System of the first generation (SIS I). Due to progress in the field of information technology and the system’s limited capacity, it was deemed necessary to further develop the system and create the second SIS generation (in short: SIS II). Work on the new system began in the course of 2001. However, the technical implementation of SIS II raised problems and the system launch was delayed several times. In order to enable the nine new Member States to connect to SIS in the wake of the big enlargement in 2007, an interim solution was found: “the SISone4all”. The developments as regards the latter and SIS II are presented in the following two news items.

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What Is “SISone4all”?

The enlargement of the Schengen area in 2007 was accompanied by several problems and a certain degree of tension. Originally, the ten new EU Member States were due to join the Schengen area in October 2007. This extension was postponed however. The Commission justified the decision with technical problems during the introduction of the new second-generation Schengen Information System (SIS II).

The new Member States assumed, however, that political reasons were behind the postponement and deplored the lack of confidence shown by the current Schengen Member States. Finally, Portugal submitted a compromise proposal which brought an end to the tension between the old and new Member States. The compromise consisted of developing an extended version of the current SIS I system – the so-called “SISone4all” in parallel to the work on SIS II. The SISone4all became operational in September 2007, allowing the connection of the new Schengen Member States and paving the way to extending the lifting of borders at the end of 2007. The SISone4all is an interim solution till the second technical version of SIS is fully initialised. Switzerland has now also decided to join Schengen and use SISone4all before SIS II deployment (which is planned for the end of 2010). For the moment, it is not clear whether the United Kingdom and Ireland will also join SIS II because the UK government in October 2007 announced plans to introduce its own electronic border control system by 2009. Also, the situation of Cyprus has not yet been clarified.

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What Is SIS II?

SIS II is the successor to the first Schengen Information System (introduced by the 1990 Schengen Convention). The installation of a second Schengen Information System was considered necessary because the current SIS was designed to cope with only 18 Member States. Furthermore, SIS II is to benefit from the latest developments in the field of information technology and allow for the introduction of new functions, such as the storage of biometric data (photographs and fingerprints of persons). First comments on SIS II note that the new system will change its “character” compared to its predecessor, SIS I: the SIS II will become not only a reporting system but also an investigation tool. It will have to differentiate itself from Europol’s information system focussing on the prevention and detection of threats to public order and security rather than on investigations into organised crime.

Following the JHA Council meeting of 28/29 May 2001, the development of

Overview of Schengen Cooperation

For more background information on the Schengen area, see:

➤ [eucrim ID=0703025](#)

1985: Schengen Agreement Signed

On 14 June 1985, France, Germany, Belgium, Luxembourg, and the Netherlands sign an agreement on the gradual abolition of checks at common borders. This became known as the Schengen Agreement, after the name of the village in Luxembourg where it was signed.

➤ [eucrim ID=0703026](#)

1990: Schengen Convention Signed

On 19 June 1990, the Schengen Convention is signed, implementing the Schengen Agreement of 1985. Furthermore, German reunification leads to the inclusion of the former East Germany on 3 October 1990.

➤ [eucrim ID=0703027](#)

1990–1992: EU's Southern Member States Join the Schengen Convention

Italy (27 November 1990), Spain and Portugal (both 25 June 1991) as well as Greece (6 November 1992) sign the Schengen Convention. However, Greece incompletely implements the agreement and requires a different visa for citizens of the former Yugoslav Republic of Macedonia because of the name-conflict between these two countries.

➤ [eucrim ID=0703028](#)

1995: Schengen Convention of 1990 Comes into Force

On 26 March 1995, the Schengen Convention comes into force. It abolishes checks at internal borders of the signatory states and creates a single external border where entry checks for the Schengen area are carried out in accordance with a single set of rules. In addition, so-called "compensatory measures" involving a common visa policy, better police and judicial cooperation, and the Schengen Information System are established.

➤ [eucrim ID=0703029](#)

1995: Austria Becomes Member of Schengen Area

On 28 April 1995, Austria signs the Schengen Convention.

➤ [eucrim ID=0703030](#)

1996: Scandinavia Joins the Schengen Convention

On 19 December 1996, Denmark, Finland, Sweden, and even the non-EU Member States Iceland and Norway sign the Schengen Convention. Through the Nordic Passport Union, these countries have an even more permissive agreement on internal movement of persons.

➤ [eucrim ID=0703031](#)

1997/ 1998: Schengen Zone Extended to Austria and Italy

Border controls are abolished at the borders to Austria and Italy.

➤ [eucrim ID=0703032](#)

1999: Schengen's Incorporation into EU's Legal Framework

On 1 May 1999, the Treaty of Amsterdam comes into force. A protocol attached to the Treaty incorporates the developments brought about by the Schengen Agreement into the EU's legal and institutional framework. Moreover, this protocol integrates the Schen-

gen acquis into the European Union and specifies that the United Kingdom and Ireland may take part in all or some of the Schengen arrangements, subject to unanimous approval by the Council.

➤ [eucrim ID=0703033](#)

2000: Greek Border Controls Abolition

Controls are abolished at the internal borders with Greece.

➤ [eucrim ID=0703034](#)

2000: UK's Approximation to Schengen

The United Kingdom's application for partial participation is approved by the Council Decision on 29th May 2000. Now, the part of the Schengen rules which cover police and judicial cooperation, as well as the Schengen Information System (to the extent that it relates to police and judicial cooperation), can be implemented in Great Britain, except for the regulations covering visas and border controls. Before the UK can apply the Schengen rules, a further decision by the Council must be taken which puts them into effect. This was done in 2004.

➤ [eucrim ID=0703035](#)

2001: Schengen Zone Extended to Scandinavia

Controls are abolished at the internal borders with Denmark, Finland, Sweden, Iceland, and Norway. On 1 December 2000, the Council decided that, as from 25 March 2001, the Schengen acquis arrangements apply to the five countries of the Nordic Passport Union.

➤ [eucrim ID=0703036](#)

2002: Approval of Ireland's Schengen Participation

On 28 February 2002, Ireland's application for partial participation in Schengen is approved by Council Decision. In parallel to the application of the United Kingdom, it covers mainly police and judicial cooperation as well as partial participation in the Schengen Information System. As with the UK, Ireland does not participate in the rules relating to visas and border controls and, similarly, the Council must put into effect the provisions Ireland wished to opt in to. Such a decision has not yet been adopted.

➤ [eucrim ID=0703037](#)

2004: EU's Enlargement to Ten New Members of East and South Europe

On 1 May 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia join the EU and already partly apply the Schengen provisions (relating to external border controls and police and judicial cooperation in particular).

➤ [eucrim ID=0703038](#)

2004: Switzerland Signs the Schengen Convention

On 26 October 2004, Switzerland signs an agreement on its association with Schengen. This agreement is ratified by a Swiss referendum on 5 June 2005.

➤ [eucrim ID=0703039](#)

2004: Schengen Provisions Apply in UK

The Council decided that the United Kingdom can participate in the Schengen acquis which it has opted into, with the exception

of the Schengen Information System. The United Kingdom is now ready to apply the relevant Schengen provisions.

➤ eucrim ID=0703040

2006: EU Clears the Way for Enlargement to the East

On 5 December 2006, the European Union Ministers of the Interior decide to integrate the 2004 European Union enlargement member states into the Schengen area.

➤ eucrim ID=0703041

2007: EU's Enlargement to Bulgaria and Romania

On 1 January 2007, Bulgaria and Romania accede to the EU and partly apply the Schengen provisions. Internal border controls will be lifted later once all compensatory measures are in place and a positive assessment report has been adopted by the Council.

➤ eucrim ID=0703042

2007: Readiness of Nine Member States for the Lifting of Internal Border Controls

On 8/9 November 2007, the JHA Council concludes that all preconditions for the lifting of internal border controls with nine of the ten Member States which joined the EU in 2004 are fulfilled. In doing so, the path was paved for the abolition of internal land, sea, and air borders in the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, and Slovakia. Although not seen as a major obstacle for the complete lifting of the borders, the Council still identified some weaknesses of the implementation of the acquis which need to be corrected by the new members in future.

The requirements are not being met by the tenth new Member State, Cyprus. For the time being, Cyprus is not joining the Schengen area due to political reasons and the lack of an appropriate infrastructure.

➤ eucrim ID=0703043

2007: European Parliament Endorses Schengen Enlargement

On 15 November 2007, the European Parliament adopts a joint resolution in which it endorsed the full application of the provisions of the Schengen acquis in the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia by the end of 2007. MEPs congratulate these states on the tremendous efforts that some of them have made in order to be ready and respect all the Schengen requirements, but want the new Schengen States to inform the EP and the Council on the measures which need still to be taken in order to remedy remaining shortcomings.

➤ eucrim ID=0703044

2007: Council Decision on Lifting of Internal Border Controls

On 6 December 2007, the Council adopts a Decision on the full application of the provisions of the Schengen acquis in the Eastern Member States and Malta. It sets the date for the lifting of internal border controls.

➤ eucrim ID=0703045

2007/2008: Abolition of Border Controls with EU's Eastern Members

Finally, on 21 December 2007, controls are abolished at the internal seaports and overland borders with the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. The controls at internal airports are abolished on 20 March 2008 with the change in flight schedules.

➤ eucrim ID=0703046

2008: Liechtenstein Signs Association Agreement

On 28 February 2008, Liechtenstein signs a protocol by means of which it would accede to the Schengen Association Agreement between the EU and Switzerland. As a result, Liechtenstein would be granted the same rights and obligations as the Swiss Confederation and be obliged to accept the Schengen acquis. The participation of Liechtenstein became necessary since the association of Switzerland with the Schengen area also affects the relationship between Switzerland and Liechtenstein. The policy of Liechtenstein is closely connected to Switzerland with which the small principality has had an open border for decades and forms a customs and monetary union. However, if Switzerland fully applies the Schengen rules (which is expected for 1 November 2008), the border between Switzerland and Liechtenstein will become an external border. Legally, Switzerland would then be obliged to secure this border and carry out border controls.

Therefore, the parties actually intend for Liechtenstein to adhere to the Schengen area at the same time as Switzerland. However, this *modus operandi* remains doubtful since the Protocol with Liechtenstein must be ratified by the EU Member States and Liechtenstein's "Schengen fitness" needs to be evaluated. The Commission already announced that it is willing to find a pragmatic solution in the event of Switzerland's participation in the Schengen area. The provisions for Liechtenstein might be applied provisionally.

➤ eucrim ID=0703047

2008: Switzerland's Participation in Schengen Area

After Switzerland notified the ratification of the Schengen association agreement on 20 March 2006 already, the Council approved the agreement on 28 January 2008. As a result, the agreement was able to enter into force on 1 March 2008. The delay in the final act of ratification was caused because some EU Member States had not ratified the agreement for a long time. From March till September 2008, the implementation of the Schengen rules in Switzerland will be evaluated. If the Council puts into force the provisions, the Schengen rules fully apply in Switzerland, i.e., controls at the internal borders which Switzerland shares with the EU Member States are lifted. The targeting date is the 1 November 2008.

The evaluation deals with data protection, police cooperation, cooperation in visa matters, the Schengen Information System, and airports (external borders of Switzerland). The first evaluation visit took place from 9 to 13 March and concerned data protection. Switzerland is the third non-EU country which will join the Schengen zone.

➤ eucrim ID=0703048

2009/2010: Cyprus' Readiness for Schengen Expected

Cyprus may join the Schengen area in 2009 or 2010. Cyprus must still fulfil some requirements which would allow it to lift its sea and air borders. Besides the establishment of the necessary infrastructure, Cyprus must solve delicate political issues on border controls with the Northern part of the island which is occupied by Turkey and would not take part in the Schengen area.

➤ eucrim ID=0703049

2011: Expansion of Schengen to Bulgaria and Romania Planned

The full participation of Bulgaria and Romania in the Schengen area is planned. Internal border controls will be lifted after Bulgaria and Romania have adopted all necessary compensatory measures.

➤ eucrim ID=0703050

SIS II started with the presentation of a Communication by the European Commission which studied the possibilities of producing and developing a second generation of the current Schengen Information System (COM(2001) 720).

► [eucrim ID=0703017](#)

On 6 December 2001, the Council decided on the creation of SIS II, allocated the necessary financial resources, and mandated the Commission to develop the details of the System, such as the technical architecture, operation and use of the system, determination of authorities authorised to access the data, data protection rules, etc. The Council confirmed the mixed nature of SIS: on the one hand, alerts on third-country nationals who enter the EU relate to Title IV of the EC Treaty (first pillar), on the other hand, the other forms of alerts, such as those regarding wanted persons or stolen objects, relate to Title VI of the EU Treaty, i.e., the third pillar.

Therefore, SIS II must be based on two legal instruments, an EC regulation and a JHA decision. Nevertheless, SIS II will not cease to be a single integrated system. In addition, a legal basis was considered necessary in order to allow national vehicle registration services to use the system. Although responsible for administrative functions, these services shall support criminal prosecution.

► [eucrim ID=0703018](#)

In May 2005, the Commission proposed a package of three instruments which shall establish the detailed legal framework of SIS II. Based on these proposals – after long negotiations within the Council and between the Council and the European Parliament – the Council finally adopted the necessary legal framework for SIS II in 2006 and 2007, respectively (see the following listing with respective links). These new legal acts will replace the relevant provisions on SIS in the 1990 Schengen Convention.

(1) Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of SIS II. The Regulation lays down specific provisions that support the free movement of persons within the context of visas and external borders.

► [eucrim ID=0703019](#)

(2) Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of SIS II. The Decision is a complementary act to the aforementioned one and lays down specific provisions on the processing of data for police and judicial cooperation in criminal matters.

► [eucrim ID=0703020](#)

(3) Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to SIS II by the services in the Member States responsible for issuing vehicle registration certificates. This text allows national vehicle registration services the right to consult certain categories of data stored on SIS II.

► [eucrim ID=0703021](#)

The implementation of SIS II has been delayed several times. Originally, its implementation was envisaged for the end of 2006. Recently, on 28 February 2008, the Justice and Home Affairs Council of the European Union presented new conclusions on SIS II, including a new timetable for the installation of SIS II. Accordingly, by the end of 2008, “the central elements of SIS II, its communication infrastructure and the interface with national systems [should] function”. Tests are envisaged to be finalised by mid 2009. Indeed, it can be expected that SIS II will be fully operational in 2010.

► [eucrim ID=0703022](#)

Do Europol and Eurojust Have Access to SIS?

Council Regulation (EC) No. 871/2004 of 29 April 2004 and Council Decision 2005/211/JHA of 24 February 2005 added some new functions to SIS I. The amendment to the current 1990 Schengen Implementing Convention were, *inter alia*, motivated by the consideration that enhancement of SIS and improvement of its capabilities is needed for the fight against terrorism. The said legal acts set up the legal bases for granting Europol and Eurojust access to the data of the Schengen Information System.

► [eucrim ID=0703023](#)

The amendment of SIS relating to Europol and Eurojust were put into force by the Council Decision of 24 July 2006. From 1 October 2006, Europol, within the scope of its mandate, has the possibility to access and search directly data

entered into SIS. The access is limited to the data on persons wanted for arrest for extradition (Art. 95 CISA), data on persons or vehicles to be put under surveillance or for specific checks (Art. 99 CISA), and data on certain stolen objects (Art. 100 CISA). The use of information obtained from a search in SIS is subject to the consent of the Member State having issued the alert. Europol may request supplementary information from the Member State. If the Member State allows the use, further handling of the data will be governed by the Europol Convention. The communication of SIS data to third countries or third bodies also requires the consent of the Member State concerned.

On 14 December 2007, Eurojust was connected to SIS after having met the necessary technical and security requirements. Direct access to and search of SIS data is allowed for the National Members of Eurojust and their assistants. Access is restricted to data on persons wanted for arrest for extradition (Art. 95 CISA) and data on witnesses and persons required to appear before the judicial authorities to locate their whereabouts (Art. 98 CISA). The consent of the Member State having issued an alert is required for the transfer of data by Eurojust to third countries or third bodies. Council Decision 2005/211/JHA, however, does not contain a further restriction on the use of SIS data as it is the case for Europol. The Decision only bans a link of SIS data to Eurojust’s own computer system (the same applies to Europol). Europol and Eurojust will also have access to SIS II within the limits described.

► [eucrim ID=0703024](#)

Foundations

Reform of the European Union

By Leonard Ghione

Ratification Process of the Lisbon Treaty Started

Heads of state and governments of the EU Member States officially signed the Reform Treaty 2007 on 13 Decem-

ber 2007 during the European Council in Lisbon. The new legal framework aims at simplifying decision-making in the EU and extending its competences to new areas (for details, see eucrim 1-2/2007, pp. 2 ff). As expected, the Treaty has made history as the “Treaty of Lisbon” and been published in the Official Journal C 306 of 17 December 2007. In order to come into force by the target date of 1 January 2009, the document now needs to be swiftly ratified by Member States.

Ireland

Ireland is the only Member State constitutionally bound to hold a referendum on the Treaty. So far it also seems to be the only Member State to actually do so, while in others are experiencing mounting pressure to call a public vote, especially in the UK and Denmark. The referendum in Ireland is expected to take place in mid-June 2008. According to an opinion poll published at the beginning of March 2008, 46 % of those polled were in favour of the treaty, while 23 % intended to vote against it. 31 % of those asked are still undecided. This poll shows a slightly favourable development for the acceptance of the treaty compared to the last poll held in November 2007 (25 % in favour, 13 against, and 62 % undecided). For general information, see the official website of the Treaty of Lisbon of the Irish Department of Foreign Affairs:

► eucrim ID=0703051

For the latest opinion poll, see:

► eucrim ID=0703052

For the November 2007 opinion poll, refer to:

► eucrim ID=0703053

Denmark

On 11 December 2007, the Danish Parliament voted against having a Referendum on the “Treaty of Lisbon”. Its decision was based mainly on a report by the Danish Ministry of Justice deducing that the Treaty does not transfer further sovereignty to the EU. The critics of this decision nevertheless stress the possibility of a sovereignty transfer to the EU and propose an independent examination of the relationship between the new treaty and the Danish Constitution.

► eucrim ID=0703054

United Kingdom

In the United Kingdom, Prime Minister Gordon Brown staunchly rejected calls for a referendum on the Lisbon treaty since the protection of Britain’s “red lines” sheltered British sovereignty (for details, see eucrim 1-2/2007 p.3-4). His argumentation is that the Lisbon treaty does not require a referendum just as the treaties of Maastricht and Nice did not. This opinion has been met with intense cross-party pressure, including demands for a referendum on the new text, stressing its similarity to the “Constitutional Treaty” for which a referendum was promised in 2005. On 5 March 2008, the Members of Parliament in the House of Commons, by a narrow majority, rejected holding a referendum on the Lisbon Treaty. On 11 March 2008, the Lisbon Treaty bill passed the House of Commons and is now to be ratified by the House of Lords.

► eucrim ID=0703055

Germany

In Germany, the two chambers of the Parliament are set to vote for the Lisbon Treaty in May 2008. However, the final act of ratification may be postponed since MEP Peter Gauweiler (CSU), who also voted against the EU Constitution, plans to defeat Germany’s ratification bill by way of a constitutional complaint before the Federal Constitutional Court (Bundesverfassungsgericht). A judgment on the EU Constitution took care of itself after the “no” votes in France and the Netherlands. The country’s Federal President, Horst Köhler, may decide to postpone the signing of the document approving the Lisbon Treaty until the Federal Constitutional Court delivers its decision. However, according to constitutional law, he is not obligated to do so.

► eucrim ID=0703056

Poland

The lower house of the Polish parliament (Sejm), on 1 April 2008, largely voted in favour of the Reform Treaty, after an accord was reached between the Government and the conservative opposition which had threatened to block its ratification in parliament since mid-March. The opposition – the Law and Justice Party (PiS) led by former Prime Minister Jaroslaw

Kaczynski – caused trouble for the Polish ratification process when it demanded additional guarantees in the ratification bill for Poland’s sovereignty. If the row with Prime Minister Tusk had not been settled, Poland might have been the second country in which the Lisbon Treaty would have been the subject of a referendum. On 2 April, also Poland’s Senate endorsed the ratification. As a result, Poland has become the seventh of the 27 EU Member States to ratify the Lisbon Treaty.

► eucrim ID=0703057

State of Play of Ratifications

The Treaty was ratified in the Hungarian Parliament by an overwhelming majority of 325 members of parliament, with only five opposed and 14 abstainers on 17 December 2007. In the meantime, Slovenia (29 January 2008), Romania (4 February 2008), Malta (6 February 2008), France (7 February 2008), Bulgaria (21 March 2008), and Poland (2 April 2008) have also approved the Lisbon Treaty by parliamentary vote. On 10 April 2008, Slovakia followed after a row on a controversial media bill had been settled by the Slovak deputies. An interactive map which shows the state of ratifications can be found at the following link.

► eucrim ID=0703058

European Parliament

On 20 February, the European Parliament (EP) adopted an own-initiative report on the Lisbon Treaty calling for maximum political commitment by Member States in order to ensure the ratification of the treaty before 1 January 2009. The report was adopted by a vast majority of 525 MEPs versus 115 dissenting votes, mainly from smaller groups on the far left and far right of the political spectrum. The vote is a demonstration of the EPs’ support for the Treaty and an appeal not to delay the ratification process.

The report, prepared by the joint rapporteurs Richard Corbett (PES, UK) and Íñigo Méndez de Vigo (EPP-ED, ES), emphasized that the new Treaty would improve the current one by bringing more democratic accountability to the European Union and enhancing its decision-making. Slovenia’s State Secretary for European Affairs, Janez Lenarčič (speaking for the Council), and Commis-

sion Vice-President Margot Wallström agreed with the rapporteurs. Wallström further announced a close cooperation between Commission, Member States, and the EP in informing of citizens about Treaty policies, such as climate change, growth and jobs, and the EU's global role during the ratification period.

► eucrim ID=0703059

Wise Group Reflects on "EU's Horizons 2020–2030"

During the Lisbon summit in December 2007, EU leaders agreed to set up an independent reflection group of 'wise' people to help shape Europe's long-term future up until 2020-2030. The mandate clarifies the idea of a "Council of the Wise" which was voiced by French President Nicolas Sarkozy in August 2007 (see eucrim 1-2/2007, p. 7). The starting point for the Group's reflections will be the challenges set out in the Berlin Declaration of 25 March 2007 (see eucrim 1-2/2007, p. 6).

The agenda of the Group will include such topics as migration, social and economic challenges, the fight against terror, climate change, as well as developments outside Europe having an effect on the EU. The Group shall identify the key issues and developments which the Union is likely to face and make proposals for their handling. It will start its work during the upcoming French Presidency (July-December 2008). This start date was suggested by German Chancellor Angela Merkel in a bid to avoid the group distracting from the upcoming ratification process of the Treaty of Lisbon. The Group will be chaired by Spain's former Prime Minister Felipe Gonzalez (and vice-chaired by former Latvian President Vaira Vike-Freiberga and Nokia's chief Jorma Ollila). Gonzalez said he wants to restore Europe's economic and geopolitical influence on the global stage. Whether the mandate will include the issue of future enlargement remains open. European Parliament's President Hans-Gert Pöttering stressed that the "group can't take the decision-making powers away from politicians. It can put forward proposals". The Reflection Group is expected to present its results in June 2010.

► eucrim ID=0703060

The Future of European Criminal Justice under the Lisbon Treaty

Report from the ERA Conference in Trier, 11-12 February 2008

By Dr. Ingeborg Zerbès

The manifold implications of the Lisbon Treaty (Reform Treaty) for police and judicial cooperation in criminal matters in the EU were addressed at a two-day conference at the Academy of European Law (ERA) in Trier from 11 to 12 February 2008. High-ranking experts from the European institutions and bodies, experts from the national ministries, high-profile academics together with the participants of the conference discussed the new state of affairs after the changes made by Lisbon Treaty. They also addressed its impact on and the pros and cons for police and judicial cooperation in criminal matters in the EU.

The conference particularly dealt with the relevant topics of the future police and judicial cooperation. The conference was divided into five sessions: session I dealt with "police and judicial cooperation in criminal matters under the Lisbon Treaty"; session II focused on the "new competences for the European Court of Justice and national parliament"; session III subjected the Lisbon Treaty to an academic evaluation; session IV discussed the institutional change at the EU level as regards the innovations for Europol and Eurojust as well as the possible long-term future in the form of a European Public Prosecutor; in session V, a final panel discussion dared to look ahead, discussing the impact of the Lisbon Treaty on European criminal justice.

In a short review on the previous work in the third pillar, it was pointed out that the work in the third pillar had often been blocked, particularly because of the rule of unanimity which allows each Member State to veto in the Council any instrument enhancing police and judicial cooperation. The participants highly welcomed that the Lisbon Treaty will abolish this rule:

the European criminal justice policy will be integrated into the legislation process which is the general rule to date in the first pillar, i.e., nearly all future regulations and directives on criminal law subjects will be released under the rule of qualified majority voting in the Council and co-decision by the European Parliament. However, the conference also revealed that the one of the main challenges will be to cope with the so-called "emergency break" procedure which each Member State can initiate to stall the decision-making process.

The academic evaluation of the new legal framework culminated in a relatively ambivalent result: on the one hand, the elements of the Lisbon Treaty which were designed towards achieving an improved European criminal justice system were appreciated, especially the spectrum of the new role of the European Court of Justice since it will have a nearly unrestrained competence over criminal justice policy matters in the future. On the other hand, the complicated systems of "opt-outs/opt-ins" which were stipulated for the United Kingdom, Ireland and Denmark were considered a danger capable of destroying the future integration of European criminal justice.

On balance, the participants evaluated the Lisbon treaty positively as a step in the right direction, regardless of all political compromises which have been incorporated into the new legal framework. However, the conference raised awareness that there is still a lot to be done in view of interpreting the new provisions of the Lisbon Treaty in the area of freedom, security and justice. For further information on the conference, please visit the following link:

► eucrim ID=0703061

Proclamation of the Charter of Fundamental Rights

By Julia Macke

Disturbed Ceremony

On 12 December 2007 – one day before the signing of the EU Reform Treaty, the so-called Lisbon Treaty – the Presidents of the European Parliament, the European Commission, and the EU Council signed

and solemnly proclaimed the Charter of Fundamental Rights in a formal ceremony at the European Parliament in Strasbourg, France, in order to reflect the Charter's specific nature and increase its public profile. All speakers underlined the importance of the Charter, which clearly shows that the EU is, first of all, a community of values for the EU citizens. The proclamation ceremony was inter-

rupted on several occasions by a minority of MEPs favouring a referendum on the Charter. Their attempt to shout down the ceremony caused a storm of protest on the part of the MEPs' majority who condemned this behaviour as intolerable.

► eucrim ID=0703062

Contents of the Charter

The Charter of Fundamental Rights maintains in a single text the fundamental rights of European citizens and all persons resident in the EU in the areas of human dignity, freedom, equality, solidarity, civil rights, and justice. The individual rights are based on the fundamental rights and freedoms already recognised by the European Convention on Human Rights, the constitutional treaties of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the EU or its Member States are parties. More precisely, the Charter consists of 54 articles which are subdivided into six chapters. However, these provisions apply to the EU institutions and bodies and to the Member States only when they are implementing Union law. The Charter does not establish any new power for the Union. In the future, the European Court of Justice will also be in charge of ensuring respect of the Charter in all acts of the European Union. The following link contains a summary of the contents of the Charter, its full text as well as explanations which were updated in the light of new EU law.

► eucrim ID=0703063

Future Binding Effect of the Charter

As part of the compromise for the adoption of the EU Reform Treaty, the state and government leaders of the EU decided in Berlin in June 2007 not to include the text of the Charter in the treaties but to adopt them as a statement on the treaties. This, however, does not change the legal status of the Charter: if the Lisbon Treaty is ratified, the Charter will have the same legal status. In the Lisbon Treaty, article 6 therefore reads as follows: "The Union recognises the rights, freedoms and principles set out in

the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

► eucrim ID=0703064

Exceptions for the United Kingdom and Poland

Unfortunately, it has to date not yet been possible to dispel British and Polish doubts. This is why a Protocol annexed to the Lisbon Treaty was negotiated by the two States which introduces specific measures for the United Kingdom and Poland, establishing exceptions with regard to the jurisdiction of the European Court of Justice and national courts for the protection of the rights recognised by the Charter. A resolution of 29 November 2007, in which the European Parliament urged the United Kingdom and Poland to make every effort to arrive at a consensus on the unrestricted applicability of the Charter, has been unsuccessful so far.

► eucrim ID=0703065

Historical Background

The Charter initiative was originally launched at the Cologne European Council in 1999. The reason for this initiative was a decision of the European Court of Justice in 1996 after which the treaties establishing the European Community did not empower it to accede to the European Convention on Human Rights. This made a separate EU human rights catalogue necessary. An ad hoc Convention chaired by former President of the Federal Republic of Germany, Roman Herzog, elaborated the "EU's catalogue of human rights". A first draft was published in October 2000. In December 2000 in Nice, the Presidents of the European Parliament, the European Commission, and the EU Council signed and proclaimed for the first time the Charter – at that time still non-binding – on behalf of their three institutions. After the attempt to incorporate the Charter as the second part of the Constitutional Treaty failed because this treaty had not been ratified, the decision was taken to give the Charter a legally binding status in the manner already described. See also eucrim 1-2/2007, p. 3.

► eucrim ID=0703066

Community Powers in Criminal Matters

*Reported by Thomas Wahl**

Deep Rifts Still Exist in Council over Community Powers on Criminal Law

Current discussions in the Council reveal that there is still a deep rift among Member States as regards the criminal law competence of the European Community. As described in the previous issues of eucrim, mainly three proposals to introduce criminal law provisions through directives based on Community law are currently pending: a Directive on the protection of the environment through criminal law (see eucrim 1-2/2007, pp. 8-9), a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (eucrim 1-2/2006, p. 13), and a Directive providing for sanctions against employers of illegally staying third-country nationals (see eucrim 1-2/2007, pp. 29-30).

Furthermore, the Commission recently submitted a new proposal for a Directive "on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences" (see below). An assessment of the examination of the dossiers in the Council working groups nourishes fears that negotiations have come to a deadlock because of the question of competence. Some Member States doubt whether the European Court of Justice ruling of 13 September 2005 in which it annulled the Framework Decision on the protection of the environment through criminal law can be extended to other policy areas. Other Member States are not convinced of the necessity for providing criminal measures. A document of the Working Party on Substantive Criminal Law from 19 February 2008, which examined the dossier on the illegal employment, illustrates the different points of view by concluding:

"During the discussions, the Working Party on Substantive Criminal Law could not come to a consensus with regard to the question of competence and necessity for the provision of criminal measures, to combat illegal immigration".

► eucrim ID=0703067

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

The proposal on intellectual property is faced with similar problems; it has not been discussed for nearly one year. As regards the proposed directive on the criminal law protection of the environment, the Council could still not come to a first consensus, a number of Member States entering scrutiny reservations on the text. This is blocking further treatment of the proposal in the European Parliament which will co-decide on the law.

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It is hardly imaginable that one of the criminal law directives will be finalised in the course of 2008, although the Slovenian Presidency is seeking to obtain agreement on the environmental law proposal by June 2008. It is more likely that the issue will be postponed till the entry into force of the Lisbon Treaty. The treaty might tilt the dispute since it allows the Commission to propose the approximation of Member States' criminal laws in all areas where the EU has harmonization powers.

Economic and Social Committee: Opinion on Draft Environmental Criminal Law Directive

While negotiations within the Council and the European Parliament on the proposed Directive on the protection of the environment through criminal law are progressing slowly, the European Economic and Social Committee (EESC) has, in the meantime, commented on the new Commission approach. The Committee complains about the long delay in adopting measures which are necessary to combat environmental crime as a result of the disagreement between the institutions on the division of competences between the first and third pillar. The new Commission proposal of 2007 (see eucrim 1-2/2007, pp. 8-9) prompted the Committee, *inter alia*, to comment as follows: the EESC is reconsidering whether the proposed criminal law provisions do not come under the third pillar since the Directive would target "serious offences" as a priority, especially those committed by criminal organizations, thus concerning organized crime which comes under Title VI TEU. In its opinion, the EESC is defending its stance that the legal instrument must, in any event, hamper

the establishment of areas "where it is cheaper to pollute".

Therefore, the EESC advocates a stronger approximation of the Member States' environmental criminal law. As a result, the EESC, for example, is not in favour of the Commission's plan to set a range of the minimum amount of maximum fines/penalties. It advocates defining a single minimum level for the maximum sentences, in the interest of greater harmonisation. The opinion ends with three recommendations:

- associations and NGOs should have the right to act to initiate public criminal proceedings;
- public prosecutors' offices specialising in environmental matters should be set up in all EU Member States enabling the law enforcement to effectively combat environmental crimes;
- the European judicial networks should be used in order to establish the necessary cooperation regarding cross-border crimes.

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Commission Takes New Run-Up to Protect Maritime Environment through Criminal Law

On 11 March 2008, the Commission presented a new proposal which seeks to strengthen the criminal law framework on ship-source pollution. The proposal is a direct reaction to the European Court of Justice (ECJ) judgment of 23 October 2007 which annulled Framework Decision 2005/667/JHA that contained criminal law-related provisions to protect the maritime environment against ship-source pollution (see eucrim 1-2/2007, p. 7). The European Community Directive 2005/35 "on ship-source pollution and on the introduction of penalties for infringements" already contains a precise definition of the infringements of ship-source discharges of polluting substances, but excludes criminal law-related matters. It only contains the rule that the defined infringements "are subject to effective, proportionate and dissuasive penalties [in the Member States], which may include *criminal or administrative* penalties".

The Framework Decision, which supplemented the Directive, defined the regime of the nature, type and level of (crimi-

nal) penalties applicable to the conduct made an offence in the EC Directive. The ECJ ruled that the Framework Decision encroached the competence of the Community legislator who is entitled to include the definition of the criminal offence and the nature of the penalties.

The tabled Commission proposal adapts Directive 2005/35/EC in line with the ECJ ruling and would replace the Framework Decision. The Commission considers the introduction of criminal measures particularly necessary in order to make effective the 1973 International Convention for the Prevention of Pollution from Ships (Marpol) which requires ensuring that penalties are "adequate in severity to discourage" potential polluters. The proposal (COM(2008) 134) contains the following amendments:

- Member States are required to lay down that any ship-source discharge of polluting substances, as defined in Article 2 of Directive 2005/35/EC, into any of the areas referred to in Article 3(1) of Directive 2005/35/EC, if committed with intent, recklessly, or with serious negligence, is to be considered a *criminal offence*.
- As stated in the annulled Framework Decision, Member States should ensure that *legal persons* can be held liable for the criminal offences committed for their benefit by certain persons acting on their behalf or when lack of supervision or control enabled those persons to commit an offence.
- *Penalties* imposed against ship-source pollution offences must be effective, proportionate and dissuasive, for both natural and legal persons. In addition to this requirement, for the criminal offence defined in the new Article 4, Member States are required to provide that the penalties for natural persons be of a criminal nature. For legal persons, it is not specified whether the penalties should be of a criminal or non-criminal nature. Member States that do not recognise the criminal liability of legal persons in their national law are therefore not under any obligation to change their national legal system.

If the Council and the European Parliament endorses the proposal, the amendments will mirror the Commission's initial draft for the Directive on ship-

source pollution presented in 2003 (cf. COM(2003) 92). However, for the time being, the Commission is not addressing the open issue of an approximation of the type and level of penalties, although a missing approximation could lead to safe havens for offenders. It can be expected that the Commission will reconsider the issue after the entry into force of the Lisbon Treaty since it would provide a clearer legal basis for the approximation of penalties.

► [eucrim ID=0703070](#)

More background information on the European Union's policy on maritime transport and safety can be found at:

► [eucrim ID=0703071](#)

Advocate General's Opinion on Validity of Directive on Ship-Source Pollution

On 20 November 2007, Advocate General Kokott delivered her opinion on the legal validity of the above-mentioned Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. A preliminary ruling had been sought by the English High Court of Justice. The claimants, a coalition of several organizations within the shipping industry, considered Articles 4 and 5 of the Directive, which lay down criminal liability for discharge violations, to be incompatible with international maritime law. Furthermore, they deemed that the standard of liability used in the Directive infringes the principle of legal certainty (see [eucrim 1-2/2007](#), p. 8).

Having analyzed the preliminary questions brought up by the English Court, Advocate General Kokott rejected all challenges to the Directive. As regards conformity with international law, the questions mainly concern the problem of whether the chosen criteria for liability in the Directive go beyond the standard set out in the 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol thereto (Marpol 73/78). Under Article 4 of the Directive, other people than the master and the owner of the ship can be held liable for discharges resulting from damage. Thus, the wording of the Directive goes further than Marpol 73/78. AG Kokott firstly states that Marpol

73/78 is the test standard applicable to the EC Directive. As a result, rules which go beyond Marpol 73/78 are not permitted. Nevertheless, the AG cannot determine an infringement of Marpol 73/78 as the two categories of persons mentioned there can only be considered as examples.

Furthermore, there seems to be a conflict in so far as the Directive provides for liability in respect of "serious negligence" – a notion which is not used in Marpol 73/78. AG Kokott suggests interpreting the "serious negligence" standard of the Directive restrictively in the sense of "recklessness in the knowledge that damage will probably result". This interpretation does not provide a stricter liability standard than Marpol 73/78 and thus ensures the Community obligation to be in conformity with international law. Such a restrictive interpretation of the term is necessary for illegal discharges outside the territorial sea where the Community is bound by Marpol 73/78.

However, Ms. Kokott recommended that the standard should get a broader meaning in the territorial sea where states are sovereign to enact measures on prevention and reduction of environmental pollution according to Article 21 (1) (f) of the Convention on the Law of the Sea. Lastly, AG Kokott tried to specify the term "serious negligence" and exposed that it does not infringe the principle of legal certainty. Her main argument is that Directive 2005/35/EC does not have to meet the criterion of legal certainty since it cannot, as a directive, contain directly effective penal provisions.

She consequently came to the conclusion that there is "no factor (...) as to bring into question the validity of Directive 2005/35/EC". The judgment of the European Court of Justice which usually follows the Advocate General's opinion is expected in the course of 2008.

The opinion is interesting to read since it contains some fundamental considerations about the relationship between Community law and international law. Furthermore, AG Kokott attempts to define a common interpretation of the notion "serious negligence" in so far as it is applied in the context of ship-source pollution.

► [eucrim ID=0703072](#)

The Hague Programme Review

ECJ: Urgent Preliminary Ruling Procedure in Justice and Home Affairs Introduced

From 1 March 2008 onwards, national courts or tribunals have the possibility to request an urgent preliminary procedure for references which relate to the area of freedom, security and justice (i.e., areas covered by Title VI TEU and Title IV TEC). The Council and the European Court of Justice (ECJ) endorsed the respective amendments to the Protocol on the Statute of the Court of Justice and to its Rules of Procedure. The amendments were published in the Official Journal L 24 of 29 January 2008. The texts follow the proposal of the ECJ which was presented on 11 July 2007 (see [eucrim 1-2/2007](#), p. 11; see also [eucrim 3-4/2006](#), p. 47 for the first reflections on the introduction of an expedited or accelerated procedure in the area of Justice and Home Affairs).

The Protocol on the Statute of the Court of Justice now allows that statements of case and written observations must be submitted within a shorter period than provided for in the ordinary preliminary ruling procedure. Furthermore, it would be possible for the ECJ to decide without a formal submission from the Advocate General. In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23 of the Statute who are authorised to submit statements of case or written observations and, in cases of *extreme urgency*, allowing the written stage of the procedure to be omitted.

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The detailed procedure is set forth in the amended Rules of Procedure of the ECJ. The new Article 104b lays down that the urgent procedure may be requested by the national court or tribunal which makes the reference, or, as an exception, by the ECJ's own motion. If the Court decides to deal with the reference under the urgent procedure, it will prescribe the period within which the parties or entities may lodge statements of case or written observations. The Court's decision may specify the matters of law to which such statements of case or writ-

ten observations must relate and specify the maximum length of documents. A chamber of three or five judges decides on the reference after hearing the Advocate General.

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The Council added a statement to the urgent preliminary procedure. There, the Council tries to specify openly formulated expressions in the aforementioned rules. However, the statement is not binding on the Court. The Council:

- (1) calls on the ECJ to provide national courts and tribunals with useful guidance on cases in which to apply for an urgent preliminary ruling procedure;
- (2) recommends the Court applying the procedure in situations involving deprivation of liberty;
- (3) calls upon the ECJ not to fix the period less than 10 working days in order to give Member States enough time to draft written observations or prepare oral arguments;
- (4) notes that an urgent preliminary procedure should be concluded within three months;
- (5) requests the ECJ to submit, no later than three years following the entry into force, a report on the use of the new procedure and the Court's practice thereto.

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Discussion on Future European Home Affairs Policy by Home Affairs Ministers

The Home Affairs Ministers of the EU Member States, at their informal meeting under the Slovenian Presidency in January 2008, discussed an interim report drafted by the Slovenian Presidency on the discussion of the High-Level Advisory Group on the Future of European Home Affairs Policy after 2010 (for more details on the group see eucrim 1-2/2007, p. 11 and eucrim 3-4/2006, p. 48). It was the first time that the considerations of the High-Level Group were discussed on a large scale by all 27 Member States. The ministers mainly exchanged views on the development of effective information exchange between the law enforcement authorities at the national and European levels, as well as with third countries, and tackled the question of what systems to use. Further topics were migrations, visa policy, and border management.

The High-Level Group will meet two more times during the Slovenian Presidency. A final report is expected by the informal meeting under the French Presidency in July 2008.

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The future European asylum policy, integration, and future police cooperation were on the agenda for the meeting on 31 March/1 April 2008. More information about the outcome of this meeting can be retrieved via the following link:

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Future Group in Justice

In parallel to the above-mentioned future group which discusses the way forward of the EU's home affairs policy after 2010, a group was also formed in order to explore the Union's priorities in the area of justice for the period from 2010-2014. The group was initiated by Portugal during its Presidency in the second half of 2007. It convened the Justice Ministers of the current trio presidencies of the EU Council (Germany, Portugal, and Slovenia), of the future trio of presidencies (France, the Czech Republic, and Sweden), the Spanish Justice Minister as representative of the third trio presidency (Spain, Belgium, and Hungary), the Commissioner for Justice, Freedom and Security (Franco Frattini), and the Chairman of the Legal Affairs Committee of the European Parliament (Giuseppe Gargani). The group met for the first time in Cascais/Portugal on 27 November 2007. Further meetings are scheduled throughout 2008. As is the case with the group for home affairs, the future group for justice intends to present a report with proposals at the beginning of the French Presidency in July 2008. It has not yet been decided whether the two groups on justice and home affairs will be merged.

In Cascais, the justice group dealt with the following topics: simplification of legislation and modernizing the administration of justice (including electronic justice), the fight against terrorism and organised crime, reinforcement of victims' protection, (especially children), and relations with third countries in the area of justice. On the occasion of the informal JHA Council meeting in Brdo pri Kranju/Slovenia on 24-26 January 2008, the fu-

ture group identified seven areas of challenges which will be debated further: (1) legislation. (2) access to justice. (3) judicial cooperation. (4) external dimension of the European justice area. (5) protection of children, (6) citizens' rights, and (7) financial instruments.

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Legislation

Permanent Justice Forum to Foster Mutual Trust

On 5 February 2008, the Commission announced in a Communication that it will launch a "Forum for discussing EU justice policies and practice" (COM(2008) 38). The Forum is planned to be formally launched in mid-April 2008. The rationale of the Justice Forum is to get a "targeted consultation", i.e., involve practitioners and other civil stakeholders in the evaluation of the implementation, enforcement, and consequences of Justice and Home Affairs instruments of the EU. In other words, the Forum is to

- (1) contribute to the *ex ante* evaluation of legislation,
 - (2) review the legal and practical implementation of instruments adopted in the area of criminal and civil justice,
 - (3) contribute to the assessment of global impacts on national judicial systems and on the functioning of judicial cooperation of EU instruments,
 - (4) contribute to a dialogue on quality of justice with a view to strengthening mutual trust, and
 - (5) work effectively with the Council of Europe, in particular with the CoE Commission for the Efficiency of Justice (CEPEJ – for this body see eucrim 3-4/2006, p. 85-86, and eucrim 1-2/2007, p. 46).
- The Justice Forum will be composed of practitioners, in particular those who deal with the EU instruments in the area of freedom, security and justice on a day-to-day basis, such as judges, civil and criminal lawyers, and prosecutors, as well as academics and representatives of NGOs and existing European Networks. The Forum is to meet regularly, several times a year – with subgroups focusing on particular subjects, such as access to legal aid, treatment of

Expert Hearing on Current and Future Development of European Criminal Law in German Parliament

On 28 November 2007, the sub-committee "European law" of the German Parliament (Deutscher Bundestag) held an expert meeting on the question "Is emerging a uniform European criminal law?" ("Entsteht ein einheitliches europäisches Strafrecht"). Academic experts and officials presented statements on the following issues: (1) competences for the creation of a uniform European criminal law on the basis of the Treaty of Nice, the case-law of the European Court of Justice (especially as to the cases C-176/03 ["environmental criminal law"] and C-440/05 ["ship-source pollution"]), and the EU Reform Treaty; (2) limitations of the German Basic Law (Grundgesetz) in view of the validity and application of a uniform European criminal law; (3) jurisdictional control of European criminal law; (4) legal protection of individuals; (5) impacts of a uniform European criminal law on the national criminal law; and (6) the need for the national legislator to take action in the context of the emergence of a uniform European criminal law. The documentation of the meeting can be found under the following link:

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victims, translation and interpretation services, respect of fair trial rights, etc. The Commission hopes for the following added value from the Forum:

- more focused and effective legislation;
- establishment of a ready-made expert group to clarify the true needs of practitioners and the problems they face in using EU justice instruments;
- better researched Impact Assessments in the specific justice areas with its direct links to the judiciary and other actors in the justice systems of the Member States;
- contribution to the standard evaluation model process set up by the Commission's June 2006 Communication on Evaluation of EU policies on Freedom, Security and Justice (see eucrim 3-4/2006, p. 46);
- provision of concrete expertise needed for the in-depth evaluation phase;

- bringing together existing European networks specialising in justice matters and facilitating more co-ordinated discussion and knowledge sharing; and
- suggestions for areas in which studies should be carried out and supervision and management of such studies.

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Bulgaria and Romania Accede to Criminal Law Conventions

In the past months, Bulgaria and Romania acceded to a number of criminal law conventions and their protocols. Compared to the former procedure of new Member States, the accession for Bulgaria and Romania was simplified (see eucrim 1-2/2007, p. 19). The accession of the two new Member States, which joined the EU in 2007, became possible after the Council had taken decisions concerning accession to the respective legal acts and determined the date of their entry into force. Before the Council decisions, the Commission had brought in a proposal and the European Parliament submitted opinions. The criminal law conventions and protocols to which Bulgaria and Romania acceded are listed in Annex I of the 2005 Act of Accession (OJ L 157 of 21 June 2005, 203).

In detail, Bulgaria and Romania acceded to the following instruments:

- Convention on the protection of the EC's financial interests and its protocols (for the Commission proposal in this respect, see also eucrim, 1-2/2007, p. 19).
► eucrim ID=0703080
- Convention on mutual assistance and cooperation between customs administrations
► eucrim ID=0703081
- Convention on the use of information technology for customs purposes
► eucrim ID=0703082
- Convention on mutual assistance in criminal matters between the Member States of the European Union
► eucrim ID=0703083
- Convention on driving disqualifications
► eucrim ID=0703084
- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
► eucrim ID=0703085

- For the accession of Bulgaria and Romania to the Europol-Convention, see eucrim 1-2/2007, p. 16.

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Administrative Sanctions Need Limit, Advocate General Says

A reference for a preliminary ruling lodged by the Landesgericht (District Court) Bozen/Italy prompted Advocate General Colomer to give general consideration to the requirements of a national administrative sanction (Cases C-55/07 and 56/07, "Michaeler und Subito GmbH"). The Italian law imposes an obligation on employers to send a copy of part-time employment contracts within 30 days of their conclusion to the competent provincial department of the Labour Inspectorate. The obligation is accompanied by a fine of €15 per employee concerned and per day of delay for failure to do so. Interestingly, the sanction does not set an upper limit for the administrative fine. As a result, the complainants were fined with nearly €217,000.

The question is whether the obligation to forward the contracts as well as the sanction concept is in line with Directive 91/81/EC, the purpose of which is to eliminate discrimination against part-time workers and improve the quality of part-time work. The Italian government argued that the norms are necessary to combat fraud and illicit work. In contrast, the AG concludes that the administrative burden to communicate the contracts to the authorities is not proportionate and thus not in line with the said Directive.

As regards the accompanying sanction, the AG refers to the case-law that a sanction which enforces a national administrative measure equally violates Community law if the administrative measure infringes Community law. Should the ECJ not follow the AG's opinion, the AG assesses whether the sanction concept itself would be in line with Community law. The AG requires that a national administrative sanction must have limits which take into account the individual liability of persons. A concept such as that in question which does not limit liability in terms of time and maximum amount infringes the general

Community principle of proportionality. As a result, the Italian provision which imposes a fine for the non-delivery of part-time contracts is not applicable, independent of the validity of the obligation to forward the contracts.

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Better Regulation in the EU

By Julia Macke

Stoiber Group on Administrative Burdens – First Meeting

On 17 January 2008, the High Level Expert Group on Administrative Burdens held its first meeting. For the start of its work, it received a progress report from the Commission on the work undertaken so far in this area.

On 19 November 2007, Commission President Barroso, Günter Verheugen, Vice President of the Commission and Commissioner for Enterprise and Industry, and Edmund Stoiber agreed on the composition of a High Level Expert Group on the Reduction of Administrative Burdens in Brussels and launched the work of the group. Mr. Stoiber, the former Prime Minister of Bavaria, Germany, will chair the High Level Group of 15 experts. Its task is to advise the Commission on the implementation of the action plan on reducing administrative burdens imposed by legislation in the Union.

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Action Programme for Reducing Administrative Burdens

In January 2007, the Commission presented a programme for measuring administrative costs arising from legislation in the EU and reducing administrative burdens for companies by 25 % by 2012. This action programme demonstrates in concrete terms the way in which the Commission intends to work with Member States to cut administrative burdens in businesses by one quarter by 2012: the programme focuses on information obligations in thirteen selected priority areas including company law, employment relations, taxation/VAT, statistics, agriculture, and transport.

In March 2007, the European Council endorsed the Action Programme for Re-

ducing Administrative Burdens and invited the Commission to launch it with the assistance of the Member States. The European Council also invited Member States to set their own national targets of comparable ambition within their spheres of competence by 2008. The measurement exercise will be completed by the end of 2008. It will focus on a list of legislative and executive acts in 13 priority areas seen as being at the origin of 80 % of administrative costs (the EU Standard Cost Model will be used). Unnecessary burdens spotted during this exercise will then be removed.

In the meantime, the Commission will propose and/or adopt concrete reduction measures for immediate action. In spring 2007, it adopted 10 such fast-track initiatives, and more are planned to follow in 2008.

On 19 November 2007, the Commission set up the above-mentioned high level expert group on the reduction of administrative burdens to advise it on the implementation of the Action Programme with a three-year mandate.

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Background: Better Regulation Strategy in the EU

The issue of reducing administrative burdens for companies, in particular Small and Medium Sized Enterprises (SMEs), is part of the comprehensive better regulation strategy of the European Union which has its origins in the Edinburgh European Summit of December 1992 and which has been developed in the past few years. Lastly, in November 2006, a “strategic review of Better Regulation in the European Union” (COM(2006) 689) was presented by the European Commission.

It aims at simplifying and improving the regulatory environment of the European Union. Beyond the described measures to reduce administrative burdens, further improvements, especially with regard to the following topics, have been targeted:

- Since the beginning of 2005 already, all major draft laws issued by the Commission must be accompanied by an impact assessment study that assesses the costs and benefits of the proposal and ensures that it is consistent with the

Commission’s drive to improve business competitiveness.

- Furthermore, the Commission decided at the end of 2004 to screen and withdraw a number of pending legislative proposals. In fact, as of March 2006, the Commission had withdrawn 68 legislative proposals after screening 183 potential new laws that were pending ratification by the Council and European Parliament.

- A strategy to modernise and simplify existing legislation is also planned. To this end, the Commission has designed, and is currently implementing, a simplification rolling programme which initially consisted of 100 initiatives covering more than 220 legal texts to be clarified, modernised, streamlined, or repealed over the period from 2005 to 2008. The rolling programme has recently been updated with the addition of 43 new initiatives to be implemented by 2009. Furthermore, the Commission is intensifying its efforts to complete the codification of about 500 basic pieces of legislation to reduce the size and ease the legibility of Community legislation.

- The EU further turns its attention to the Member States’ contribution, the transposition and implementation of EU law, and the quality of national and regional regulation.

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Call for Better Implementation of Community Law

In this context, it is also worth mentioning that the European Commission on 5 September 2007 put forward a series of proposals to improve the application of Community law by Member States. These proposals comprise four main areas of action:

- more targeted preventive measures,
- improved information-provision and problem-solving,
- a more efficient management of infringement cases, attaching priority to those cases which present the greatest risks and widespread impact for citizens and business and defining general priorities as well as annually fixed in certain sectors, and
- increased transparency.

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Better Regulation on Slovenian Presidency's Priorities

On 21 January 2008, the Slovenian Minister of Public Administration, Dr Gregor Virant, presented the priorities of the Slovenian Presidency in key working areas within the "Better Regulation" agenda. In this context, he especially stressed the drafting of better regulations, reduction of administrative burdens, measurement of administrative costs, and assessment of the impact of legislation on citizens and economic stakeholders.

As to the reduction of administrative burdens and the measurement of administrative costs, he added that in 2008 it will be important to ensure that the activities in the 13 priority areas set out in the European Commission's Action Plan continue in order to achieve the 25 % goal by 2012. Slovenia will also give precedence to the agreement on implementing the second package of the "fast track" measures for removing the administrative barriers of the European Commission where possible. The Minister further emphasised the important role of business which is why he will give greater attention to the interests of small and medium-sized businesses, e.g., by means of a special conference in April 2008.

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Institutions

OLAF

German Journalist in OLAF Leak Case Successful before Strasbourg Court

The row between the journalist from the German news magazine Stern, Hans-Martin Tillack, on the one hand, and the Belgian authorities as well as OLAF, on the other hand, has reached its climax for the time being before the European Court of Human Rights (ECtHR) in Strasbourg. In its judgment of 27 November 2007, the ECtHR ruled that the Belgian State violated Article 10 of the ECHR (freedom of expression) as a result of searches carried out at the home and office of the journalist in 2004. The searches by the Belgian police were triggered after OLAF filed

a report containing suspicions that the Stern reporter received confidential information by bribing a civil servant of the Commission. Information from confidential documents was the basis of two articles by the journalist in 2002 reporting the allegations of a European civil servant concerning irregularities in the European institutions and the internal investigations of OLAF in this respect.

The ECtHR reiterated in general terms that freedom of expression constitutes one of the fundamental components of a democratic society, and the guarantees conferred to the press are particularly important in this respect. The Court continues that the protection of journalistic sources is a cornerstone of press freedom. This protection is even more important, according to the Court, since the press must be able to inform the public with precise and reliable information. An interference with the exercise of press freedom could not be compatible with Article 10 of the Convention unless it was justified by an overriding requirement in the public interest.

While assessing the case, the Court held that the main purpose of the searches was the detection of the "leak" of the confidential information pursued by OLAF and therefore the measures concerned the domain of the protection of journalistic sources. In the decisive paragraph of the judgment, the Court emphasized that "a journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged." The Court also took into account the amount of property seized (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). As a result, the ECtHR ruled that the measures were not "necessary in a democratic society" and thus the interference with Art. 10 ECHR was not justified. Under Article 41 ECHR (just satisfaction), the Court awarded the applicant €10,000 in

respect of moral damage and €30,000 for costs and expenses.

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Mr. Tillack had previously brought actions before Belgian and European Community courts without success. Journalists in their statements welcomed the judgment "of Strasbourg" as reaffirmation of press rights. OLAF reacted by stressing that the judgment concerns the Kingdom of Belgium and not OLAF. OLAF further declared that the judgment of the ECtHR does not touch upon the ruling of the Court of First Instance in Luxemburg of 4 October 2006 where it was held that subsequent legal acts of national authorities following the forwarding of information by OLAF are the sole and entire responsibility of the national authorities (see also eucrim 3-4/2006, p. 49).

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Meanwhile, the Belgian police has announced that it will drop the case against the journalist and return to him the bulk of documents which were seized during

OLAF and Eurojust Discuss Better Cooperation in Fraud and Corruption Cases

Eurojust and OLAF organised a two-day conference in The Hague where Eurojust's National Members, officials from OLAF, and judicial professionals from all over Europe convened to look into better use of the know-how and resources of both organisations. They focused on the international dimension of fraud and corruption, its links and trends, and the need to put in place effective countermeasures. Mr. José Luis Lopes da Mota, President and National Member for Portugal at Eurojust, highlighted the professional and sophisticated way in which criminals commit fraud, corruption, and other offences affecting the EU; he also pointed out that improved coordinated action and cooperation between the two bodies are important to effectively fight such crime. Mr. Franz-Hermann Brüner, Director-General of OLAF, stressed that good cooperation and the will to share information through bodies such as Eurojust and OLAF are indispensable in the successful fight against the said forms of crime.

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the raid at the journalist's premises, the online news service "euobserver.com" reported.

Practice: Back-up of OLAF Allows Convictions in Adulterated Butter Case

Since 1997, Italian-based companies have used animal, vegetable, and synthetic materials in order to manufacture a product falsely declared as butter. This adulterated butter was sold on the European market and Community subsidies for butter were obtained for it. OLAF investigated, together with various national authorities, and provided back-up for the national investigations.

On 22 November 2007, the French Magistrates Court in Créteil could therefore convict two managers of a dairy company for selling goods under false pretences. They obtained suspended prison sentences of eight and five months, respectively, and have to pay back over €23 million in illegally obtained European subsidies to the agency responsible for paying out Community subsidies in France (the agency took part as a civil party in the proceedings). It remains to be seen whether the Court of Appeal is going to rule in the same direction. The case has a long-standing history. It dates back to the end of the 1990s and OLAF supported investigations in France, Italy, Belgium, and Germany for a number of years. Criminal proceedings are currently also pending in Italy and Belgium. German authorities have recovered Community subsidies totalling €150.000.

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Europol

New Decision Establishing Europol on Track

The JHA Council of 28 February 2008 reached an agreement on two of the three outstanding issues regarding a proposal for a Council Decision establishing the European Police Office (Europol):

- the lifting of immunity for Europol officials when participating in operational activities, especially Joint Investigation Teams (JITs), and
- the principle of staff rotation and the possibility for Europol staff participat-

ing in a JIT to receive instructions from the team leader.

What remains open is the issue of the budgetary implications of the new regime which shall be guided by budgetary neutrality. Some Member States have requested additional clarification from the Commission. The Slovenian Presidency seeks to reach a political agreement on the Council Decision at the JHA Council meeting in April 2008. Putting Europol on new footing is one of the priorities of the Slovenian Presidency. The Decision would replace the Europol Convention and Europol would then become an entity of the European Union (similar to Eurojust or the European Police College), financed by the Community budget. For the Decision, see also eucrim 1-2/2007, p. 17 and eucrim 3-4/2007, p. 51.

➤ eucrim ID=0703098

On 14 March 2008, the General Secretariat of the Council presented a consolidated text of the proposed Decision:

➤ eucrim ID=0703099

New Europol Decision – Opinion of the European Parliament

On 17 January 2008, the European Parliament (EP) voted on the aforementioned proposal for a Council Decision establishing Europol which was brought forward by the Commission on 20 December 2006. The wide majority of MEPs welcomes the establishment of Europol as an EU agency replacing the Europol Convention. Highly welcomed are the extension of Europol's mandate and the increased possibilities to support cross-border investigations since Europol would be, for example, empowered to initiate actions against money laundering and ask Member States to launch certain investigations. However, the EP's legislative resolution contains a series of amendments to the text proposed by the Commission. MEPs mainly consider that improvements should be made as regards data protection and democratic scrutiny over Europol. In detail:

- The EP calls for additional safeguards (including judicial review) when Europol obtains data from private entities which often may not be safe or reliable.
- It must be certain that Regulation No. 45/2001, which applies to all Community bodies when processing personal data,

also applies to Europol staff, in particular if Europol processes personal data originating from Community bodies

- The EP is in favour of the creation of an ombudsman to protect Europol data, but thinks that his/her independence must be ensured by the new law.

- The Joint Supervisory Body of Europol and the European Data Protection Supervisor should be consulted if personal data is processed outside the Europol Information System or the Analysis Work Files or if data processing systems are interconnected.

- Communication of personal data to third countries or international organisations should only be made in exceptional situations and on a case-by-case basis; furthermore additional safeguards are proposed for such transfers.

- The EP would also like to beef up the text in order to strengthen the rights of the data subject, such as the right of access.

- As regards the aspect of democratic control, the EP wants a say in the selection of the Director whereas the current proposal only foresees EP's consultation in case of the Director's dismissal.

- The EP strongly rejects moves of Member States to continue the financing of Europol by the Member States. It insists on Europol's financing by means of the Community budget since this would ensure the Parliament's involvement in the agency's financing and thus secure democratic control over Europol.

- Lastly, the MEPs say that the Decision should be revised within a period of six months following the date of entry into force of the Treaty of Lisbon.

➤ eucrim ID=0703100

Switzerland Extends Cooperation with Europol

On 1 January 2008, Switzerland extended the scope of its operational cooperation agreement with Europol. The agreement, which entered into force on 1 March 2006, had been limited to eight crime areas, such as drug trafficking, trade in human beings, terrorism, and forgery of money and means of payment, as well as money laundering activities in connection with these forms of crime. Now the agreement covers 25 crime areas, including murder, kidnapping and hostage-taking, organized rob-

bery, swindling and fraud, corruption, counterfeiting, and product piracy. In doing so, the cooperation agreement has been adapted to Europol's current scope of mandate.

► [eucrim ID=0703101](#)

Eurojust

Eurojust – Croatia: Judicial Cooperation Agreement

On 9 November 2007, Eurojust signed an important cooperation agreement with Croatia. The agreement is designed to improve judicial cooperation between Croatia and Eurojust and to facilitate the coordination of investigations and prosecutions covering the territory of Croatia and one or more EU Member States. The agreement mainly contains rules on (1) the secondment of a Croatian liaison prosecutor to Eurojust and his/her powers, (2) the exchange of information between the two parties, and (3) data protection and data security. It is the fifth cooperation agreement between Eurojust and non-EU countries.

Previous agreements were signed during 2005 and 2006 with Norway, Iceland, Romania, and the USA. Croatia, which is expected to enter the EU in 2009, already concluded an operational and strategic cooperation agreement with Europol in 2006 (see [eucrim 1-2/2006](#), p. 8).

► [eucrim ID=0703102](#)

Eurojust – European Judicial Training Network: Memorandum of Understanding

On 7 February 2008, Eurojust and the European Judicial Training Network (EJTN) signed a Memorandum of Understanding on cooperation between the two organisations. The purpose of this Memorandum of Understanding is to establish and regulate co-operation between Eurojust and the EJTN in the field of judicial training. It enables secondments to Eurojust of practising judges and prosecutors, as well as trainee judges and prosecutors, from the Member States in order to make them familiar with Eurojust's tasks, functioning, and activities. The parties may also consider undertaking other forms of co-

operation relating to judicial training. The importance of incorporating a European component in national training programmes was highlighted in the Hague Programme on strengthening freedom, security and justice in the European Union. The MoU between Eurojust and the EJTN can be found here:

► [eucrim ID=0703103](#)

The EJTN is designed to improve mutual understanding of Member States' legal systems among judges and prosecutors and enhance the practical implementation of judicial cooperation within the European Union. The EJTN comprises the institutions specifically responsible for the training of the professional judiciary within the EU. Founded on 13 October 2000, the EJTN is a non-profit making international organisation under Belgian law with its headquarters in Brussels. Since 14 March 2008, Victor Hall is the Secretary General of the EJTN.

The organisation aims to promote training programmes for members of the judiciary in Europe with a real European dimension. Each year, it distributes a catalogue containing the training possibilities offered by its members and open to all European judges and prosecutors. The European Commission has also recognised its monopoly for the implementation of the Exchange Programme which enables participants to get to know different European systems better, thanks to immersion training periods at a court/prosecutor's office or at judicial training institutions. Finally, it is also developing a website aimed at all legal professionals in order for them to find useful information on the training possibilities, judicial systems in Europe, as well as EU law and case law. The following link leads to the homepage of the EJTN:

► [eucrim ID=0703104](#)

New President of the College of Eurojust

On 6 November 2007, the College of Eurojust elected Mr. José Luis Lopes da Mota as its new President. Mr. Lopes da Mota, who is National Member for Portugal at Eurojust and was Vice-President prior to his election, follows Michael Kennedy, who stepped down from office as President and National Member

for the United Kingdom in November 2007. New Vice-Presidents are Raivo Sepp, National Member for Estonia, and Michèle Coninx, National Member for Belgium. They were elected in September 2007 and December 2007, respectively.

According to Art. 28 para. 2 of the Decision setting up Eurojust, the College elects its President from among the National Members and may, if considered necessary, elect two Vice-Presidents at most. The result of the election must be approved by the Council. This election procedure is unique in the EU.

► [eucrim ID=0703105](#)

Eurojust / European Judicial Network (EJN)

Strengthening Eurojust and the EJN – General Remarks

Discussions on the future role of Eurojust and the EJN started with a seminar in Vienna/Austria at the end of 2006 (see [eucrim 3-4/2006](#), p. 53). The recent months were marked by further discussions on the short-term, mid-term and long-term perspectives of the two European judicial bodies responsible for enhancing judicial cooperation within the European Union. The discussion reached a decisive stage when, in January 2008, a group of Member States presented two initiatives for Council decisions aiming at reinforcing the role and capacity of Eurojust and the EJN, respectively, and making their action more unified. Before, input had been provided by the Justice Ministers at their Council meeting in December 2007, a communication of the Commission, and Eurojust itself. Furthermore, another seminar in Lisbon at the end of October 2007 laid the foundation for the new proposals. The development is summarized in the following, beginning with the latest initiatives, and then continuing chronologically:

Initiative on Eurojust

14 Member States agreed that the time has come to table a concrete legislative proposal on the strengthening of Eurojust. The measures proposed would modify and supplement the Council Decision

of February 2002 setting up Eurojust. The main items of the proposal are:

- Establishment of an Emergency Cell for Coordination (ECC): this would make it possible for Eurojust to be contacted permanently and intervene in urgent cases.
- Extension of formal intervention by the College of Eurojust: The tasks of the College (consisting of all National Members) would be extended in so far as there would be the right to intervene in deadlock situations, i.e., in cases of conflicts of jurisdiction or in cases where a national authority does not execute a request for judicial cooperation. However, the interventions by the College remain non-binding.
- Approximation of status and powers of National Members: The 2002 Eurojust Decision gives Member States discretion as to which powers they would like to confer to their National Members at Eurojust. The 2008 draft fixes the term of office and details the powers which should be equivalent to all National Members without excluding the Member States' possibility to go any further. The proposal also precisely states the appointment and role of deputies and assistants to the National Member.
- Establishment of a Eurojust national coordination system: Each Member State shall designate one or more national correspondents to Eurojust. In this manner, the Eurojust national coordination system shall be set up to especially create a communication channel between the national and European levels and facilitate the supply to Eurojust of information on criminal investigations.
- Transmission of information: While the 2002 Decision on setting up Eurojust remains vague as regards the transmission of information from national authorities to Eurojust, the proposed amendment would, in particular, introduce obligations for Member States to transmit certain information.
- Reinforced external cooperation: The proposal grants Eurojust the possibility, firstly, to send liaison magistrates to third countries and, secondly, to coordinate the execution of requests for legal assistance coming from third states and addressed to several EU Member States.
- Relationship with other bodies: The

proposal also tries to clarify the relationship between Eurojust and the EJM. Furthermore, the cooperation with other EU bodies, such as Frontex, and international organisations such as Interpol and the World Customs Organisation, is set out. Possible new provisions relating to the relationship with OLAF are not foreseen.

► eucrim ID=0703106

Member States generally reacted positively to the proposal during a first exchange of views in the Council working party. The Slovenian Presidency would like to pursue the proposal with priority. The European Parliament was requested to give a statement by 30 June 2008.

Initiative on the European Judicial Network

The second above-mentioned initiative intends to put the European Judicial Network (EJM) on a new legal footing. The Joint Action of 1998, which created the EJM in criminal matters, shall be replaced by a Council Decision. This takes into account the new order of legal instruments as introduced by the Treaty of Amsterdam in 1999. The proposal incorporates most of the provisions of the Joint Action, thus maintaining the practically oriented work of the EJM. Since the objectives of the EJM and Eurojust are similar, the main amendment is to clarify the relationship between both bodies. The proposal especially introduces reciprocal obligations to exchange information in order to ensure smooth cooperation. Another point of intersection between the EJM and Eurojust is that the national contact points of the EJM should form part of the Eurojust national coordination system (see above).

► eucrim ID=0703107

Contribution of Eurojust

In September 2007, Eurojust itself provided an important impetus by outlining its considerations for the reform of the body. The contribution by Eurojust served as preparation for the Commission Communication on Eurojust and the EJM (see next news item). Eurojust considered the following points as important for its reform:

- a uniform minimum period for the appointment of the National Members of Eurojust, their deputies and assistants;

- the need for minimum level of powers of the National Members;
- a more binding character for all requests made by Eurojust as well as the granting of supplemental tasks to Eurojust, such as issuing European Arrest Warrants, issuing and answering letters rogatory, initiating and leading Joint Investigation Teams, etc.;
- the need to be provided with information by national authorities in a timely, consistent, and systematic manner in order to enable Eurojust to fulfil its core casework task;
- setting up of national correspondents to Eurojust who ensure an effective flow of information and of "Eurojust national offices" which facilitate the transmission of information;
- establishment of information exchange mechanisms with authorities other than judicial ones (police, administrative authorities, customs, etc.).

A major part of the contribution is dedicated to the relationship of Eurojust with other actors in the area of judicial and police cooperation in criminal matters. As regards the EJM, Eurojust is reflecting on an "integration" of the EJM into Eurojust, i.e., Eurojust would merge with the EJM's function – a proposal which was obviously not taken up by the Member States.

As regards the relationship with OLAF, Eurojust considers that a formal and clear mutual obligation for OLAF and Eurojust to inform one another, at an early stage, of all cases falling within their respective competence would be desirable. Such an obligation is not contained in the Memorandum of Understanding between Eurojust and OLAF in 2003 which is currently the basis for their cooperation. Eurojust also suggests appointing contact points from Eurojust and OLAF who could improve communication and serve as a link to the respective other body.

It is also envisaged that Eurojust has the right to formally submit a request to OLAF, with the consequence that OLAF has to respond to such a request by duly justifying and motivating any refusal to cooperate (application of Art. 6-8 of the Eurojust Decision to OLAF). However, Eurojust objects to the idea of a merger of Eurojust and OLAF because of the

specific function of OLAF as an administrative investigator. In the context of the debate on a European Public Prosecutor, Eurojust has found that a consolidation of Eurojust's tasks is first necessary before entering into further discussions.

► [eucrim ID=0703108](#)

Commission Communication on the Role of Eurojust and the EJN

The Commission refrained from presenting a first own legislative proposal in 2007 but tabled a paper for discussion on how Eurojust and the European Judicial Network can be strengthened. The Commission distinguishes between opportunities in the short-/mid-term, i.e., on the basis of the current legislation as well as those in the long-term which would require a change of legislation. Taking into account the aforementioned contribution of Eurojust, the Communication of 23 October 2007 on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union (COM(2007) 644) gives options on how Eurojust can get the information needed to perform its tasks. It also gives an overview of how the Council Decision of 2002 for setting up Eurojust has been implemented in the Member States.

The Commission mainly focuses on two shortcomings: First, the heterogeneous powers of the National Members of Eurojust, making it necessary to increase these powers. Second, underused powers of the College of Eurojust. As regards the position of the National Members, the Commission agrees that all members must have a (minimum) set of powers. In the longer term, the Commission proposes to confer the following powers to the National Members:

- initiating criminal cases, especially those involving offences prejudicial to the financial interests of the Union;
- setting up a joint investigation team, and participation in it;
- taking specific investigative measures.

As regards the College, the Commission advocates having the College function in the short-term as a channel for the settlement of disagreements between the Member States, such as acting as a mediator to resolve conflicts of jurisdiction. In the long-term, the College could have

more decision-making powers, according to the Communication, such as:

- settling conflicts of jurisdiction between Member States and conflicts regarding the working of the mutual recognition instruments;
- initiating inquiries in a Member State and proposing prosecution there, and playing a role in specific investigation measures;
- initiating criminal inquiries at the European level, especially regarding offences prejudicial to the financial interests of the Union.

The Communication also contains considerations on the relationship of Eurojust with other players in judicial cooperation in criminal matters. As regards the EJN, cooperation should be rendered smoothly by exchanging information via the national contact persons of the EJN.

As regards OLAF, the Commission would like to step up cooperation with Eurojust by means of a regular exchange of information at a sufficiently early stage. Furthermore, data protection rules between the two bodies should be made compatible when it comes to cooperation.

The Commission Communication on the role of Eurojust and the EJN served as a basis for debate at a seminar in Lisbon on 29/30 October 2007 and prompted conclusions on the matter by the JHA Council in December 2007.

► [eucrim ID=0703109](#)

From Vienna to Lisbon: Second Major Seminar on Future of Eurojust

One week after the afore-mentioned Communication of the Commission, a seminar in Lisbon/Portugal on 29 and 30 October 2007, entitled "Eurojust: navigating the way forward", discussed in depth the crucial issues for a reform of Eurojust and the European Judicial Network. The debate could be based on the work done so far, namely: the outcome of the seminar "A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network", held in Vienna on 25/26 September 2006 (see [eucrim 3-4/2006](#), p. 53); the EJN Vision Paper of 11 December 2006 drawn up by the European Judicial Network; Eurojust's contribution for the European Commission Communication concerning the future of Eurojust and the EJN;

replies of Member States to a questionnaire on the implementation of the Eurojust Decision, and the above-mentioned Commission Communication of 23 October 2007. The discussions at the seminar gave an important impetus for the 14 Member States to submit a concrete proposal for a reform of 2001 Eurojust Decision and the 1998 Joint Action on the European Judicial Network (see above). Issues which were also taken up by the Member States' initiatives included:

- enhancing the status of National Members of Eurojust and the capabilities of the national bureaux;
- increasing both National Members' and the College's powers;
- improving the exchange of information;
- coordinating the relationship between Eurojust and the European Judicial Network.

The general report on the seminar, compiled by Ms. Catherine Deboyser, Head of the Legal Service of Eurojust, can be downloaded via the following link:

► [eucrim ID=0703110](#)

Council Conclusions on Eurojust Reform

On the basis of the Commission Communication on the role of Eurojust and the EJN of October 2007 and the following seminar in Lisbon, the Justice and Home Affairs Council of 6/7 December 2007 adopted conclusions on this matter. The conclusions are compiled rather generally without giving clear political guidance. The Ministers invited the Member States and the Commission to further examine, reflect, and analyse the issues put forward during the discussions outside the Council beforehand.

► [eucrim ID=0703111](#)

European Union Agency for Fundamental Rights (FRA)

By Julia Macke

Duty to Cooperate with OLAF

On 23 October 2007, the Management Board of the Agency for Fundamental Rights (FRA) decided on the terms and conditions for internal investigations in relation to the prevention of fraud, cor-

ruption, and any illegal activity detrimental to the Communities' interests. It there states that all members of the FRA are required to cooperate fully with the European Anti-fraud Office's agents and lend any assistance required to an investigation. Any official or servant of the FRA who becomes aware of evidence which gives rise to a presumption of the existence of possible cases of fraud, corruption, or any other illegal activity detrimental to the interests of the Communities, or of serious situations relating to the discharge of professional duties which may constitute a failure to comply with the obligations of officials or servants of the Communities liable to result in disciplinary sanctions, shall inform without delay his or her Head of Unit or the Agency's Director (as the case may be) or the Office directly.

All the institutions, bodies, offices, and agencies established by or on the basis of the EC Treaty or the Euratom Treaty should – on the basis of their administrative autonomy – entrust to the European Anti-fraud Office the task of conducting internal administrative investigations, because Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 provide that the European Anti-fraud office is to initiate and conduct administrative investigations within these institutions, bodies, offices, and agencies (so-called internal investigations).

►eucrim ID=0703112

Morten Kjærøum becomes first Director of FRA

Morten Kjærøum from Denmark has been designated as new Director of the European Union Agency for Fundamental Rights. He will take office on 1 June 2008. On 7 March 2008, the Agency's Management Board decided to appoint the Danish expert because of his experience in the field of human rights and his administrative and management skills. Beforehand, Morten Kjærøum was the long-time Director of the Danish Institute for Human Rights. Furthermore, he is a member of the United Nations Committee on the Elimination of Racial Discrimination and was a member of the EU network of independent experts responsible for monitoring compliance

with the EU Charter of Fundamental Rights.

The Council of the European Union and the European Parliament had previously selected Morten Kjærøum as their first choice for the post of director.

►eucrim ID=0703113

FRA Gets its first Multi-Annual Framework

On 28 February 2008, the Justice and Home Affairs Council, after consulting the European Parliament, decided on the Agency's Multi-Annual Framework. The Multi-Annual Framework covers the first five years of European Union Agency for Fundamental Rights' existence from 2007 to 2012 and determines the thematic areas of the Agency's work. The Council's decision states that the agency will work in the following areas:

- racism, xenophobia, and related intolerance;
- discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation, and against persons belonging to minorities and any combination of these grounds (multiple discrimination);
- compensation of victims;
- the rights of the child, including the protection of children;
- asylum, immigration, and integration of migrants;
- visa and border control;
- participation of the EU citizens in the Union's democratic functioning;
- information society and, in particular, respect for private life and protection of personal data;
- and access to efficient and independent justice.

As reported in eucrim 1-2/2007, p. 19, the European Commission presented the proposal for a Council decision regarding the adoption of a Multi-Annual Framework for the period 2007-2012 in September 2007.

►eucrim ID=0703114

Agreement with Council of Europe Approved

On 28 February 2008, the Council also approved the Agreement between the European Community and the Council of Europe (CoE) on cooperation between the FRA and the CoE. The agreement

establishes regular contacts and meetings between the CoE and the FRA, arranges the exchange of information, and provides for coordination of activities in order to avoid duplication of work. The Agreement further makes possible joint and complementary activities on subjects of common interest and also contains provisions on the appointment by the Council of Europe of an independent person to sit on the Management and Executive Boards of the Agency, together with an alternate.

On 13 December 2007 already, the Agreement between the European Community and the CoE on cooperation between the FRA and the CoE had been approved by the European Parliament as set out in a proposal for a Council decision (COM(2007) 478) which dated from 21 August 2007. The Commission proposal incorporated the results of first negotiations between the Commission and the Secretary General of the Council of Europe which took place in March, April, and May 2007 (see eucrim 1-2/2007, p. 19).

►eucrim ID=0703115

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Second Commission Implementation Report on PFI Convention and its Protocols

On 18 February 2008, the Commission presented its second report on the implementation by the EU Member States of the Convention on the protection of the European Communities' financial interests and its protocols (so-called "PFI instruments"). The report is considered a follow-up to the first report of 25 October 2004. The second report (COM(2008) 77) now assesses the situation of implementation in all 27 EU Member States, including the new Member States which joined the EU in 2004 and 2007. The first report of 2004 (COM(2004) 709) only covered the "old" Member States (EU-15). As in 2004, the overall assess-

ment is still a quite frustrating one in the view of the Commission.

The Commission mainly identifies two shortcomings: First, many Member States still do not comply with their obligation to ratify the PFI instruments. The second protocol of 1997 still cannot enter into force since Italy has not yet ratified it. This impedes the completion of the legal framework on the fight against fraud, not only as regards the liability of legal persons but also with regard to a more effective cooperation between the authorities since the 2nd protocol also contains provisions on the exchange of information. Therefore, the Commission harshly criticizes Italy for the non-ratification of the 2nd protocol, emphasizing that “this situation is undermining the desired effective and dissuasive protection of the EC’s financial interests in criminal law (...)”.

Furthermore, four new Member States (the Czech Republic, Hungary, Malta, and Poland) have not acceded to any of the PFI instruments, despite the undertakings given in the 2003 Acts of Accession. Estonia has yet to accede to the Protocol which gives jurisdiction to the European Court of Justice to interpret, by means of preliminary rulings, the PFI Convention and the first protocol. The report states that, as a result of the lack of formal compliance, the current system of protection, based on conventions, de facto creates a “multi-speed situation” hindering an effective and dissuasive penal protection of the EU budget throughout the EU.

The second shortcoming is the widely incorrect implementation of the requirements of the PFI instruments in the national legal orders of the Member States. According to the report, only five Member States “now appear to have taken all measures needed to comply in a satisfactory way with the PFI instruments”. Of the old Member States, Belgium, Germany, France, Ireland, Italy, Luxembourg, and Austria are particularly blamed in the report of still having significant shortcomings in implementation. The Commission will address these Member States individually in order to solve the deficits. If diverging positions persist, the Commission is considering triggering the so-called dispute-settlement procedure

before the European Court of Justice (cf. Art. 8 para. 2 of the PFI Convention, Art. 8 para. 2 of the 1st Protocol).

On balance, the Commission assesses that, more than ten years after the signature of the PFI Convention and its protocols and three years after the 2004 enlargement, the method of protecting the EU budget and corruption by means of third pillar conventions proved inadequate. The desired harmonisation effect failed and an effective and dissuasive penal protection is missing – a conclusion which was also drawn by Commissioner Siim Kallas while presenting the report. Against this background, the Commission reiterates its conclusion in the first implementation report of 2004 that the findings confirm the urgent need for a Directive on criminal law protection of the ECs’ financial interests. Based on Art. 280 EC Treaty, the Commission presented an amended proposal of the Directive in 2002. The Directive would incorporate all the provisions of the PFI instruments relating to the definitions of offence, liability, penalties, and cooperation with the Commission. Negotiations on the legislative project of a PFI Directive have been stalled since 2003.

However, the Commission’s hope to further pursue the Directive has been given fresh impetus by the ruling of the European Court of Justice on the Framework Decision on the protection of the environment through criminal law (see eucrim 1-2/2006, p. 3) and by the new provisions of the Lisbon Treaty (see eucrim 1-2/2007, pp. 3-4).

The Commission’s implementation report is supplemented by a staff working paper. The working paper provides a detailed analysis of the national provisions of each Member State which implement the single provisions of the PFI instruments. It is a highly valuable contribution towards comparing the implementation measures in the EU-27 Member States.

The second Commission report and the staff working paper can be retrieved from the following link:

➤ [eucrim ID=0703116](#)

The first Commission report of 2004 is available here:

➤ [eucrim ID=0703117](#)

The following link leads to the propos-

al of the Directive on the criminal law protection of the Community’s financial interests:

➤ [eucrim ID=0703118](#)

Commission Presents New Concept of Fraud-Proofing

On 17 December 2007, the Commission released a Communication which adapts the Commission’s strategy to make legislation and the management of contracts safe from fraud (COM(2007) 806). The new approach to fraud-proof legislation and contracts will be mainly based on operational results. In particular, the “intelligence” work of OLAF will be included into the strategy. The core tool of the new strategy will be the creation of a “large pool of information” which will include any source of information, such as information from internal and external OLAF investigations, audit findings, reports and findings of the European Court of auditors as well as information from Member States’ authorities. Information on fraud, irregularities, risks, etc. will then be analysed in a multidisciplinary and structured way in order to identify weaknesses or vulnerabilities either in legislation, contracts, or management/control systems. The results of the analysis may lead to (1) ad hoc recommendations by OLAF, (2) general recommendations to Commission departments, EU institutions and bodies, or other stakeholders, (3) a compendium of cases describing fraud, irregularity patterns, and modus operandi, and (4) a new guide to prevention of fraud (also compiled by OLAF).

Furthermore, structural or systematic weaknesses shall be communicated by OLAF to the audit departments of the EU institutions and bodies. The Commission expects that first results of the new approach – ad hoc recommendations and the compilation of the compendium – will be issued in the second half of 2008.

To date, the fraud-proofing of legislation and the management of contracts is based on a Communication of 2001 (SEC(2001) 2029) which sets out the principles and procedures to improve fraud prevention. The main purpose was to make expertise, in particular from OLAF, available within the Commis-

sion. The Communication itself is based on the White Paper "Reforming the Commission" (COM(2000) 200) which included the commitment "to render the present system of fraud-proofing more effective". The Communication of 2007 would replace its forerunner of 2001. It is accompanied by a working document which summarizes the achievements of fraud-proofing since the adoption of the 2001 Communication.

➤ [eucrim ID=0703119](#)

EP: National Structures Main Cause for Inefficient Protection of the EC's Financial Interests

On 19 February 2008, the European Parliament (EP) adopted a resolution based on the own-initiative report drafted by MEP Francesco Musotto in response to the Commission's 2005 and 2006 annual reports on the protection of the Communities' financial interests and the fight against fraud. The resolution welcomes the fact that the reports on the protection of the Communities' financial interests and, in particular, the report concerning the financial year 2006 have become more analytical. The EP notes, however, that the statistics rely on very diverse national structures with different administrative, judicial, supervisory, and inspection systems.

Among the manifold issues raised by the EP, the following should be highlighted:

- The Musotto report assesses the figures on losses due to irregularities and fraud, in particular as regards own resources and agricultural expenditure. In this context, the EP is concerned about the low recovery level of sums by the Member States;
- the Commission should analyse more deeply the weaknesses of the current anti-fraud structures in the Member States and indicate – as far as own resources concerned – which further actions it will undertake to put a stop to the fraudulent importing of televisions, cigarettes, and counterfeit goods;
- the Commission should also attach particular importance to criminal networks specialising in the misappropriation of EU funds;
- more efforts should be taken to "black-list" fraudsters, i.e., to create a legal ba-

sis enabling OLAF to publish the names of companies and individuals who have defrauded the Community;

- as regards the reform of the OLAF Regulation, the EP favours the plan to group together OLAF's investigatory powers in one single regulation;

Lastly, the EP tackles the considerable losses due to VAT fraud about which it is very concerned. As a remedy, the EP considers it essential that cooperation between the Member States and OLAF must be improved. In this context, the VAT information exchange system (VIES) and cooperation in the field of data analysis, should be strengthened with the assistance of OLAF.

➤ [eucrim ID=0703120](#)

European Court of Auditors' Report on the 2006 Financial Year

Each year, the European Court of Auditors (ECA) publishes an annual report on the implementation of the EU budget. The report is part of the discharge procedure which brings the annual budgetary process to an end.

For the financial year 2006, the opinion of the Court was largely positive. With a net error rate of only 0,7 % the accounts are considered to be true and fair. The Court gives its "green light" when the risk of error is 2 % or less. In 2006, this was the case in over 40 % of total payments which constitutes a clear improvement compared to the past years. The most apparent progress has been made as regards agricultural spending which is nearly 50 % of the EU budget. Although the level of error still remains just above the materiality threshold, the Court found a marked reduction of errors in underlying transactions if the so-called "Integrated Administration and Control System (IACS)" applied. The IACS is an anti-fraud and expenditure control mechanism for payments made to farmers under the European Union Common Agricultural Policy (CAP). It applies in all EU Member States and covers about 70 % of CAP spending.

The Court also gave green light to commitments, revenue, administrative expenditure, and much of pre-accession aid (so-called "unqualified opinion"). However, the ECA gives an adverse opinion on the legality and regularity of the large

"Protection of the EC's Financial Interests and the Development of European Criminal Law"

Ljubljana/Slovenia, 30-31 May 2008

The annual conference addressed to the members of the Associations of European Lawyers for the Protection of the European Community Financial Interests will take place in Ljubljana/Slovenia from 30 to 31 May 2008. The conference is organised by the Institute for Criminology of the University of Ljubljana. It is co-financed by the Hercule-Programme. At the event, the meeting of the Presidents of the Associations will also be hosted.

majority of EU expenditure, such as CAP expenditure (not covered by IACS), structural funds, and internal policies.

On balance, the risk of errors is still too high. Complicated rules, unclear eligibility criteria, complex legal requirements, and insufficient checks on expenditure claims are considered to be the main reasons for frequent errors. The Court particularly blames the Member States which manage and control 80 % of the EU budget. The supervisory and control systems in the Member States are considered generally ineffective or moderately effective. Further efforts and control arrangements are therefore indispensable. The ECA "certifies" improvements of the Commission to reduce weaknesses in the management of the risks to Community funds but calls upon the Commission to make more progress.

As well as in the past years, the ECA did not approve a positive Declaration of Assurance concerning the legality and regularity of transactions. This remains another goal for the following years. For the report relating to the financial year 2005 see [eucrim 3-4/2006](#), p. 55.

By *Lina Schneider*

➤ [eucrim ID=0703121](#)

ECJ Decides on Competence between Customs and Judicial Authorities in Cases of ex post Recovery

In a case of post-clearance recovery of customs duty involving Portugal, the European Court of Justice (ECJ) had to decide on the interpretation of the concept of "an act that could give rise

Anti-Fraud Investigation Activities Examined at Conference in Milan/Italy

On 24/25 January 2008, the Italian European Lawyers Union organised a symposium in Milan/Italy entitled "New Perspectives of the Anti-Fraud Investigation Activities in Europe". The conference was opened in presence of the highest representatives of all the judicial institutions and professions in Milan. It hosted 450 representatives from interested legal professionals, mainly attorneys, representatives from the judiciary, Eurojust and the investigative services such as the Guardia di Finanza. The event, organised at the time of the opening of the judicial year 2008 at the Appeal's Court in Milan, has been a welcome opportunity to give international judicial cooperation in Europe greatest visibility amongst the interested services and professions of the judiciary. It has also served as a forum to debate recent developments in international judicial and police cooperation assisted by OLAF and the use of new investigative instruments, such as computer forensics, for the protection of the EU's financial interests.

to criminal court proceedings" (Case C-62/06, "ZF Zefeser"). The legal background was Council Regulation (EEC) No. 1697/79 of 24 July 1979 which allows tax authorities to recover ex post customs duties from the liable persons if an error has been made. The Regulation has since been repealed. Because of the principle of legal certainty, the Regulation provided for a time-limit of 3 years after which a post-clearance recovery of import levies is precluded. However, the Regulation also stipulates an exception to that three-year period which does not apply if "the competent authorities find that it is following an act that could give rise to criminal court proceedings that the competent authorities were unable to determine the exact amount of the import duties or export duties legally due on the goods in question" (Art. 3). Accordingly, Portuguese law would apply instead which provides for a 10-year limitation period if the determination of customs duties resulting from fraudulent acts is not possible.

In the main proceedings, the company ZF Zefeser and the Portuguese tax authorities disagree on the lawfulness of an adjusted customs assessment which requires ZF Zefeser to make ex post payment of customs duties not collected. The parties disagree on which time-limit applies for the post-clearance. The Portuguese customs authorities initiated criminal investigations against ZF Zefeser because of alleged smuggling, but the criminal investigations ended in a final court judgment which acquitted ZF Zefeser partially on the basis of limitation and partially for lack of evidence. Nevertheless, the Portuguese administrative authorities took the view that the customs assessment on the fraudulent act and thus the 10 year limitation period of the Portuguese law applies, whereas ZF Zefeser claimed that the three-year limitation of the Regulation applies so that the Portuguese authorities are no longer entitled to recover duties. The Portuguese administrative court, which made reference to the ECJ, wanted to know, in essence, which authority is competent to classify an act as "an act that could give rise to criminal court proceedings" for the purposes of applying the derogation of the three-year limit of Art. 3 of the Regulation.

The ECJ concluded that the classification falls within the competence of the customs authorities and not the criminal courts. The ECJ based its reasoning on the wording of the Regulation. The Court rejected the objection of ZF Zefeser that such an interpretation would contradict the principles of legal certainty and the presumption of innocence of the persons liable for payment of those duties. The ECJ argues that "[c]lassification by the customs authorities of an act as 'an act that could give rise to criminal court proceedings' does not constitute a finding that an infringement of criminal law has actually been committed (...). As is clear from recitals one and two in the preamble to Regulation No. 1697/79, that classification is made only in the context and for the purposes of an administrative procedure whose sole purpose is to enable those authorities to make good incorrect or insufficient collection of import or export duties".

Interestingly, Advocate General Trstenjak came to the reverse result in the case. She

concluded that "the legal concept of 'an act that could give rise to criminal court proceedings' must be regarded (...) as referring to the law of criminal procedure of the Member States. As a result, only final conviction by a criminal court of a Member State is capable of delivering an interpretation with effects for the relevant Community law on post-clearance recovery". She based her findings on the wording of the literal, schematic, and teleological interpretation of the Regulation as well as on the interpretation in the light of the Community fundamental rights (right to a fair legal process and principle of presumption of innocence). She advocated the necessity of an assessment by the criminal justice authorities since, otherwise, "customs and tax authorities, part of the executive branch of the State, [would be] granted a quasi-judicial role which is supported neither by the constitutional traditions of the Member States nor by Community law."

➤ eucrim ID=0703122

EU Intensifies Negotiations with Liechtenstein on Anti-Fraud Agreement

On the occasion of the signing of the agreement by which the Principality of Liechtenstein accedes to the Schengen-area (see above), Liechtenstein's Prime Minister Otmar Hasler announced that he also intends to quickly finalize an agreement with the EU to counter fraud. The agreement could be similar to that which was signed between the EU and Switzerland during the second round of bilateral agreements (see above). Hasler added that negotiations to conclude an anti-fraud agreement with the EU "have made very good progress." However, he added, that "of course, we will continue to represent the legitimate interests of our citizens in these negotiations, as our European partners do. [...] In Europe, we have different ideas of what constitutes tax fraud and tax deviation, therefore this term will have to be defined during negotiations," Hasler said by noting: "Tax fraud will, if we follow these negotiations, go beyond the Liechtenstein definition".

At the moment, the principality would only like to cooperate with the EU Member States as regards smuggling and VAT fraud but not in the area of direct taxes.

Tax evasion is not a criminal offense in Liechtenstein, therefore law enforcement authorities and banks do not provide legal assistance in these matters. Authorities only become active if the act falls under Liechtenstein's definition of "tax fraud" which – similar to Swiss law – requires the fulfilment of qualified elements, e.g., tax evasion connected to document forgery. The Commission's negotiations with Liechtenstein on an agreement to counter fraud are being led by OLAF. They already began several years ago.

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Practice: Operation "Wasabi" – "Hot Food" Withdrawn from Circulation

A joint customs operation code-named "Wasabi" detected a large-scale fraud scheme involving vegetables and fruits which damaged the EU budget by millions of Euros. Importers declared fruits (e.g., apples) at the customs clearance, but in reality they imported garlic. This is only one example of how duties on food from Asia are being circumvented. The joint customs operation was led by OLAF and involved the customs authorities of all 27 EU Member States. The operation was carried out by targeted controls on specific containers, particularly imports from South Asia. The import of garlic is a very sensitive issue as regards the protection of the EU's financial interests since the EU imposes qualitative restrictions on the product if it originates from China. Since China is one of the world's leading producers of garlic and production costs are very low there, evasion of the duties has become very attractive for importers (see also eucrim 34/2006, p. 55).

► eucrim ID=0703124

Tax Fraud / VAT

Measures against Tax Fraud – General Remarks

Following the proposed anti-tax fraud strategy of 2006 (see eucrim 3-4/2006, p. 57) and the important Council conclusions of June 2007 (see eucrim 1-2/2007, p. 22), the European institutions carried out further work on the establishment of a scheme at the Community level to suc-

cessfully combat tax fraud, especially in the field of Value Added Tax (VAT). The scheme is expected to avoid, in particular, carousel fraud. In its conclusions of June 2007, the Council prioritised a certain number of tasks, encompassing both conventional and more far-reaching measures. The "conventional measures" are mainly addressed to the Member States and concern the question of how to tackle tax fraud within the existing legal framework. The "more far-reaching measures" concern considerations of a more radical modification of the current VAT system, i.e., the taxation of intra-Community transactions and the introduction of the reverse-charge system.

In response to the requests of the Council, the Commission presented two communications encompassing suggestions for both fields of measures. The first communication on some key elements contributing to the establishment of a VAT anti-fraud strategy was issued in November 2007 and is dedicated to the conventional measures, whereas the second communication of February 2008 tackles the far-reaching measures and contains proposals on measures to change the VAT system to fight fraud. On 17 March 2008, based on the communication of November 2007, the Commission tabled first concrete legislative proposals relating to conventional measures; they would amend the current VAT legislation. The Council put the topic on its agenda mainly at the meeting of the Finance Ministers in December 2007 and in March 2008.

The European Court of Auditors, in a special report of 2007, contributed to the discussion by making concrete recommendations on how administrative cooperation can be improved in order to combat tax fraud more successfully.

The following news items mirror the development of the EU's recent effort to better combat tax/VAT fraud. They start with the Council's conclusions of its December meeting and then presents in more detail the Commission's steps regarding the conventional measures. Then, the views of the Commission and the Council regarding the far-reaching measures are analysed. Lastly, the report of the European Court of Auditors is presented.

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Council Gives Guidelines on Combating Tax Fraud

At its meeting on 4 December 2007, the ECOFIN Council examined the state of play of the steps already taken in view of the implementation of the agreed anti-fraud strategy of 2006 (see eucrim 3-4/2006, pp. 57-58). The Council recalled its conclusions of June 2007. It called on the Commission to further work on concrete legislative proposals as regards the conventional measures and to undertake more in-depth analysis of the far-reaching measures. The Council also provided some political guidelines in response to the Commission's Communication of 23 November 2007 (see the following news item).

► eucrim ID=0703130

Commission's Considerations on Conventional Measures to Combat VAT Fraud

The Commission Communication of 23 November 2007 concerning some key elements contributing to the establishment of the VAT anti-fraud strategy within the EU (COM(2007) 758) can be considered as a follow-up of its initial Communication of May 2006 concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud (see eucrim 3-4/2006, p. 57). The purpose of the Communication is to seek political guidance from the Council on the future work on four key issues which are considered crucial to reducing VAT fraud within the existing legal framework (*conventional measures*).

As a result, the Commission made four observations, defining the needs for a more effective action against VAT fraud: (1) There is a need for tax administrations to have accurate information (from businesses) to control the VAT system. In this context, the Commission stresses that possible future legislation which reviews the reporting obligations of businesses must be in line with the Lisbon strategy's objective to reduce administrative burdens (see above).

(2) There is a need for the tax authorities to take responsibility, not only for the protection of the national VAT receipts, but also for those of other Member States ("integration of a real EU approach into the management of the VAT system").

(3) There is a need for the tax administration and business operators to have updated information on the VAT status of persons. Therefore, EU-wide standards for registration and de-registration of traders is necessary. The Commission suggests making Member States liable for the VAT loss incurred by another Member States due to negligence in updating the database of its taxable persons.

(4) There is a need to enhance the capacity of tax administrations to collect VAT receipts in fraud cases. This objective should be achieved through a targeted use of joint and several liability for traders involved in fraudulent activities as well as through an improved and strengthened administrative cooperation in the field of recovery of taxes.

The Communication is accompanied by a staff working paper which summarizes the discussions of an expert group on the conventional measures to combat tax fraud. The expert group was created as a response to the ECOFIN Council conclusions of 28 November 2006 (see *eucri* 3-4/2006, p. 57). Its task is to fletch out the priority areas identified by the Council as regards anti tax fraud measures.

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Commission Tables Proposals to Make VAT Fraud Detection More Effective

On 17 March 2008, the Commission adopted a legislative proposal (COM(2008) 147) which takes up two conventional measures also highlighted by the Council. These measures require amendments of the VAT Directive 2006/112/EC and the VAT Administrative Cooperation Regulation No. 1798/2003. The proposal aims at speeding up the collection and exchange of information on intra-Community transaction from 2010 onwards. The purpose is to enable Member States' authorities to detect carousel fraud more quickly. This purpose should be achieved mainly by means of an obligation for businesses to send information on the intra-Community supply or purchase of goods to the tax administration more frequently. It should be noted that the European Court of Auditors also recommended radically shortening the deadlines for collect-

ing and transmitting VAT data (for the ECAs' special report, see below).

In detail, the Commission proposes:

- Harmonising and reducing to one month the period which persons liable for VAT have to declare intra-Community transactions involving the supply of goods or services within the Community;
 - Reducing from three months to one month the period for transmission of this information between Member States;
 - Collecting information monthly on intra-Community acquisition of goods or purchases of services where the buyer or customer is liable for VAT in order to make it easier to cross-check the data with that provided by suppliers. This obligation will apply to buyers or customers carrying out such transactions for an amount higher than €200,000 per calendar year. This threshold has been set in order to be considerate of burdens for small businesses.
 - Simplifying the procedures for submitting declarations on intra-Community transactions in Member States in which these procedures are unusually complex in order to reduce the burden which the procedures may impose on businesses.
- The Commission stresses that the proposal is part of a wide range of measures which have been, or are about to be, agreed upon to combat VAT fraud more effectively. Only some of the measures require legislative amendments.

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For an assessment of the Commission proposal, a study was carried out by the professional services firm PricewaterhouseCoopers. It analyses the possible impacts on business of the more frequent declarations. On balance, the study showed that the additional costs for economic operators are rather minimal. The two parts of the study (timeframes and more detailed information) can be downloaded via the following link:

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Commission Puts forward Ideas on a More Radical Change of VAT System

On 22 February 2008, the Commission adopted a Communication which presents the options for the so-called *far-reaching measures* which would bring

about a more fundamental change in the current VAT system (COM(2008) 109). Following the mandate of the Council, the Communication addresses the taxation of intra-Community transactions and the reverse-charge system. Similar to the purpose of the aforementioned Communication of November 2007, the present Communication seeks political guidance from the Council for future work on the above-mentioned topics. Beyond the Communication, a Commission staff working paper explains in more detail the pros and cons of the taxation of intra-Community transactions and the introduction of a generalised reverse-charge system.

As regards the *taxation of intra-Community transactions*, the Commission proposed the following concept: intra-Community supplies should continue to be taxed in the Member State of departure, but the exemption of taxation of intra-Community supplies would cease to apply. Instead they would be taxed at the rate of 15 %. Where the Member State of destination applies a rate of more than 15 %, the purchaser in the latter Member State would have to pay the additional VAT directly to that Member State. Where the Member State of destination applies a rate lower than 15 % (due to the application of certain reduced VAT rates or the zero rate in certain Member States), the Member State of arrival would allow credit to the taxable person who is making the intra-Community acquisition.

However, the Commission identifies the following disadvantages:

- Although the concept would prevent carousel fraud, it does not prevent the use of other fraud patterns.
- The new system could have negative impacts on the cash flow for traders, particularly for small and medium-sized enterprises, which would have to pre-finance the VAT in transactions for which they currently do not pay VAT.
- The concept is politically delicate since it would make individual Member States VAT receipts dependent on transfers of other Member States. The Commission estimates that some 10 % could become dependent on other Member States. Therefore, a well thought-out clearing system must be established.

Protection of EU and Swiss Financial Interests

Conference in Basel from 10-11 December 2007

“Protection of EU and Swiss Financial Interests: Challenges for Law Enforcement and the Financial Industry” was the topic of a two-day training conference in Basel, Switzerland, in December 2007. The conference was organized by the Academy of European Law (ERA) and the Basel Institute on Governance and funded by the Hercule Programme of the EU. Officials from the European institutions and bodies (European Parliament, OLAF, Europol), officials of the ministries, officers of national law enforcement authorities, defence councils, academics as well as representatives of financial institutions discussed the protection of the EU’s financial interests as embedded in the enforcement tools which are applied to date (e.g., administrative and judicial cooperation) as well as the bilateral agreement on combating fraud which will fundamentally regulate cooperation in fiscal matters between the EU and Switzerland in the near future. Speakers at the seminar also focused on best practices of cooperation as well as compliance of the private sector, such as banks, to the requirements of the EU law in order to effectively prevent or combat fiscal fraud, money laundering, or corruption – offences which are detrimental to the EU budget.

Case studies within the framework of two workshops gave participants the opportunity to discuss practical problems in relation to cooperation in fiscal matters between the EU and its Member States on the one hand and Switzerland on the other hand. The first workshop, for instance, dealt with customs investigations occurring after suspicious transactions of money or consignments of goods involving Switzerland, Liechtenstein, and EU Member States such as Italy and Germany. The cases demonstrated the practical problems which customs officers experience in identifying the suspicious behaviour of enterprises which try to circumvent customs duties. The second workshop discussed cases involving OLAF and its cooperation with national authorities. The cases focused on traditional fraud schemes. In particular, OLAF officials highlighted the very important problem of recovery of EU subsidies after the beneficiary – usually an enterprise – has become bankrupt, thus not fulfilling its obligations incumbent under the grant agreement with the Commission. In this regard, possibilities to administrate the money by means of trust accounts were considered to avoid follow-up problems.

Prof. Mark Pieth, Professor of Criminal Law at Basel University and Chairman of the Board of the Basel Institute on Governance, summarized at the final panel discussion that contributions during the conference mainly addressed the following three questions: (1) How can the existing legal instruments be used best? (2) Which changes and challenges will arise after the new legal instruments come into force? (3) How can private-public partnership be improved? He concluded that the current cooperation instruments cover nearly all cases of fraud which Switzerland is providing legal assistance for in practice. The legal status quo already offers a wide range of possibilities; however, they are not fully used in practice. The new agreements would – in practice – only extend the possibilities to a certain extent. Ultimately, according to Mark Pieth, the conference also revealed that technical challenges – in particular for the private sector – are often caused by political compromises.

Information about the conference can be found here:

➤ [eucrim ID=0703125](#)

More information about the Basel Institute on Governance is available here:

➤ [eucrim ID=0703126](#)

Background: Relations between Switzerland and the EU in General

The above-mentioned seminar in Basel is a good opportunity to provide more background information on the relationship between Switzerland and the EU, in particular as regards cooperation in fiscal matters. In order to understand the cooperation in fiscal matters, some general preliminary remarks must be made.

Switzerland is not an EU Member State and not member of the European Economic Area, but is part of the European Free Trade Association (EFTA). Notwithstanding, Switzerland is in the centre of Europe, not only geographically but also economically and culturally. On the one hand the EU is the most important trading partner for Switzerland; on the other hand, Switzerland is the second largest export market for EU products after the US. Beyond its close connection to the EU, Switzerland can be considered one of world’s major financial centres and a transit country for huge amounts of money. These factors create a risk for the EU’s financial interests, but they are also the reason for close cooperation in fiscal matters between EU Member States and the Swiss Confederation. Interestingly, Switzerland itself has an increasing interest in the protection of the EU’s financial interests since the country also makes contributions to the EU budget. It, for instance, agreed to contribute €125 million per annum over five years to the social and economic cohesion in the enlarged EU, enabling Switzerland to select and finance projects in the new EU Member States.

In general, relationship between the EC/EU and Switzerland is based on bilateral agreements. Their development can be divided into four main stages:

- the free trade agreement of 1972,
- the agreement on insurances of 1989,
- a first package of seven bilateral agreements of 1999, and
- a second package of nine bilateral agreements of 2004.

The free trade agreement establishes free trade in goods and competition rules. The partners do not pursue a harmonised customs policy, i.e., there is no customs union; this is why customs authorities continue carrying out controls at the borders. The agreement on insurances between the EEC and Switzerland guarantees that insurance companies have the same rights of establishment in the territory of the other contracting party. In addition to the free trade agreement, the seven bilateral agreements of 1999 provide for the opening of markets in specific sectors (free movement of persons, public procurement, land and air transport, agriculture, research, and mutual recognition of conformity assessment).

The second package of bilateral agreements (2004) covers additional economic interests and extends cooperation to several political areas, such as internal security, asylum, environment, and culture. The dossiers encompass the following:

- participation in “Schengen and Dublin cooperation”,
- judicial and administrative cooperation in the fight against fraud,
- taxation of savings,
- trade in processed agricultural products,
- participation in the European Environment Agency,
- statistical cooperation,
- participation in the Media programme,
- preparations for participation in future programmes in the fields of education, youth and training, and
- avoidance of double taxation of retired EU officials.

In a report of 2006, the Swiss federal government decided to continue the "bilateral approach" in the short- and mid term. An EU membership of the Swiss Confederation is only considered an option in the long term. One of the main pros for the bilateral approach is that it allows Switzerland to maintain its institutional independence and retain certain characteristics of its own system. This is especially true for assistance in fiscal matters keeping up – as far as possible – bank secrecy by limited cooperation in that respect. A good overview of the EU's relations with Switzerland can be found here:

► [eucrim ID=0703127](#)

Background: Relations between Switzerland and the EU in Fiscal Matters

As regards the protection of financial interests in particular, cooperation between Switzerland and the EU Member States is to date mainly based on the following instruments:

(1) Administrative assistance is ensured by an additional protocol of 1997 to the free trade agreement of 1972 covering mutual administrative assistance in the area of customs and by an agreement of 1987 on a common transit procedure.

(2) Legal assistance has been provided on the basis of the Council of Europe convention of 1959 on mutual legal assistance in criminal matters and the (Swiss) Federal Act on international mutual assistance in criminal matters. Switzerland has not ratified the additional protocol to the European convention on mutual legal assistance in criminal matters of 1978 which withdraws the possibility to refuse assistance simply because the request concerns a fiscal offence.

In the future, cooperation will mainly be regulated by the following two instruments:

(1) The Convention Implementing the Schengen Agreement of 1990 (because of the participation of Switzerland in the Schengen acquis) and

(2) The agreement of 26 October 2004 between the European Community and its Member States, as one party, and the Swiss Confederation, as the other party, to counter fraud and all other illegal activities affecting their financial interests (in short: agreement to counter fraud). The agreement to counter fraud will cover both administrative and legal assistance. Although

Switzerland had already ratified these two new agreements, the entry into force has been blocked so far since some EU Member States are lagging behind in the ratification of the agreements with Switzerland. When the agreement to counter fraud is to come into effect is still open.

The legal assistance of Switzerland in fiscal matters today is limited: cooperation in cases involving the evasion of direct or indirect taxes is only possible if the act, requiring assistance from Switzerland, fulfils the (qualified) elements of the so-called "Abgabebetrag" (tax fraud). Furthermore, assistance in cases of "Abgabebetrag" is only possible for mutual assistance in criminal matters, i.e., for the support of foreign criminal proceedings such as the gathering of evidence. Extradition as well as asset seizure for confiscation purposes is excluded. In cases of money laundering, legal assistance from Switzerland requires that the predicate offence is a "Verbrechen" (crime) and is excluded if the predicate crime is a fiscal offence.

The participation of Switzerland in the Schengen agreement, as well as the application of the agreement to counter fraud, will alter the current legal assistance scheme in fiscal matters: Mutual legal assistance will not only be limited to "tax fraud" but will also provide for the evasion of indirect taxes and duties. In cases of indirect taxes/duties, extradition and confiscation will also be possible. However, requests for legal assistance in relation to the evasion of direct taxes remain uncovered unless the act can be qualified as "Abgabebetrag". Moreover, legal assistance may be refused in "minor cases", i.e., if the alleged amount of duty unpaid or evaded does not exceed €25,000 or where the presumed value of the goods imported or exported without authorisation does not exceed €100,000. In cases of money laundering, the Swiss judicial authorities will accept requests for assistance if the predicate offence concerns indirect taxes/duties. However, the predicate offence must be punishable both under the law of the respective EU Member State and Switzerland by a custodial sentence or a detention order of a maximum period of more than six months.

More background information about the bilateral agreements as well as the texts of the above-mentioned agreements can be retrieved via the following website of the Swiss Department of Foreign Affairs:

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If Member States disagree with this concept, the Commission sees the taxation of intra-Community supplies at destination to be the only alternative.

As regards the introduction of a *generalised reverse-charge system*, the Commission also details the negative aspects of this particular concept. The reverse-charge system means that, instead of the supplier (in principle, the current system), it would be the recipient/customer of goods or services who declares the VAT in business-to-business relations. The customer can then set off this payment against his input tax deduction. Thus, any flow of money which is currently being exploited by fraudsters can be avoided.

However, the Commission warns that the system cannot solve other forms of fraud, such as untaxed consumption and the misuse of VAT identification numbers. In order to combat these new forms of fraud, a number of new measures would need to accompany the reverse-charge system; they could complicate the system and create new burdens for businesses and tax administrations.

Furthermore, the Commission objects to the idea of introducing the reverse-charge mechanism on an optional basis – a proposal which was put forward particularly by Germany and Austria. The Commission advocates making the system in the entire EU mandatory, but is not averse

to testing the system in one Member State in the form of a pilot project.

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Council Torn Over What Best Combats Fraud

The ministers responsible for Economic and Financial Affairs could not agree on conclusions to combat tax fraud at its Council meeting on 4 March 2008. As a result, a formal reaction to the above-mentioned Commission's Communications was postponed. In particular, some Member States remain opposed to the general introduction of the reverse-charge system.

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European Court of Auditors' Report on Member States' Cooperation in VAT Matters

In its special report 8/2007 (published in the Official Journal C 20 of 25 January 2008, p. 1), the European Court of Auditors (ECA) assessed the administrative cooperation between the Member States' tax authorities in the field of VAT. The ECA found that "despite new EC legislation introduced in 2004 by Regulation No. 1798/2003, administrative cooperation between Member States in the field of VAT is still not intensive enough to cope with intra-Community VAT evasion and fraud".

According to the report, Member States make insufficient use of the Regulation, which is designed to speed up and strengthen cross-border cooperation, mainly through clearer procedures, the more comprehensive exchange of information, and increased direct contacts between local tax offices. Efficient cooperation is often hampered by late replies to requests – frequently because not all Member States have established adequate administrative structures and/or operational procedures. Moreover, the exchange of spontaneous information is not well-established.

In its recommendations, the ECA stresses that "for combating intra-Community VAT fraud successfully, higher priority needs to be given by Member States to administrative cooperation, in respect of both the operational information exchanges and their administrative management".

Furthermore, the ECA recommends that Member States should do the following:

- encourage more direct communication;
- monitor exchanges of information more efficiently;
- clarify procedures for exchanges of information without prior request;
- improve the accuracy and reliability of data in the current Value Added Information Exchange System (VIES);
- consider the introduction of harmonised rules for withdrawing VAT numbers from traders involved in VAT fraud.

The ECA's demand on enhancing the possibility of cross-checks as well as accelerating the exchange of information

was taken up by the above-mentioned Commission proposal to amend the current VAT Directive and the said Regulation.

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Practice: VAT Fraud Scheme for Smuggling Chinese Goods Discovered

OLAF announced a successful strike against a European-wide scheme of VAT fraud and circumvention of customs duties. In cooperation with the Austrian authorities, OLAF detected that the origin of textiles and shoes stemming from China had been falsely declared. The goods were then imported into the EU where they were cleared in the Member State of arrival without paying VAT. Afterwards they were transported to another Member State of destination. Part of the scheme was also that the goods were heavily undervalued and the majority of consignees was either non-existent or disappeared from the scene after a short period of operation. The estimated financial damage is running to millions of Euros.

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Excise Duties – Commission Suggests Counter-Fraud Measures

On 14 February 2008, the Commission tabled a proposal which aims, inter alia, at strengthening the fight against fraud in relation with the movement of excise goods (alcoholic beverages, tobacco products, and mineral oils). The Commission considers in its proposal (COM(2008) 78) the introduction of an EU-wide computerised system an essential tool to effectively combat tax fraud in this area in the future. The so-called "Excise Movement Control System" (EMCS) should allow the processing of data for declaring, monitoring, and discharging movements of excise products for which no tax has yet been paid. The electronic processing will replace the current paper-based system for the monitoring of excise goods for which no duties have yet been paid since the paper-based system was prone to misuse for fraud activities. The Commission hopes to have the system operational in 2009.

The history of the EMCS already began in 2003 when the Council and the European Parliament stated in a decision that

"it is necessary to have a computerised system for monitoring the movement of excisable goods, such as will allow Member States to obtain real-time information on those movements and to carry out the requisite checks, [...]". The Council and the European Parliament called on the Commission to put this system in place by 1 July 2009.

The new Commission proposal for a legal framework of the EMCS is included in a general proposal to overhaul the Directive 92/12/EEC of 25 February 1992 "on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products". The Directive contains the basic principles applicable to all products subject to excise duties, thus ensuring the proper functioning of the internal market as to excise goods. It has become necessary to update and recast the text of the Directive, as well as take into account legal developments, and simplify and modernise the excise procedures. Beyond the EMCS, the present Commission proposal for a new Directive therefore also aims at liberalising existing rules for alcoholic beverages bought in one Member State and transported to another, and simplifying and harmonising the procedures in the Member States for commercial movements of these excise goods.

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Cigarette Smuggling

EC's Agreement with Philip Morris Stand Scrutiny in Parliament

On 11 October 2007, the European Parliament adopted a resolution based on an own-initiative report drafted by Belgian Green MEP Bart Staes on the implications of the agreement between the Community, Member States, and Philip Morris on intensifying the fight against fraud and cigarette smuggling and progress made in implementing the recommendations of Parliament's Committee of Inquiry into the Community Transit System. The EP's assessment of the implementation of the agreement is mixed. While the conclusion of the agreement has been called a "gold

Methods, Trends, and Threats of Carousel Fraud at Europol Conference

In November 2007, participants at a high-level conference, organised by Europol in The Hague, strategies to combat the phenomenon of (VAT) carousel fraud. They assessed methods, trends, and threats of this form of crime which is extremely detrimental to the EU's budget. Europol reported that it is creating two new analysis work files on "counterfeit and missing trader intra-community fraud".

Combating VAT carousel fraud was identified as one of the major challenges for the EU in the 2007 Europol Crime Threat Assessment (OCTA; see eucrim 1-2/2007, p. 28). There, Europol already made some suggestions, such as increased public/private partnerships, provision of more "real time" intelligence and support, as well as enhanced coordinated interventions.

➤ eucrim ID=0703139

standard" for future agreements by rapporteur Bart Staes, the report identified a number of shortcomings in the fight against cigarette smuggling by the EU Member States. The EP has written a litany of measures and strongly recommends Member States and the Commission to follow them in order to fight the illicit trade in cigarettes much more efficiently.

As regards the agreement with Philip Morris, the EP remarks that "[it] is very disappointed about the way the Commission handled the distribution of the payments from the Philip Morris agreement among the 10 Member States and the Community, whereby the Community received only 9,7 % thereof and the rest went un-earmarked straight to the Ministers of Finance of the Member States; considers that this distribution goes against the spirit and intention of the agreement, which was negotiated on the basis that the USD 1,25 billion concerned had to be used in the fight against fraud."

In 2004, the world's largest cigarette manufacturer Philip Morris, EU Member States, and the Commission concluded an agreement which led to Philip

Morris paying compensation for loss of revenues. Furthermore, Philip Morris is offering assistance in combating smugglers (see also eucrim 3-4/2006, p. 57).

➤ eucrim ID=0703140

Commission Concludes Landmark Agreement with Japan Tobacco

While the European Parliament regretted in the aforementioned resolution that other cigarette producers, such as Japan Tobacco and Reynolds American, still have not followed Philip Morris in signing a similar agreement, the Commission announced on 14 December 2007 that it successfully concluded a multi-year agreement with Japan Tobacco International (JTI) – the world's third largest cigarette manufacturer. The Commission and 26 EU Member States are participating (the UK is not taking part). The agreement includes close cooperation between JTI and OLAF as well as the establishment of an efficient system to fight future cigarette smuggling. JTI has made a series of commitments which will help both in reducing the smuggling of genuine products into the EU as well as in damming counterfeit cigarettes. For example, JTI will be committed to maintaining and expanding its current compliance programmes. JTI will also apply tools in the field of tracking and tracing by labelling master cases and cartons of JTI cigarettes in a manner which will easily allow government officials to readily obtain key information relating to the manufacture, storage, and sale of JTI products.

JTI has committed itself to paying USD 400 million to the European Community and the participating Member States over a period of 15 years. The money is to be used for anti-contraband and anti-counterfeit initiatives. The agreement further provides for payments in the event of future seizures in the EC of the JTI's genuine products above and beyond defined quantities. As a result of these provisions, any future lawsuits against JTI for civil claims arising out of alleged past conduct related to illicit trade activity have been excluded by the agreement.

The Commission considers the agreement with JTI to be a model for future agreements with other manufacturers.

The agreement shares the objective of the 2004 agreement with Philip Morris; however, it is tailored to the specific business model of JTI. In addition, it was not motivated in connection with the settlement of a pending lawsuit, as was the case with Philip Morris.

➤ eucrim ID=0703141

Worldwide Treaty on Illicit Trade in Tobacco on Track

On 11 February, representatives of governments of over 150 countries met in Geneva/Switzerland to begin negotiation on the international treaty to combat illicit trade in tobacco products. This treaty is to be concluded in the form of a protocol which is to supplement the WHO Framework Convention on Tobacco Control (FCTC). Nations that are party to the FCTC agreed in July 2007 to negotiate this protocol (see eucrim 1-2/2007, pp. 20-21) since illicit trade in tobacco products and counterfeit cigarettes is undermining other tobacco control efforts which are foreseen in the FCTC. The governments also recognized that the illicit tobacco trade is a transnational problem that cannot be addressed without a comprehensive system of international cooperation.

In the pre-run of the conference, expert groups and international associations drafted measures which they would like to see included in the protocol, such as systems for tracking and tracing tobacco products, criminalization measures, increased penalties for illegal activity, international cooperation on investigation, and prosecution of illicit trade cases. The goal is to conclude the protocol by 2010. OLAF is supporting the negotiations on behalf of the European Union.

➤ eucrim ID=0703142

Practice: Cigarette Mafia Eradicated

In the course of demands on enhanced international cooperation to combat illicit trade on tobacco products, OLAF, the Central Investigation Bureau of the Polish Police, and the German Customs Investigation Service, announced on 18 March 2008 a successful blow against an international smuggling ring. The gang is considered responsible for having smuggled millions of cigarettes

into the EU from former Soviet Union countries and China. The operation, which was supported by OLAF, led to the arrest of 26 people in Poland and Germany. Confiscations of cigarettes (nearly 7 million), money, gold, jewellery, and private property accompanied the arrests. The loss of tax revenue is estimated at €2 million.

► eucrim ID=0703143

Corruption

By Lina Schneider

Study on Ethical Rules and Standards for Public Officials

On 11 December 2007, the Commission released a comparative study of the rules and standards of professional ethics for the holders of public office in the EU-27 and EU institutions. The study is part of the Commission's Transparency Initiative which, among other goals, is trying to increase the openness and accessibility of EU institutions. It was carried out by the European Institute of Public Administration in Maastricht in co-operation with the Utrecht School of Governance, the University of Helsinki, and the University of Vaasa. The study focuses on the analysis of "rules and standards" in the field of conflicts of interest. Officials in the EU institutions as well as five institutions in each Member State were asked whether and how they regulate various issues of conflicts of interest.

Concerning the situation in the Member States, the study concludes that there is no evidence that conflicts of interest are increasing as such. Whereas some issues, such as post-employment obviously need better rules and standards, other issues, such as gift policies, are generally well managed. Particularly the new Member States sometimes even have too many and too restrictive rules. The study advises taking into account that this may become counterproductive. The implementation and enforcement of too many and too tight restrictions and prohibitions are costly, bureaucratic, and potentially ineffective.

As to the EU institutions, the study shows that especially the European Commission and the European Investment Bank

have a relatively sophisticated conflict-of-interest infrastructure. However, the Court of Justice and the European Parliament should introduce more standards and rules for their officials. Due to the different institutional needs and particularities, each EU institution should adopt its own specific code. Nevertheless, similar rules are needed in the fields of transparency, confidentiality, and secrecy. The study therefore recommends the adoption of a general and short, "aspirational code" for all EU institutions. Such a measure would also send an important signal to the public and make EU institutions more compliant.

As the public tends to question practices where public institutions regulate their own ethical conduct, the study further recommends thinking about the establishment of an independent Ethics Committee or an Office of Government Ethics. The study may serve as a good basis to share best practices among public administrations.

► eucrim ID=0703144

Money Laundering

By Lina Schneider

Commission Report on FIU Cooperation

A Commission report of 20 December 2007 (COM(2007) 827) evaluates whether the 27 Member States dispose of a legislative and operational framework to support cooperation between their Financial Intelligence Units (FIU) as laid down in the Council Decision 2000/624/JHA of 17 October 2000. *FIUs* are specialised governmental agencies which collect and analyse information with the aim of establishing links between suspicious financial transactions and underlying criminal activity in order to prevent and combat money laundering. FIUs are common in countries around the world.

The EU Decision has largely been influenced by the standards and principles established by the *Egmont Group*, an informal worldwide network of FIUs. Since 1995, this group has been promoting and enhancing international co-operation in anti-money laundering and terrorist financing. In this context, the sharing of

information between the FIUs is considered crucial.

This was also pointed out at the European Union level in the third Anti-Money Laundering Directive as well as in the Regulation on cash controls which have been applicable since 2007 in all Member States. The Regulation obliges persons entering or leaving the EU and carrying any sum equal or exceeding €10,000 to declare it to the customs authorities. They are entitled to gather information on such cash movements and transmit it to other authorities (also see eucrim 1–2/2007, p. 23). The Third Anti-Money Laundering Directive introduced an obligation for financial and credit institutions to follow money transactions. Moreover, it confirmed many aspects of FIU functions and cooperation set out in the above-mentioned Decision.

The Commission report on the implementation of Decision 2000/624/JHA mainly focuses on the legislative implementation in the EU Member States. The report addresses four issues: (1) definition of the FIU, (2) basis for the exchange of information, (3) modalities for the exchange of information, and (4) data protection. The report concludes that most Member States implemented the main requirements of the Decision but identifies two particular ambits where problems exist: First, further measures and clarifications are necessary in the field of data protection. It is unclear in which way and under what conditions the obtained information may be used and which other authorities, agencies, or departments may have access to the information. The adoption and implementation of the proposed Framework Decision on Data Protection for law enforcement (see eucrim 3-4/2006, p. 63) is expected to achieve more clarity in this field.

The second problem results from the different legal status of FIUs. Whereas some FIUs are administrative entities, others are judicial or law enforcement based. Consequently, the extent to which information can be exchanged differs. In this regard, the Commission recommends considering whether a model Memorandum of Understanding could facilitate information exchange and encourage cooperation among FIUs. The FIU.NET project shall also support op-

erationally efficient cooperation. FIU. NET is a decentralised computer network designed to connect EU Financial Intelligence Units using modern technology and computers to efficiently exchange financial intelligence information.

The Commission report is indicated in the following link:

► [eucrim ID=0703145](#)

The underlying Council Decision 2000/624/JHA can be retrieved here:

► [eucrim ID=0703146](#)

More information about the Egmont group can be found here:

► [eucrim ID=0703147](#)

Money Counterfeiting

European Central Bank Comments on Commission Proposal for Better Euro Protection

On 17 December 2007, the European Central Bank (ECB), at the request of the Council, gave an opinion on the Commission proposal for a Council Regulation amending Regulation (EC) No. 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting (see eucrim 1-2/2007, p. 24). The proposal aims at facilitating the protection of the euro by allowing the transport of counterfeits among competent authorities. Furthermore, it would oblige financial institutions to check the authenticity of euro banknotes and coins before putting them back into circulation. The ECB mainly suggests the following amendments:

(1) the ECB and the national central banks should, as a rule, be entitled to receive samples of banknotes used or retained as evidence in criminal proceedings;

(2) the scope of the definition of institutions which would be obliged to check the authenticity of the euro should be broadened, including, for example, retailers and casinos;

(3) a fixed deadline for the implementation of the new law should not be set in the Regulation but instead it should be left to the ECB and the Commission to lay down deadlines in the procedures underpinning the new obligations.

► [eucrim ID=0703148](#)

Euro Coin Counterfeiting in 2007

On 10 January 2008, the Commission released the latest figures on counterfeit euro coins in 2007. It reported that last year a total of 211,100 counterfeit euro coins were taken out of circulation. Compared to the 75 billion genuine euro coins which circulate in the EU, the number of counterfeits is very small but it increased 29 % compared to 2006. However, this rise is smaller than in the previous years. The 2-euro coin remains, by far, the most counterfeited coin. The amount of withdrawn coins still remains lower than the sum of counterfeit coins detected in the Euro area countries before the introduction of the uniform currency in 2002. To a large extent, the recorded increase is also the result of stronger efforts by the competent authorities. The protection of the euro against counterfeiting is the responsibility of the relevant national authorities, the European Central Bank, Europol, and the Commission/OLAF.

The support of Europol especially allowed the dismantling and closing of two illegal mint shops in Italy and Spain in 2007. These and other operations could prevent the introduction into circulation of approx. 90,000 counterfeit euro coins.

With regard to the situation, the Commission stated that counterfeit euro coins are not a significant cause of concern for the public. Nevertheless, it recommended that more efforts should be undertaken to protect the euro against counterfeiting. In this context, the Commission pointed out its latest legislative proposal that obliges financial institutions to ensure that euro banknotes and coins are authentic before putting them back into circulation (see aforementioned news item).

By *Lina Schneider*

► [eucrim ID=0703149](#)

Euro Banknote Counterfeiting in 2007

At the beginning of 2008, the European Central Bank (ECB) released its biannual information on euro banknote counterfeiting. On this occasion, Europol also took stock of its activities against euro counterfeiting in 2007. The ECB figures revealed that nearly 600,000 euro bank-

notes were withdrawn from circulation in 2007. The €50 banknote is the most counterfeited one. The amount of counterfeit euro banknotes identified as being in circulation remained stable in 2007 in comparison to 2006.

Europol – also the Central Office of the EU for combating euro counterfeiting – had a considerable impact on hampering the entry into circulation of counterfeit euros. With the support of Europol, national authorities were able to arrest more than 500 suspects. Moreover, 19 illegal print shops and two illegal mint shops were dismantled in Europe as well as in Bosnia and Herzegovina, Colombia, and Peru.

By *Lina Schneider*

► [eucrim ID=0703150](#)

Non-Cash Means of Payment

By *Lina Schneider*

Practice: Operation "PIPAS" Successful in Dismantling Credit Card Fraud Gang

In cooperation with Europol, Spanish authorities arrested 99 persons from an international credit card fraud network at the beginning of 2008. In addition, eight clandestine print shops producing counterfeit cards and three print shops producing faked identity documents were discovered. The equipment of the criminal network was confiscated. The perpetrators used false keyboards, micro cameras, and other tools in order to manipulate payment terminals in Spain and especially in the area of the Mediterranean coast. The obtained data was used to produce counterfeit payment cards that have been utilized for illegal cash withdrawals in Spain and seven other European countries.

Europol facilitated information exchange, coordinated the operation, and provided strategic analysis. During the raid, Europol analysts provided on-the-spot analytical support with mobile offices. As payment card fraud has become an important cross-national phenomenon in Europe, coordination and centralisation at the European level is considered indispensable.

► [eucrim ID=0703151](#)

Counterfeiting and Piracy

Intellectual Property Owners Suffer Setback at European Court of Justice

On 29 January 2008, the European Court of Justice (ECJ) delivered its judgment solving the row between the Spanish music association “Promusicae” and the Spanish Internet service provider “Telefonica” (Case C-275/06; see *eucri*m 1-2/2007, p. 25). The Court agrees with the views of Advocate General Kokott and Telefonica that Community law does not require Member States to legislate an obligation for Internet service providers to disclose personal data in civil proceedings – data that could have been used by Promusicae to take legal action against persons who had allegedly illegally distributed copyrighted songs. Spanish law only allows the communication of the data for purposes of criminal prosecution, public security, or national defence.

The Court rules that neither does EC data protection law (Directive 2002/58 on privacy and electronic communications) *forbid* Member States to lay down an obligation to disclose personal data in the context of civil proceedings nor do EC directives on the protection of industrial property, in particular copyright, *force* Member States to lay down such an obligation. Hence, it is up to the Member States to reconcile the requirements of two conflicting fundamental rights positions, namely the right to respect for private life (which includes protection of personal data), on the one hand, and property rights (which include protection of intellectual property), on the other hand. The ECJ finally notes the following:

“the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in

conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality”.

The Court’s judgment came amid calls from the record industry and politicians for forcing Internet service providers to disconnect customers who illegally download music.

➤ *eucri*m ID=0703152

Practice: First Joint Success of EU and US Customs in Protecting IPR Infringements

On 22 February 2008, the European Commission Taxation and Customs Union Directorate General (TAXUD) and U.S. Customs and Border Protection (CBP) announced the results of their first joint operation combating counterfeit integrated circuits and computer networking equipment. The operation was carried out in November and December 2007 and resulted in the seizure of over 360,000 counterfeits of the said material.

Integrated circuits are used in a wide range of applications, including automobiles, aircraft, computers, telecommunications, medical devices, and consumer electronics. Therefore, counterfeits do not only harm the manufacturers’ rights but also pose a threat to safety and public security. The operation against counterfeit computer hardware implements the targets set out in the 2006 EU-US Action Strategy for the Enforcement of Intellectual Property Rights.

➤ *eucri*m ID=0703153

More information about the U.S. Customs and Border Protection can be found here:

➤ *eucri*m ID=0703154

Organised Crime

By Lina Schneider

Slow Transposition of Framework Decision on Confiscation of Crime-Related Proceeds

In its report delivered on 17 December 2007, the Commission regrets that many EU Member States still have not

transposed the Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities, and property into their national law.

The Framework Decision aims to ensure that all Member States have effective rules governing the confiscation of crime-related proceeds. It provides that each Member State take the necessary measures to enable it to confiscate the following:

(1) instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year or of property, the value of which corresponds to such proceeds (Art. 2); and
(2) property belonging directly or indirectly to persons convicted of certain serious offences, in particular where the property in question has been obtained as a result of criminal activities (Art. 3).
On balance, the Commission is utterly unsatisfied with the progress made in the EU-27 in transposing the Framework Decision. At the time of the report, only ten Member States had transposed the Framework Decision in the main, six had transposed it in part, and five were in the process of preparing the relevant legislation. As is the case for other reports, the Commission is struggling with some Member States that have not even submitted information about their national measures.

It invites all Member States to send further relevant information about the transposition and requests those who still have not adopted adequate legislation to do so as quickly as possible.

➤ *eucri*m ID=0703155

Follow-Up on Confiscation Measures

At the end of 2008, the Commission intends to pass a Communication with a deeper analysis on European measures for the confiscation and recovery of property obtained through criminal activity as well as recommendations on better police and judicial cooperation in this field. A contribution to this Communication was provided by an EU conference on cooperation between national asset recovery offices. The conference was organised by Europol, together with Belgium, Austria, and the financial support of the Commission; it took place

in Brussels from 6-7 March 2008. The swift exchange of intelligence on the location of criminals' assets among the competent national offices was of particular interest. In this context, reference was also made to the new EU legislation on the establishment of a network of National Asset Recovery Offices (see the news below under "Law Enforcement Cooperation").

► eucrim ID=0703156

The identification, tracing and confiscation of instrumentalities and the proceeds from crime is regarded as an essential tool in combating organised crime. More background information on the common EU approach to the fight against organised transnational crime can be found via the following link:

► eucrim ID=0703157

Illegal Employment

By Lina Schneider

Commission Communication on Fight against Undeclared Work

On 14 October 2007, the European Commission published the communication "Stepping up the fight against undeclared work" (COM(2007) 628). The text underlines the policy relevance of reducing undeclared work, illustrates its causes, and tries to encourage Member States to increase their efforts to reduce undeclared work. The Communication also contains a series of good practices in various Member States tackling the phenomenon of undeclared work. Of interest from a criminal point of view is the Commission's description of some Member States' measures of surveillance and sanctioning.

Regarding the complexity of the phenomenon, the Commission recommends that Member States take a multifunctional approach of prevention, law enforcement, and sanctions. The Commission, inter alia, proposes investigating the feasibility of a European platform for cooperation between labour inspectorates and other enforcement bodies, such as those in charge of tax or immigration. Furthermore, workers' and employers' representatives should actively be involved in the fight against undeclared work.

The Communication on undeclared work can be seen as the second component of the Commission in tackling illegal employment, after the presentation of a draft directive to introduce and enforce sanctions against employers of illegally staying third-country nationals (on the latter, see eucrim 1-2/2007, pp. 29-30). Although the Commission may not have made a legislative proposal, follow-up measures on undeclared work may have criminal law implications.

► eucrim ID=0703158

Racism and Xenophobia

MEPs Not Completely Satisfied with Current Text of FD on Combating Racism and Xenophobia

On 29 November 2007, the European Parliament (EP) adopted a report of French MEP Martine Roure proposing amendments to the tabled compromise text on a Framework Decision (FD) on combating racism and xenophobia. The Council decided to re-consult the EP when a compromise on the FD under the German Presidency was found in 2007, after years of difficult negotiations (see eucrim 1-2/2007, p. 30). The EP already adopted a first opinion on 4 July 2002; however, it referred to the Commission's initial proposal of 2001 which differs substantially from the compromise. In its legislative resolution of 2007, the EP mainly regrets the substantial restriction in scope by the Council.

MEPs suggest that Member States shall not exempt from criminal liability speeches or behaviour liable to stir up hatred. Respect for freedom of religion shall not hinder the effectiveness of the Framework Decision. Furthermore, the EP advocates including insults and being a leader of a racist group into the lists of offences, which was the case in the initial proposal of the Commission. The majority of MEPs also thinks that the Member States should go further after the revision of the FD which is foreseen 3 years after its implementation. MEPs would like to clarify that the provisions of the FD only maintain a minimum protection. The final decision of the Council is still pending.

► eucrim ID=0703159

Procedural Criminal Law

Procedural Safeguards

Proposal for Better Protection of Defendants Tried in Absentia

In January 2008, seven EU Member States (Slovenia, France, the Czech Republic, Sweden, Slovakia, the United Kingdom, and Germany) drafted a Framework Decision on the enforcement of judgments *in absentia*. The initiative seeks to establish uniform rules in procedures of mutual recognition of judgments given in criminal proceedings at which the defendant was not present (judgments *in absentia*).

The background is that all instruments on mutual recognition currently in place give the possibility to refuse the execution of foreign judgments handed down in the absence of the defendant, but each instrument provides for different conditions under which to do so. As a result, divergence hinders the work of practitioners, hampers judicial cooperation, and contradicts the principle of legal certainty. Therefore, the proposal would like to modify in a uniform way the Framework Decisions (1) on the European Arrest Warrant, (2) on mutual recognition of financial penalties, (3) on mutual recognition of confiscation orders, and (4) on the mutual recognition of judgments imposing custodial sentences or measures involving deprivation of liberty. It shall serve as a basis for future instruments of the same direction.

The seven Member States propose that, as a rule, the executing judicial authority may refuse to enforce or execute a decision rendered in absentia. By way of derogation, this possibility ceases to exist in the following cases:

- if the person was summoned in person or informed of the hearing which led to the decision rendered in absentia in accordance with the national law of the issuing State via a competent representative and in due time and was informed about the fact that such a decision might be handed down if the person does not appear for the trial; or
- if, after being served with the decision rendered in absentia and being informed about the right to a retrial and to be

present at that trial, the person expressly stated that he/she did not contest the decision or did not request a retrial within a defined timeframe.

For the European Arrest Warrant, an additional provision takes into account the situation where the person has not been served with the judgment in absentia, but is notified after the surrender.

The initiators consider the draft a strengthening of procedural safeguards within the EU. However, they stress that the proposal aims only to harmonize the definition of the grounds for refusal in cases of judgments in absentia but does not harmonize the national law concepts of judgments rendered in absentia or rules on the right to a retrial.

German Justice Minister Brigitte Zypries noted: "It is a miracle that the big trio of Germany, Great Britain, and France are all on the same position in this issue, which makes it the more likely that the rules will be implemented." Southern European countries such as Italy, France, Portugal, or Spain allow in absentia trials, but this is not the case, for example, in Germany and Britain which were the countries pushing for the accord.

► [eucrim ID=0703160](#)

Data Protection

Framework Decision on Data Protection – State of Play

At the Justice and Home Affairs Council meeting on 8-9 November 2007, a general approach was reached on the proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (FD DPPJCC). In the meantime, the recitals have been further revised and the legislative quality of the provisions further refined. In the light of the changes made to the original text during the negotiations, the Council decided to re-consult the European Parliament pursuant to Art. 39 TEU. The EP was invited to deliver its opinion by 1 April 2008. It already delivered two opinions on the drafts on 27 September 2006 and 6 June 2007. Furthermore, the proposal is still subject to general parliamentary scrutiny res-

ervations by some Member States. For the development of the FD DPPJCC, see also [eucrim 3-4/2006](#), pp. 63-64 and [eucrim 1-2/2007](#), p. 31. The latest Council draft of December 2007 is indicated in the following link:

► [eucrim ID=0703161](#)

EU and USA Discuss Common Data Protection Rules

High-ranking officials of the EU and the USA are negotiating a paper which should regulate all future exchanges of personal data from the EU to the US in the field of security. Negotiations happen in a secret committee named "High Level Contact Group on data protection". The group is attempting to define "data protection principles for which common language has been developed". The US side is still unsatisfied with the EU's so-called "adequacy test". The principle of restricting the exchange of data to third countries stems from the EC data protection Directive 95/46 which stipulates that transfer of personal data to a country outside the European Economic Area is prohibited unless that country ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. The "adequacy test" is likely to be introduced into the above-mentioned Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, too. A conflict with the USA has occurred since the USA has no comprehensive data protection legislation and its system has been primarily based on self-regulation.

The documents produced by the EU-US High Level Contact Group are confidential and not open to the public. More information can be found at the following website of Statewatch:

► [eucrim ID=0703162](#)

Passenger Name Record (PNR) – Plan for an EU System

After the EU had concluded the controversial deal with the USA allowing law enforcement to process and analyse Passenger Name Record (PNR) data which are provided by air carriers, Commissioner Franco Frattini, on 6 November 2007, tabled a proposal (COM(2007)

654) to introduce an equivalent system within the European Union. Most EU Member States' governments and the Commission consider the use of PNR data necessary to prevent and fight terrorist offences and organised crime. As a result, "the proposal aims to harmonise Member State's provisions on obligations for air carriers operating flights to or from the territory of at least one Member State regarding the transmission of PNR data to the competent authorities for the purpose of preventing and fighting terrorist offences and organised crime".

The essential contents are as follows:

- **Obligation:** Air carriers would be obliged to make available a set of 19 pieces of air passenger data which they collect and process in their reservation systems. These pieces are listed in an Annex which is equal to that listed in the EU-US agreement. The data include passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences, etc.

- **Geographical scope:** the obligation is limited to flights from third countries to the EU and from the EU to third countries.

- **Sanctions:** If an air carrier fails to meet the obligation – e.g., transmits no, incomplete, or erroneous data – Member States are required to provide "dissuasive, effective and proportionate sanctions", including financial penalties, against the air carriers. In case of repeated serious infringements, these sanctions shall include measures such as the immobilisation, seizure, and confiscation of the means of transport, or the temporary suspension, or withdrawal of the operating licence.

- **Use:** The use and purpose of the collection of the PNR data is confined to the prevention of and fight against terrorism and "other serious crime, including transnational organised crime", hence purposes of the third pillar. This is why the Commission considers a Framework Decision (Art. 34 para. 2 b TEU) to be the appropriate legal basis. The PNR data should mainly make it possible for law enforcement authorities to identify unknown high-risk passengers, allowing for a secondary screening upon their arrival and refusal of entry.

• **Decentralised system:** The Commission does not propose a centralised pan-European database because – as the Commission interestingly argues – “[this] would have a high risk of failure because of the vast amounts of data that a centralised unit would receive...”. Instead, the Commission suggests that “Passenger Information Units” (PIUs) be set up in each Member State. They would be mandated to collect the PNR data from the air carriers, analyse them, and carry out risk assessments of the passengers. The PIU may then forward the PNR data to other law enforcement authorities of the Member State.

• **Exchange of information:** PIUs may share the PNR information with law enforcement authorities in other Member States. This is to be done on a case-by-case basis and if “necessary” for the prevention or combatting of terrorist offences and organised crime.

• **Push method:** As a general rule, the so-called “push method” applies instead of the “pull method”. The difference is that in the case of the “push method” the data are transmitted by the carriers of the national authorities whereas in the “pull method” the national authority obtains access to the reservation system of the air carriers and takes the data.

• **Retention period:** The Commission proposes that PNR data be kept for 5 years (in the EU-US agreement it is 7 years) in the database at the PIU. Afterwards the data can be retained for a further 8 years in a “dormant” database.

• **Data protection:** According to the Commission, protection of the PNR data should be governed by the – yet to be adopted – Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation (FD DPPJCC, see above).

• **Transfer to third countries:** The transfer of PNR data to countries outside the EU is allowed under certain conditions.

• **Sensitive data:** The Commission proposal clarifies that the retention of personal data which reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or data concerning the health or sex life of the individual concerned (so-called “sensitive data”) is prohibited.

► eucrim ID=0703163

The Commission proposal on the introduction of an EU-wide PNR scheme is part of a package of other measures which have been proposed in order to enhance the EU’s fight against terrorism. For details, see the following link.

► eucrim ID=0703164

The proposal on the PNR largely mirrors the agreement which was concluded between the EU and the USA on the use of PNR data (see in this respect eucrim /2007, pp. 9-11; 3-4/2006, pp. 48-49; 1-2/2006, pp. 3-4).

First Assessment of the New PNR Proposal in the Council

At the ministerial level, a first introductory discussion on the above-mentioned Commission proposal for a Framework Decision on the use of PNR for law enforcement purposes was held at the informal meeting of the Justice and Home Affairs Council in Brdo pri Kranju/Slovenia in January 2008. The ministers confirmed political support for the project while stressing the need to ensure a high level of personal data security. Taking into account the guidelines by the ministers, the proposal will now be further negotiated in the Council working groups. The issue of retaining sensitive data could become controversial. According to newspaper reports, some Member States, such as the UK, Cyprus, Denmark, Estonia, Italy, and Sweden, oppose the clear ban in the Commission proposal and favour the inclusion of these data in the PNR scheme.

It will be exciting to see whether the Council will “push through” the law before the entry into force of the Lisbon Treaty. At the moment, the European Parliament (EP) is only consulted and does not have the possibility to block the law. If the Lisbon Treaty enters into force, the EP will have the right to veto because the co-decision procedure would apply. The EP has already taken a critical stance on the PNR scheme (see below).

► eucrim ID=0703165

Critical Assessment by the European Data Protection Supervisor

The above-mentioned Commission proposal on the use of Passenger Name Record data has neither justified the

necessity of the intended measures nor demonstrated their proportionality. Furthermore, there is a lack of clarity in many aspects of the proposal. These are the key findings of a very critical assessment of the draft by the European Data Protection Supervisor (EDPS) Peter Hustinx.

In particular, in its assessment of 20 December 2007, the EDPS focuses on four points and draws the following conclusions:

• **Legitimacy of the proposed measures:** The EDPS tested in detail the proportionality and necessity of the proposed EU PNR scheme, in accordance with Article 8 of the EU’s Charter of Fundamental Rights (which expressly guarantees the right to the protection of personal data) and Articles 5 and 8 of the Council of Europe Data Protection Convention No. 108. The EDPS concludes that the Commission has not circumscribed and justified either the necessity or the proportionality of a profiling system based on the processing of PNR data by the law enforcement.

• **Applicable legal framework:** The EDPS notes the mixed nature of the proposal, involving both the private sector and law enforcement. Thus, different rules may apply, i.e., sui generis rules of the proposal, rules of the first pillar Data Protection Directive 95/46/EC, or those of the future third pillar Framework Decision on data protection (FD DPPJCC). Therefore, the EDPS requests clarification of which data protection rules apply at which stages of the processing.

• **Quality of recipients:** Similarly, the EDPS deplores the lack of specification with regard to the quality of recipients of personal data collected by airlines. It is, for instance, not clear under which conditions the Passenger Information Units will exercise their powers. Furthermore, the Commission proposal seems to allow any national law enforcement authority (defined as “competent authority”) to receive PNR data.

• **Transfer of data to third countries:** Since agreements with third countries on the transfer of PNR data are already in place (with the USA and Canada), the EDPS calls for having a coherent system subject to a harmonised level of protection.

In addition, the EDPS evaluates other relevant aspects of the proposal (e.g., the quality of data or the data retention period) that require further precision or a better taking into account of data protection principles. All in all, the EDPS recommends not adopting the Framework Decision in its present form since it is not in line with Article 8 of the Charter of Fundamental Rights. He also recommends waiting till the entry into force of the Lisbon Treaty so that the European Parliament can have a full say on the instrument.

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National Data Protection Authorities Opposed

The Commission proposal on the use of PNR data for law enforcement purposes was also the subject of a thorough examination by the Data Protection Commissioners of the EU Member States under the auspices of Article 29 Data Protection Working Party and the Working Party on Police and Justice. Like the EDPS, parliamentarians and many other stakeholders, the Working Parties above all, deny the necessity of a new EU legislation on the retention of PNR data. In their joint opinion of 18 December 2007, they particularly question the added value in relation to the existing possibility to use advance passenger information data (API data). API data, which consist of certain pieces of information on passengers (e.g., names, type of travel document used, departure and arrival time, etc.), are already communicated by air carriers on the basis of Directive 2004/82/EC by means of which national authorities are supported in border controls and the detection of illegal immigration. The authors of the opinion wonder whether API data may be sufficient in the identification of terrorists and criminals, especially against the background that no assessment has been carried out so far as regards API data.

Further issues of the opinion which should be highlighted here are as follows:

- It has been criticised that the proposal does not give any details on the rights of passengers and does not specify any safeguards.

- The reference to the Framework Decision on data protection processed in the framework of police and judicial cooperation in criminal matters (see above) is considered inadequate since the FD would only cover the exchange of information between law enforcement authorities and not the transfer of data by (private) air carriers.

- The pieces of data in the annex are too extensive and the retention period of 13 years is disproportionate.

- As regards the filtering out of sensitive data, the national data protection authorities or joint data supervisory bodies must be involved.

- As regards the approach of a decentralised data processing system, drawbacks must be taken into account because of diverging data protection levels and varying technical systems in different Member States. Hence, it will be indispensable for the EU to put in place consistent safeguards.

On balance, the opinion urges the EU legislator not to forget the overall context of the PNR proposal which comes on top of the storage of fingerprints of all citizens when applying for their passports to the retention of all telecommunication traffic data in the EU. The joint opinion concludes that “if the current version of the draft Framework Decision is implemented, Europe would take a great leap forward towards a complete surveillance society making all travellers suspects.”

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Article 29 Working Party already opposed the introduction of an EU PNR regime in the pre-run of the Commission proposal. In an answer of 31 January 2007, prepared for the Commission’s impact assessment of the proposal, it was remarked: “[...] the Article 29 Working Party has not seen any information presented by the Commission that would substantiate the pressing need to process PNR data for the purpose of preventing and fighting terrorism and related crimes, or law enforcement.”

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The Working Party was established by Article 29 of the EC’s Data Protection Directive 95/46. It is made up of the Data Protection Commissioners from the EU Member States, together with a

representative of the EU Commission. The Working Party is independent and acts as an advisory body. The Working Party seeks to harmonise the application of data protection rules throughout the EU, and it publishes opinions and recommendations on various data protection topics. It also advises the EU Commission on the adequacy of data protection standards in non-EU countries.

The Working Party on Police and Justice is a similar body which was created in the framework of the Conference of the European Data Protection Authorities. It monitors and examines developments in the area of police and law enforcement as regards the protection of the individuals’ personal data. It also issues comments and opinions on data protection topics.

First Reactions Issued by the European Parliament

The European Parliament has not yet adopted an official opinion on the above-mentioned Commission proposal. However, a first reaction can be found in its resolution of 12 December 2007 “on the fight against terrorism”. There, the EP states as follows:

“[The EP] considers that any form of ‘profiling’ in counter-terrorism measures is unacceptable; regards it as unacceptable to pursue an EU-PNR system without a complete evaluation of the EU-US and EU-Canada PNR agreements, in particular their impact on reducing the threat and increasing security as well as their impact on privacy and civil liberties.” Like the EDPS, the EP questions the necessity and proportionality of the proposed EU PNR scheme.

►eucrim ID=0703169

When the Commission tabled its proposal, the political groups of the EP piped up. The majority of the groups took a very critical stance on the proposal. Most groups question the need for a new legislation on the use of PNR for law enforcement purposes.

The Socialist Group (PSE), the second largest political group in the EP, is of the opinion that the “EU plans to match passengers with terrorist profiles face rough ride”. It said “it could not support the plans in their present form for collection of information about airline pas-

sengers”. The Socialist Group also noted that “it was concerned about uncertainty as to how the new data would be protected and it called for an explanation of the need to keep such data for 13 years.”

➤ [eucrim ID=0703170](#)

Liberal Dutch MEP Sophie In't Veld (ALDE Group), who will examine the Commission proposal in more detail for the EP as the EP's rapporteur on the dossier, reflected:

“We should not be compounding the mistakes of the July PNR agreement with the US by introducing our own – at least until there is serious and irrefutable proof that such mass exchange of personal data is resulting in the arrest of terrorists. (...) I remain adamant that PNR data should not be used as an indiscriminate form of data profiling. But evidence points to the contrary as the US authorities are still able to \$pull\$ all sorts of information from EU carriers' databases without prior permission and without adequate safeguards on the end users or length of data retention.”

➤ [eucrim ID=0703171](#)

MEP Kathalijne Buitenweg from the Greens commented:

“Today's proposal on the retention of air passenger data in the EU seems unnecessary and incoherent. The Commission has made no attempt to justify why these measures are necessary and why the existing legislation is not sufficient – an existing Directive on passenger data from 2004 has yet to be fully implemented! It is also incoherent to propose a European-level decision on data storage, while leaving the issues of data protection and how the data should be processed fully to national legislators.”

➤ [eucrim ID=0703172](#)

A rather favourable comment came from the conservatives. German MEP Manfred Weber from the EPP-ED Group, the largest political group in the EP, noted on the PNR: “Such a database is a valuable contribution to the war on terror. However, if these are to be purely national databases, the question is why national parliaments have not started discussing and agreeing on them. There is no need for a European framework for national databases.”

➤ [eucrim ID=0703173](#)

Other Reactions

Beyond the above-mentioned statements by the data protection supervisors and the parliamentarians, highly critical voices have also come from stakeholders in civil society, such as the airline industry and NGOs. Ulrich Schulte-Strathaus, Secretary-General of the Association of European Airlines (AEA), stated: “Commissioner Frattini's proposed decentralised system means that our carriers will have to comply with 27 different national data collection systems. We are talking about an operational and technical nightmare – and the Commission totally ignores the financial implications for the airline industry, which we haven't even started assessing yet.” He also pointed out that the proposed PNR scheme leads to discrimination since not all means of transport are covered.

➤ [eucrim ID=0703174](#)

Tony Bunyan from Statewatch, a British civil liberties group, declared:

“This is yet another measure that places everyone under surveillance and makes everyone a “suspect” without any meaningful right to know how the data is used, how it is further processed and by whom.” He also said: “Unless stopped in its tracks it is just a question of time before the scope of the EU-PNR scheme is extended to cover all crime, flights inside and between Member States and sea, land and rail travel as well.” Statewatch provides an overview of the EU PNR measures, including the latest developments, at the following link:

➤ [eucrim ID=0703175](#)

Ne bis in idem

New Cases on ne bis in idem

At the moment, two interesting cases are pending before the European Court of Justice which promise further clarification of the interpretation of Art. 54 of the Convention Implementing the Schengen Agreement. In one case, a German court referred to the ECJ the question of whether Art. 54 can be applied if the penalty imposed on a defendant could never be enforced under the laws of the sentencing contracting party (Case C-297/07, “Bourquain”).

➤ [eucrim ID=0703176](#)

In another case, an Austrian Court would like to know from the ECJ whether Art. 54 precludes prosecution of a suspect in the Republic of Austria for the same acts for which criminal proceedings in the Slovak Republic were discontinued after its accession to the European Union. This had been effected by means of a binding order on the part of a police authority, thus suspending the proceedings without further sanctions to be taken after examination of the merits of the case (Case C-491/07, “Turansky”).

➤ [eucrim ID=0703177](#)

Victim Protection

Ruling against Italy for Non-Transposition of Crime Victims Directive

The Commission was successful before the European Court of Justice in bringing about a judgment against Italy for not having implemented Council Directive 2004/80/EC of 29 April 2004 relating to compensation for crime victims. The Court rendered its judgment on 29 November 2007. The Directive was required to be transposed by 1 January 2006. Italy claimed in vain that the transposition of the Directive's provisions was on track. On 18 July 2007, the Court ruled against Greece for the same reasons (see [eucrim 1-2/2007](#), p. 35).

➤ [eucrim ID=0703178](#)

Witness Protection Commission Decides Against Harmonisation of Witness Protection Rules

In a report of November 2007, the Commission vouches for presently not having binding EU legislation in the area of protection of witnesses and collaborators with justice (COM(2007) 693). The report represents an impact assessment of a possible legislative proposal which was once mooted in this area. The paper takes stock of the state of play on legislation and general practice at the national, European, and international levels. This is followed by an analysis of problems, objectives, and possible policy options.

The Commission notes that legislation in the EU Member States is very heterogeneous. Some Member States do not

have legislation on witness protection; other Member States either regulate it in separate acts or as part of their code of criminal procedure. Different legislative and administrative structures also exist between Member States when it comes to operative rules of witness protection programmes. Differences are equally large as regards “collaborators with justice”, even though nearly all of the countries concerned are aware of the possibility for the judge to mitigate the sentence if the offender helps the police/judicial authorities to clarify their or other crimes.

At the European and international levels, only informal cooperation mechanisms on witness protection exist. Worthy of mention is the European Liaison Network which is coordinated by Europol and gathers the heads of specialist witness protection units of the EU-27, plus those of several non-EU countries and international organisations. The Network exchanges information on best practices and develops guidelines in the field of witness protection but does not carry out operational activities.

The Commission offers three policy options:

- (1) Maintaining the status quo but increasing efforts of coordination among the EU Member States;
- (2) Harmonizing the EU Member States’ legal systems by setting minimum standards generally in a binding instrument;
- (3) Establishing a special binding EU legislation focusing on the cooperation between Member States in cases of relocation of protected persons.

The Commission discards the plan for a binding EU legislation since most EU Member States are currently reluctant to accept this option. In this context, the Commission cites the example of the Council of Europe which has been failing so far to reach agreement on a binding convention regarding witness protection. The Commission would like, for the time being, to pursue the track of intensified cooperation between the Member States in the field of witness protection and that of collaborators with justice.

Background: First efforts at the EU level on the protection of witnesses and persons who collaborate with law enforce-

ment began in the mid-1990s. This was closely connected with the EU action geared towards a more effective fight against organized crime. Preparatory work for a binding EU legislation on the protection of witnesses date back to 2004.

►eucrim ID=0703179

Freezing of Assets

By Dr. Frank Meyer

This section follows up on the introduction to the subject published in eucrim 3-4/2006, pp. 66-68. The overview concluded with the presentation of the most important and, then, most recent cases before European Community Courts (in particular, before the Court of First Instance – CFI) addressing legal problems related to terrorist blacklists maintained by the EU. The subsequent section provides an update on court proceedings that have taken place in the meantime.

Case OMPI – EU Changes Strategy for Provision of Statements of Reasons

The initial outline concluded with the OMPI case (T-228/02) before the Court of First Instance (CFI). The Iranian resistance group OMPI, which had been included in a list based on EC Regulation No. 2580/2001 and maintained autonomously by the EC institutions, achieved an annulment of the Council Decision with regard to its listing, for want of a sufficient statement of reasons. The Court found that a statement of reasons must be supplied to individuals or entities at the time of listing, as required by Article 253 of the EC Treaty (TEC). Instead of removing OMPI from the list, the Council subsequently provided a sufficient statement of reasons and replaced the annulled Council decision by subsequent Decision 2006/379/EC of 29 May 2006. As a consequence, OMPI remains on the list and its assets frozen.

The group lodged an action against this decision before the CFI, seeking partial annulment of Council Decision 2007/445/EC of 28 June 2007 (repealing Decisions 2006/379/EC and 2006/1008/EC) which maintained the applicant on the list of the persons, groups, and en-

tities to whom a freezing of funds and other financial resources applies (Case T-256/07).

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The subsequent provision of a statement of reasons became the main remedy on which Council relied in order to comply with the requirement of said CFI judgment with respect to the affected persons and institutions, who/which were already on the list. As regards new listings, the Council has adopted a proactive approach. Aggrieved individuals and institutions now receive a statement of reasons justifying the listing and identifying the main sources of information underlying the respective Council decision.

Cases Sison & Al Aqsa – CFI Annuls Council Decisions

Prior to the aforementioned change, the CFI annulled yet another Council decision, in so far as it concerned the applicants, for similar reasons as those in the OMPI case. On 11 July 2007, the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in the Sison case (T-47/03), in so far as it concerned the Philippine citizen Mr. Sison who had been listed since 2002. The CFI held that his action for annulment of the Council Decision keeping his name on the list was justified as he had not been supplied with a statement of reasons and thus suffered a serious impairment of his right to bring an action before a court.

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In the Al-Aqsa case (T-327/03) was decided on the same day as the above-mentioned judgment in the Sison case; the CFI annulled for similar reasons Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Al-Aqsa (which describes itself as an Islamic social welfare foundation governed by Netherlands law whose main objective is the provision of assistance to Palestinians living in the territories occupied by Israel and in the Gaza strip). The court found that the Council Decision did not adequately state the reasons for listing Al-Aqsa.

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Despite their success before the CFI, the Council, however, refused to remove the names of Sison and Al Aqsa from the list after a new review process. The most re-

cent Council Decision of 20 December 2007 confirmed their listing.

► [eucrim ID=0703183](#)

Sison and Al Aqsa have therefore applied anew to the CFI and brought actions to partially annul the Council Decision (Cases T-341/07, T-348/07 respectively).

Cases PKK & Kongra-Gel – CFI Confirms Settled Case Law

In the cases PKK (T-229/02) and Kongra-Gel (T-253/04), the CFI annulled Council Decision 2002/460/EC of 17 June 2002 and Council Decision 2004/306/EC of 2 April 2004, respectively, in so far as they concerned the applicants. In both rulings, the CFI refers to the prior judgments in the cases of OMPI and AL-Aqsa as settled case law. The obligation to state reasons provided by Article 253 EC as elaborated by these decisions had not been satisfied in the circumstances of the present cases. Both judgments were issued on 4 April 2008.

► [eucrim ID=0703184](#)

Cases Kadi & Al Barakaat – Appeals Pending before the ECJ

With a view to the blacklist established pursuant to EC Regulation No. 881/2002 and, hence, determined by decisions of the UN sanctions committee, two prominent cases have reached their final stages before the European Court of Justice (ECJ). The appeals of Kadi (C-402/05 P) and Yusuf/Al-Barakaat (C-415/05 P) will be decided by the Court within the next few months. The passionate opinions of AG Maduro have considerably raised the stakes for the ECJ. In his emphatic pleas on the rule of law, AG Maduro urged the ECJ to take account of the complete absence of procedural protections at the level of the UN Security Council and refuse the idea of supremacy of the resolutions of the UN Security Council as intimated by the CFI. The judgment of the ECJ in this politically extraordinary sensitive area is awaited with great anticipation. The opinions in the two appeal cases are summarized in more detail in the following:

Case Kadi – The Opinion of AG Maduro

On 16 January 2008, Advocate General (AG) Maduro delivered his remarkable

opinion in the Kadi case. He recommended that the ECJ set aside the judgment of the Court of First Instance of 21 September 2005 and annul the contested Council Regulation No. 881/2002 in so far as it concerned the appellant.

AG Maduro identified four main legal issues, namely (1) the legal basis of the contested Regulation, (2) the jurisdiction of the Community Courts to review whether contested Regulation breached fundamental rights, (3) the question of the appropriate standard of review, and (4) the impact of the contested Regulation on the fundamental rights invoked by the appellant.

Starting with the legal basis of the Regulation, the AG questioned the CFI's opinion that the powers to impose economic and financial sanctions provided for by Articles 60 and 301 TEC do not cover the interruption or reduction of economic relations with individuals within those countries which forced the CFI to rely on the flexibility clause in Article 308 TEC instead which fills gaps in the TEC if no specific legal basis for the furtherance of the Community's objective is available. AG Maduro found this view difficult to reconcile with the wording and purpose of Article 308 TEC in that he strictly circumscribes it as an enabling provision: it provides the means, but not the objective. If one were to exclude the interruption of economic relations with non-State actors from the realm of acceptable means to achieve the objectives permitted by Article 301 TEC, one could not use Article 308 TEC to bring those means back. A measure directed against non-State actors either fits the objectives of the CFSP, which the Community can pursue by virtue of Article 301 TEC, or not. In the latter case, Article 308 TEC would be of no avail. AG Maduro therefore concluded that the CFI's judgment is already vitiated by an error in law for this reason.

Addressing the jurisdiction of the Community Courts afterwards, the AG immersed himself in an extensive review of the relationship between the international legal order and the Community legal order. Starting from the ECJ's landmark ruling in *Van Gend en Loos* of 1963, in which the Court affirmed the autonomy of the Community legal order, he argued that the Community Courts determine

the effect of international obligations within the Community legal order by reference to conditions set by Community law. The obligations under Article 307 TEC, which lays down the priority of pre-existing international treaties vis-à-vis TEC provisions but obliges Member States to take steps seeking to prevent incompatibilities, and the related duty of loyal cooperation flow in both directions: they apply to the Community as well as to the Member States. As Members of the United Nations, the Member States have to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. Article 307 TEC, therefore, cannot render the contested Regulation exempt from judicial review, given the Member States' responsibility to minimise the risk of conflicts between the Community legal order and international law.

AG Maduro also repudiated the recognition of a political doctrine exempting Community measures that implement resolutions which the UN Security Council has considered necessary for the maintenance of international peace and security from judicial review. Although he conceded that extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions, he nonetheless emphasized that the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights.

Ultimately, the Court is not required to refrain from reviewing the contested Regulation due to its alleged effect of constituting an implicit judicial control of Security Council resolutions. The legal effects of a ruling by this Court remain confined to the municipal legal order of the Community. To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public interna-

tional law. The Council's contention that, by reviewing the contested Regulation, the Court would assume jurisdiction beyond the perimeters of the Community legal order is, therefore, misconceived.

On this basis, AG Maduro identified another error in law in the CFI's holding that it had no jurisdiction to review the contested Regulation in the light of fundamental rights that are part of the general principles of Community law.

Having thereby paved the way for a comprehensive review of EC Regulation No. 881/2002, AG Maduro then turned to the alleged breaches of fundamental rights. Dismissing strict *jus cogens* standards (as did the CFI) he argued that the measures at issue are intended to suppress international terrorism and should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, the Court is reaffirming the limits that the law imposes on certain political decisions.

After full review of the alleged infringements, the AG determined that there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected and might nevertheless remain in place indefinitely as a result of a denial of the right to effective judicial protection. He underlined that the right to effective judicial protection holds a prominent place in the Community's legal order. Consequently, subjecting Community citizens to extremely severe sanctions without access to an independent tribunal impairs the essence of that right and is unacceptable in a democratic society. AG Maduro consequently proposed that the court should annul the contested decision in so far as it concerns the appellant.

➤eucrim ID=0703185

Case Al Barakaat – The Opinion of AG Maduro

One week later, on 23 January 2008, the opinion on the appeal of Al Barakaat (C-415/05 P), an international foundation established in Sweden, followed. Based on virtually identical reasoning, AG Maduro concluded that the contested Regulation infringes the right to be heard, the right to judicial review, and the right to property. Consequently, he

proposed that the Court should set aside the judgment of the CFI of 21 September 2005 in the appellant's case and annul EC Regulation No. 881/2002 of 27 May 2002 in so far as it concerns the appellant.

➤eucrim ID=0703186

Case Möllendorf – Land Registry Offices prohibited from Registering Blacklisted Persons as Owners of Real Estate

For the time being, another decision recently rendered by the European Court of Justice on the interpretation of EC Regulation No. 2580/2001 addressing the impact of a listing on private business deserves closer attention. In the Möllendorf case (C-117/06) referred to the Court by the German High Court (Kammergericht) of Berlin, the ECJ ruled on 11 October 2007 that land registry offices are prohibited from registering a blacklisted person as the owner of real estate. One of the three purchasers had been blacklisted after conclusion of the contract with the Möllendorfs (two German sisters who then owned the premises and later initiated proceedings before German courts) but before registration as the owner. The competent land registry in Berlin refused to register said person.

The ECJ now held that real estate constitutes an economic resource falling in the ambit of Article 2 para 3 of EC Regulation No. 881/2002 which must not be made available to blacklisted persons. Moreover, the fact that the listing took place after the conclusion of the contract did not render the exception clause in Article 2a of said regulation applicable. Its scope is limited to financial payments to bank accounts already frozen.

➤eucrim ID=0703187

Council of Europe Slams UN and EU Blacklists

By Julia Macke

Council of Europe Assembly Demands Review of Blacklisting Procedure

The problematic UN and EU blacklists also stirred into action the Parliamentary Assembly of the Council of Europe as

a main protector of human rights, pluralist democracy, and the rule of law in Europe. At its winter session from 21 to 25 January 2008, the review of United Nations and EU blacklisting procedures for terrorist suspects was requested.

According to Resolution 1597 (2008) of 23 January 2008, the Assembly finds that the procedural and substantive blacklisting standards currently applied by the United Nations Security Council and by the Council of the European Union in no way fulfil the necessary minimum standards and thus violate the rule of law and the fundamental principles of human rights as laid down in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

The Assembly especially criticizes the following:

- even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by a particular member;
- the person or group concerned is usually neither informed of the request, nor given the possibility to be heard, nor even necessarily informed about the decision taken;
- there are no procedures for an independent review of decisions taken and for compensation of infringements of rights;
- substantive criteria for the imposition of targeted sanctions are at the same time wide and vague; and
- sanctions can be imposed on the basis of mere suspicions.

It stresses that such practices are unworthy of international bodies such as the United Nations and the European Union and therefore urges both the United Nations Security Council and the Council of the European Union to overhaul the procedural and substantive rules governing targeted sanctions.

In detail, the Assembly demands that the following minimum procedural and substantive standards must be guaranteed to ensure the credibility and effectiveness of targeted sanctions:

- Persons concerned shall be notified promptly and fully informed of the charges held against them, of the decision taken, and the reasons for that decision.

- The fundamental right to be heard and the right to be able to defend oneself against these charges must be guaranteed.
- It must further be possible to have the decision affecting one's rights speedily reviewed by an independent, impartial body with a view to modifying or annulling it.
- A compensation for any wrongful violation of one's right has to be paid.
- In addition, a clear definition of grounds for the imposition of sanctions and applicable evidentiary requirements is indispensable.
- The blacklisting procedure should also be limited in time.
- Attention should further be paid to the issue of remedy.

In order to achieve this aim, the Assembly also calls all Member States of the Council of Europe – especially those who are permanent or non-permanent members of the United Nations Security Council – to use their influence. Inter alia, these States shall establish appropriate national procedures to implement sanctions imposed by the Security Council or the EU Council on their nationals or legal residents, in order to remedy the shortcomings of the procedures at the level of the United Nations or the EU as long as these shortcomings persist.

► eucrim ID=0703188

Reports by Dick Marty as Basis for Resolution 1597

Resolution 1597 (2008) was based on several critical reports by Dick Marty which were published in March and November 2007 and lastly amended in January 2008. Marty therein already attacked the UN and EU blacklists as “completely arbitrary” by saying that the current blacklisting procedures were a “dangerous ongoing erosion of fundamental rights and freedoms, even within the instances mandated to protect and promote them”.

The Swiss Senator Dick Marty, particularly known for his investigations into alleged secret CIA detentions, was appointed as rapporteur of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights in this matter after the motion for a blacklisting resolution in April 2006.

► eucrim ID=0703189

European Parliament MEPs Agree with Blacklist Criticism

On 18 February 2008, European Parliament Members of the Civil Liberties Committee and the Subcommittee on Human Rights debated the previously mentioned CoE Resolution 1757 (2008) in the presence of CoE rapporteur Dick Marty. They criticised the EU terror list and backed both the resolution's recommendations and a proposal to set up an independent body to control how EU Member States decide who is put on the EU blacklist.

Cooperation

Law Enforcement Cooperation

New Web Pages Promote Joint Investigation Teams

Europol and Eurojust took a joint action to promote information on Joint Investigation Teams (JITs). Two web pages (indicated in the link below) particularly aim at raising awareness of the Network of National Experts on JITs. The Network was established in 2005 and consists of at least one expert per Member State. Its main objective is to promote the use of JITs by helping to facilitate the setting up of the teams and assisting in the sharing of experiences, best practices, and dealing with legal considerations. The experts assist practitioners in the Member States set up JITs. The Network as yet has no secretariat of its own, but Eurojust, Europol, and the Council Secretariat provide support.

The web pages present information on (1) the historical background of the network, (2) the role of JITs' national experts, (3) meetings convened to date in the context of these networks as well as (4) general information on JITs, such as their legal basis, links to relevant documents, and the role of Europol and Eurojust in JITs.

The publication of the JITs web pages forms part of the “JITs Project” which is currently being jointly run by Eurojust and Europol. The JITs Project also

encompasses the updating of the Guide to EU Member States' Legislation on JITs (not yet available), the elaboration of a handbook listing practical issues to be dealt with when setting up JITs, and, since 2005, the co-organisation (under the auspices of the General Secretariat of the Council and the Commission) of the annual meeting of the national experts on JITs.

Background: The project is a valuable contribution to the successful implementation of Art. 13 of the 2000 EU Convention on Mutual Assistance in Criminal Matters – the general legal basis for JITs. Art. 13 provides that “by mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. A joint investigation team may, in particular, be set up where:

(a) a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

(b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.”

Paragraphs 6 and 7 reflect the novelties of the concept, i.e., seconded members may take certain investigative measures in the territory of operation and they may request their own competent authorities to take investigative measures without the need of any further request under the traditional mutual legal assistance regime.

Europol also has the possibility to participate in joint investigation teams for a short time after an additional protocol to the Europol Convention entered into force in March 2007 (see new Art. 3a of the Europol Convention and eucrim 3-4/2006, p. 50). Eurojust has the capacity to make an official request to the competent authorities in EU Member States to set up a JIT (cf. Art. 6 and 7 of the Council Decision of 28 February 2002 setting up Eurojust).

► eucrim ID=0703190

Asset Recovery Offices Set to Operate

On 6 December 2007, the Council finally adopted a decision to set up a network of Asset Recovery Offices in the EU (for background information, see eucrim 3-4/2006, p. 69). The Decision obliges Member States to set up or designate Asset Recovery Offices, the task of which is – as a central contact point in an EU Member State – to enable the quick exchange of information that can lead to the tracing and seizure of proceeds from crime and other property belonging to criminals. The decision foresees that information and best practices are exchanged, both upon request and spontaneously. As regards the exchange of information upon request, the offices shall rely on Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities (see eucrim 3-4/2006, pp. 68-69). As a result, particular time limits for the exchange of information as well as limited grounds for refusal contained in the Framework Decision will apply. Member States must ensure that they are able to cooperate fully in accordance with the provisions of the Decision by 18 December 2008.

►eucrim ID=0703191

Customs Cooperation

EU Tightens Relations with Japan in Customs Cooperation

On 1 February 2008, an agreement between the European Community and the Government of Japan on cooperation and mutual administrative assistance in customs matters (CCMAA) entered into force. The agreement aims at simplifying and harmonizing customs procedures for reliable traders and provides the means to fight customs fraud and exchange information on mutual assistance matters. It will also enhance cooperation on the protection of intellectual property rights (see also eucrim 1-2/2007, p. 27). The agreement was published in the Official Journal L 62 of 6 March 2008.

►eucrim ID=0703192

Based on the agreement, an EC-Japan Joint Customs Cooperation Committee

(JCCC) was established. The Committee met for the first time in Brussels on 11 February 2008. The JCCC is responsible for discussing practical ways of working together in order to implement the CCMAA. The first meeting dealt with (1) supply chain security and trade facilitation, progressing towards the mutual recognition of security measures; (2) enforcement of intellectual property rights through customs; and (3) mutual administrative assistance in view of pursuing customs frauds and irregularities.

Similar agreements and cooperation mechanisms as with Japan already exist with the United States, Canada, Korea, Hong Kong, China, and India. The EC aims at concluding further agreements with ASEAN countries. The following link leads to general information on the EC's international customs policy:

►eucrim ID=0703193

Police Cooperation

Council Agrees on Prüm Implementing Decision

As reported in eucrim 3-4/2006, p. 72, seven of the EU Member States (Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Spain) signed the Treaty of Prüm on 27 May 2005, the purpose of which is to step up cross-border cooperation in the field of terrorism, cross-border crime, and illegal migration, especially by means of an automated exchange of DNA, fingerprints, and vehicle registration data. The provisions of the Prüm Treaty relating to the third pillar (among them the said data exchange) are to be integrated into the legal order of the European Union. As a consequence, all 27 EU Member States can apply these provisions of the Prüm Treaty. The legal instrument – a decision pursuant to Art. 34 para. 2c TEU – which will incorporate the provisions into the framework of the EU has not yet been adopted by the Council.

On 30 July 2007, Germany initiated a draft Decision with common provisions deemed indispensable for the administrative and technical *implementation* of the Prüm Treaty (see eucrim 1-2/2007, p. 37). The initiative is based on the

Implementing Agreement of 5 December 2006 concerning the administrative and technical implementation and application of the Prüm Treaty. As with the Prüm Treaty, this agreement was concluded outside the framework of the EU by the above-mentioned states.

The proposed provisions particularly concern the automated exchange of DNA data, fingerprint data, and vehicle registration data. As regards DNA data, for example, the proposal states that Member States should use existing standards for DNA data exchange (the European Standard Set as well as Interpol's Standard Set of Loci), that transmission should take place within a decentralised structure, and that appropriate measures must be taken to ensure confidentiality and integrity, including the encryption.

Details concerning requests and answers, transmission of unidentified DNA profiles, automated searches, and comparisons of unidentified DNA profiles are also set out. The initiative is supplemented by an Annex which contains further technical specifications. The initiative without the Annex was published in the Official Journal C 267 of 9 November 2007 on p. 4 (see following link).

►eucrim ID=0703194

At the meeting of 8-9 November 2007, the Council of the Justice and Home Affairs Ministers agreed on a general approach on Germany's draft Decision implementing the "Prüm rules". The text of the implementing Decision has now been more or less finalised.

►eucrim ID=0703195

A so-called Friends of the Presidency Group discussed the said Annex to the implementing Decision in greater detail. The outcome of the discussions in this group is set out in a Council document of 4 February 2008 which the following link leads to:

►eucrim ID=0703196

EDPS Issues Opinion on Prüm Implementing Rules

On 19 December 2007, the European Data Protection Supervisor (EDPS) published an opinion on the above-mentioned initiative establishing administrative and technical implementing rules for the EU-wide functioning of the Prüm Treaty. It is an own-initiative report since

the EDPS – contrary to prior recommendations of the EDPS – was not officially consulted by the Council. The opinion of the EDPS addresses general points and specific issues of the initiative.

The EDPS, *inter alia*, makes the following observations:

- Even if the initiative widely follows the existing implementing agreement of the signatory states of the Prüm Treaty, the EDPS recommends an open discussion of the envisaged provisions involving the main institutional actors such as the European Parliament and the EDPS.
- The Council decisions incorporating the Prüm Treaty should not enter into force before Member States have implemented the Framework Decision on data protection in the third pillar (see above) as a “*lex generalis*”. Since this Framework Decision will only provide minimal harmonization and guarantees and does not apply to domestic data processing, the tabled initiative should introduce specific tailored data protection rules as “*lex specialis*” and also cover domestic processing.
- There is a lack of transparency of the proposed measures; therefore the EDPS requests the publication of the annex in the Official Journal and the establishment of mechanisms to inform citizens about the features of the system, their rights and how to exercise them.
- The Council should take into account a possible decrease in effectiveness if the system, which currently works with few Member States, will be applied on a large scale in the future (27 Member States with several different languages and different legal orders).
- The role of the national data protection authorities should be strengthened. They should get involved as regards amendments to the implementing rules, the implementation of data protection rules, and the evaluation of data exchange.
- Certain definitions should be revised, such as the introduction of a clear and inclusive definition of personal data.
- The legislator must duly take into account the accuracy of the matching process if data are searched and compared in an automated way.
- Specific emphasis is to be given to the evaluation of data protection aspects. The opinion of the EDPS is not binding on the Council. As regards the draft

Council Decision on the integration of the Prüm Treaty, the EDPS already gave his opinion on 4 April 2007 (see eucrim 1-2/2007, p. 37, 38).

➤ eucrim ID=0703197

European Arrest Warrant

ECJ Treats German Court's Questions on EAW with Priority

On 14 February 2008, the Higher Regional Court (Oberlandesgericht) of Stuttgart/Germany made reference to the European Court of Justice (ECJ) for a preliminary ruling concerning the interpretation of Art. 4 No. 6 of the Framework Decision on the European Arrest Warrant (Case C-66/08, “Szymon Kozłowski”). The questions are raised in proceedings against a Polish national who is presently in custody in Germany, but Polish authorities would like to have him extradited since he committed minor offences in Poland, too. The German Court identified a possible discrimination in the German law which transposes the FD EAW since it lays down different conditions for Germans and other EU nationals if the defendant does not agree on his/her extradition by means of an EAW.

By order of 22 February, the ECJ decided to deal with the case in an expeditious way. However, since the reference was made before 1 March 2008, the Court cannot apply the new urgent preliminary procedure (new Article 104b of the Rules of Procedure of the ECJ, details see above), but must apply the accelerated procedure as provided for in Article 104a. According to Article 104a of the Rules of Procedure, the ECJ can, in essence, give priority to the reference for a preliminary ruling over all other pending cases. However, in contrast to Article 104b, all stages of the normal preliminary ruling procedure are carried out.

➤ eucrim ID=0703198

Statistics for 2006 – Latest Figures

The Council published updated figures on the practical operation of the European Arrest Warrant in the year 2006. The update dates from 3 March 2008 (see also eucrim 1-2/2007, p. 39).

➤ eucrim ID=0703199

European Supervision Order / Transfer of Sentenced Persons

European Supervision Order – Revised Council Text

As reported in eucrim 1-2/2007, pp. 39-40, the JHA Council of September 2007 came to the conclusion to redraft the text on a European Supervision Order in pre-trial procedures. After consultation with the incoming Slovenian and French Presidencies, the Portuguese Presidency tabled a revised text of the new legal instrument on 13 December 2007. It will serve as a basis for further discussions in the next months by the Council preparatory bodies. The Framework Decision on the European Supervision Order aims at enabling EU Member States to mutually recognise each other's pre-trial supervision measures. The instrument was proposed by the Commission on 29 August 2006 (see eucrim 3-4/2006, pp.74-75).

➤ eucrim ID=0703200

European Supervision Order – European Parliament's Opinion

On 29 November 2007, the European Parliament (EP) adopted a legislative resolution with suggestions for some amendments to the proposal on the above-mentioned European Supervision Order in pre-trial procedures between Member States of the EU. The amendments, *inter alia*, clarify the definition of residence and widen the scope of the Framework Decision by including the suspect's possibility not only to return to his/her country of ordinary residence but also to another Member State where he/she has close links to (e.g., country of nationality). Furthermore, the EP would like to avoid a separate transfer mechanism as initially proposed by the Commission and instead connect it with the surrender procedures of the European Arrest Warrant. Against the background of the current absence of the Framework Decision on data protection processed in the framework of police and judicial cooperation in criminal matters, the EP's amendments have inserted specific provisions on data protection into the proposal of the European Supervision Order.

The Council is not bound to the opinion of the Members of Parliament. Since the

Council Presidency tabled a revised text for debate, the EP might be consulted.

➤ eucrim ID=0703201

Framework Decision on Suspended Sentences Makes Headway

A legal instrument which is already more advanced than the European Supervision Order is the German-French initiative on a Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (see eucrim 3-4/2006, p. 75 and eucrim 1-2/2007, p. 40). At its Council meeting in December 2007, the Justice and Home Affairs Ministers of the EU Member States agreed on a general approach to the proposal. In the meantime, the Council bodies have examined the recitals, the certificate and the form, as well as technical issues in the operative part of the text. Now the text is ready for submission to legal-linguists for further revision.

The Framework Decision will make it possible, for example, that a person who was given a suspended sentence in Germany can continue to live and work in France while probation measures relating to him/her do not lose their effects. EU Member States undertake the obligation to recognise a criminal judgment against the respective person without considerable formalities and to supervise probation measures or alternative sanctions. The Member States agreed that certain types of probation measures and alternative sanctions which are common among the Member States will be obligatory to supervise. They are free to supervise other types of measures. The executing Member State will be responsible for supervising all subsequent measures relating to the judgment, such as revocation or pardon.

➤ eucrim ID=0703202

Framework Decision on Suspended Sentences – European Parliament's Opinion

On 25 October 2007, the European Parliament (EP) made a series of amendments to the above-mentioned initiative for a Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and con-

ditional sentences. In its legislative resolution, the EP above all introduces the principle of the hearing of the defendant. According to the EP, the defendant should be heard in case the suspended sentence is revoked or a conditional sentence imposed. Moreover, the person standing trial should be heard before the judgment or decision for conditional release is transmitted. The EP has also inserted a definition of "lawful and ordinary residence" which mirrors the concept developed in the case law of the European Court of Justice. The Council is not bound to the proposed amendments of the EP.

➤ eucrim ID=0703203

E-Justice

Slovenian Presidency Further Pursues E-Justice Project

As stated in the trio-presidency Programme, Germany, Portugal, and Slovenia placed the development of e-justice at the top of their agendas. The Slovenian Presidency now wishes to enter a stage where "tangible results are yielded". As a showcase for e-justice, the EU would like to launch the so-called "European e-justice portal" as soon as possible. The portal is designed to be the key point of access to legal information, legal and administrative institutions, registers, databases, and other services with a view to accelerating the everyday tasks of EU citizens, legal and other experts, employees and other professionals, and entities within the framework of European justice. The Justice and Home Affairs Ministers, at their informal Council meeting in January 2008, envisaged a timeframe of 24 months to open the portal to the public. They agreed that the portal will begin as a pilot project between the representatives of the Member States. The meeting also dealt with the question of how to finance e-justice projects.

For the development of e-justice, see also eucrim 1-2/2007, p. 40. The project of interconnecting criminal records is already well advanced. In the future, the EU would also like to encourage the wider use of videoconferencing in

Seminars Relating to European Criminal Law at ERA

The Academy of European Law (ERA) is organising a series of interesting conferences dealing with various current issues of European criminal law and cooperation. Conference topics in the upcoming months include the following:

- The European Arrest Warrant and Joint Investigation Teams in Practice (Trier, 24-25 April 2008)
- Pre-Trial Detention, Enforcement and Supervision of Sentences (Trier, 15-16 May 2008)
- Data exchange and data protection in the Area of Freedom, Security and Justice (Trier, 26-27 May 2008)

An introduction to EU criminal law and to the instruments for cooperation in criminal justice matters is provided for in the one-week "Summer Course: European Criminal Justice" (Trier, 23-27 June 2008).

For further information, please consult the following website:

➤ eucrim ID=0703204

cross-border judicial cases before courts or other institutions, such as the hearing of witnesses or expert testimony. A progress report on e-justice projects is expected for June 2008.

➤ eucrim ID=0703205

External Dimension

Western Balkan – Priority Area for JHA Cooperation

Since the Western Balkans is considered a priority area for the EU, the Commission presented a Communication, entitled "Western Balkans: Enhancing the European Perspective" (COM(2008) 127) on 5 March 2008. The Communication also sets out the future core priorities as regards cooperation in the area of justice, freedom and security. A staff working paper, annexed to the Communication, lists the EU activities in relation to the Western Balkans as well as the next steps planned.

➤ eucrim ID=0703206

Also, the Slovenian Presidency puts particular emphasis on the Western Balkans

as a whole. The efforts are to a large extent devoted to the fight against organized crime. Worth mentioning is the goal of drawing up a comprehensive regional threat assessment in the field of organized crime, following the example set by the EUROPOL OCTA reports (see eucrim 1-2/2006, p. 14). The reports focusing on the Western Balkans are called “South Eastern Europe (SEE) OCTA” and are likewise designed to define common priority tasks in the region which will then be implemented at the national and international levels.

► eucrim ID=0703207

The Western Balkans is also a very important region for Europol. The strengthened cooperation is mirrored by strategic agreements between the countries of the Western Balkans and Europol. These agreements, which allow the exchange of strategic and technical information, have increased during the last years. Europol also regularly holds workshops with its partners in the Western Balkans.

► eucrim ID=0703208

USA – State of Play of JHA Cooperation Discussed

On 13 March 2008, the Presidents of the Justice and Home Affairs Council (the Slovenian Justice and Interior Ministers) met with their US counterparts in Brdo pri Kranju/Slovenia. The meeting was the first one of two regular annual meetings between the EU and the US in the field of justice and home affairs. As regards justice, the Ministers discussed the state of play of the 2003 EU-US agreements on mutual legal assistance and extradition. Since the US and not all EU Member States have ratified the agreements, the politicians agreed that the ratification process should be completed by the end of the year. Other topics of the meeting were the visa regime between the EU and the US, migration policy, organized crime, and preventive measures against terrorism.

► eucrim ID=0703209

Also, the Portuguese Presidency fostered the political dialogue between the EU and the United States in the field of justice and home affairs at a ministerial meeting in Washington D.C. on 10/11 November 2007.

► eucrim ID=0703210

Russia – Permanent Partnership Council

At the 7th Justice and Home Affairs Meeting between the EU and Russia on 22/23 November 2007 in Brussels, Ministers dealt with visa policy, document security, the fight against illegal immigration, border management, the prevention of terrorism and fight against human traf-

ficking. The meeting was held within the framework of the EU-Russia Permanent Partnership Council – the institutional framework for regular consultations at the ministerial level as regards the partnership between the EU and Russia in the area of freedom, security and justice (see also eucrim 3-4/2006, p. 79).

► eucrim ID=0703211



Council of Europe

Reported by Julia Macke

Foundations

Relations between the Council of Europe and the European Union

Signing of a Cooperation Agreement between PACE and EP

A cooperation agreement between the Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament (EP) was signed on 28 November 2007 in Brussels. It aims at stepping up cooperation between the two bodies, fostering complementary initiatives, and increasing synergies and therefore provides for joint meetings and hearings and regular contacts between rapporteurs. Furthermore, the achievements and actions of both assemblies shall be referred to and taken into account, when appropriate, in each other's documents and activities. Finally, the existing cooperation in joint electoral observation missions shall be reinforced.

The agreement is a concrete follow-up to the report by Jean-Claude Juncker which makes a series of proposals for strengthening the partnership between the Council of Europe (CoE) and the EU (see also eucrim 3-4/2006, p. 81; eucrim 1-2/2007, p. 42).

► eucrim ID=0703212

Reform of the European Court of Human Rights

2008 Will Be the “Year of Hope”

At its traditional annual press conference on 23 January 2008, European Court of Human Rights' President Jean-Paul Costa announced that – after a year of disappointments and especially after Russia's disappointing refusal to ratify Protocol No. 14 to the European Convention on Human Rights – 2008 would be “the year of hope”. In this context, he especially underlined that, in 2008, alternatives to Protocol No. 14 and other ways of dealing with manifestly unfounded cases before the Court shall be found. He further emphasized the complementary work of other parts of the CoE in preventing violations of the Convention, the efforts at the national level to implement the Court's judgments and prevent human rights abuses, and the prospect of the EU acceding to the Convention.

► eucrim ID=0703213

Beforehand, several attempts to convince Russia to finally ratify Protocol No. 14 had failed. Two visits by the President of the CoE Parliamentary Assembly, were in so far unsuccessful. For Protocol No. 14, see eucrim 1-2/2007, p. 42-43.

► eucrim ID=0703214

PACE Resolution: CoE Member States' Duty to Cooperate with the ECtHR

At its fourth session from 1 to 5 October 2007 in Strasbourg, France, the Parliamentary Assembly of the Council of Europe (PACE) adopted both Resolution 1571 (2007) and Recommendation 1809 (2007) on "CoE Member States' duty to cooperate with the European Court of Human Rights (ECtHR)".

Above all, PACE stresses that the Court requires the cooperation of all States' parties at all stages of procedure and even before a procedure is formally opened. The assembly is therefore calling upon the competent authorities of all Member States to improve their behaviour. In this context, the following criticism was especially expressed:

- that a number of cases involving the alleged murder, disappearance, beating or threatening of applicants initiating cases before the Court have still not been fully and effectively investigated by the competent authorities;

- that illicit pressure has also been brought to bear on lawyers who defend applicants before the Court and assist victims of human rights violations in exhausting domestic remedies before applying to the Court; and

- that, in a significant number of cases, the competent authorities of several countries have failed to cooperate with the Court in its investigation of the facts.

These competent authorities shall refrain from putting pressure on applicants, potential applicants, their lawyers or family members and instead take positive measures to protect them from reprisals by individuals or groups. Furthermore, they shall thoroughly investigate all cases of alleged crimes against applicants, their lawyers or family members and assist the Court in fact-finding by putting at its disposal all relevant documents and by identifying witnesses and ensuring their presence at hearings organised by the Court.

➤ [eucrim ID=0703215](#)

Human Rights Fund Trust Created between CoE and Norway

On 14 March 2008, an agreement for the creation of a Human Rights Fund Trust was signed by Terry Davis, Sec-

retary General of the Council of Europe, and Jonas Gahr Støre, the Minister of Foreign Affairs of Norway. It will – in cooperation with the CoE Development Bank – support projects in Europe to ensure the application of the Convention on Human Rights, i.e., the application of the Convention in national human rights legislation, the training of legal professionals, the dissemination of European Court of Human Rights case law, and the execution of judgments of the Court at the national level. The first projects will be funded in 2008. Therefore, Norway will initially make a contribution of one million Euros to the fund. Other states are welcome to participate.

➤ [eucrim ID=0703216](#)

New Developments on European Court of Human Rights Website

The European Court of Human Rights (ECtHR) continues to improve its web presence. In October 2007, it launched RSS news feeds for news, webcasts of public hearings, and monthly 'information notes' on its Internet site and thus allows Internet users to receive automatic electronic updates in subjects of interest to them. RSS, known colloquially as "Really Simple Syndication", is a family of Web feed formats used to publish frequently updated content such as, for example, blog entries, news headlines, or podcasts. RSS makes it possible for people to keep up with their favourite websites in an automated manner that is easier than checking individual websites.

Furthermore, it is now also possible to look up summaries of the Court's pending and recent cases through HUDOC, the searchable online database of the Court's case law and other relevant texts adopted under the European Convention on Human Rights. In the coming months, HUDOC will also be providing summaries of the most significant cases to have been brought before the Court.

Two other initiatives aimed at bringing about better transparency of the Court had already been launched in June 2007. They include a webcast of the Court's public hearings and new information material about pending cases (see also [eucrim 1-2/2007](#), p. 43).

➤ [eucrim ID=0703217](#)

Annual Activities Report for 2007 Published

On 11 March 2008, the Court published a provisional version of its 2007 annual report. It gives an overview of the Court's activities last year, contains an analysis of the main judgments delivered by the Court, and provides comprehensive statistical information.

➤ [eucrim ID=0703218](#)

Annual Survey of Activities for 2007 Published

In January 2008 already, the ECtHR published its annual survey of activities for 2007. The number of pending cases before the Court had increased by 15 % (from 90,000 in 2006 to 103,000 in 2007). The total number of judgments delivered by the Court in 2007 was 1503, fewer than the 1560 delivered in 2006.

➤ [eucrim ID=0703219](#)

In addition, a table of violations listed by country for 2007 was published. The table reveals that Turkey had the highest number of judgments with at least one violation of the Convention recorded against it (319), followed by Russia (175), Ukraine (108), Poland (101) and Romania (88).

➤ [eucrim ID=0703220](#)

Election of 5 Judges to the European Court of Human Rights

On 22 January 2008, the Parliamentary Assembly of the Council of Europe elected five judges to the ECtHR. While the sitting judge in respect of Latvia was re-elected, four judges from Bulgaria, Ireland, Moldova, and Turkey were elected for the first time.

➤ [eucrim ID=0703221](#)

Execution of Judgments of the European Court of Human Rights

Round Table about Compliance with ECtHR Judgments

The fact that public authorities in several countries still fail to comply with domestic judicial decisions and thus regularly violate the European Convention of Human Rights (ECHR), for which reason a number of judgments of the European Court of Human Rights (ECtHR) were

accordingly declared violations of the ECHR in this regard, gave reason to an interesting Round Table entitled “Non-enforcement of domestic court decisions in CoE Member States: general measures to comply with European Court judgments”. It took place on 21 and 22 June 2007 in Strasbourg, France.

In general, the supervision of the execution of ECtHR judgments is ensured by regular meetings of the Committee of Ministers. Because the Committee’s action also includes comprehensive legal and technical assistance in the process of reforms required by the judgments, the Round Table was intended to support the States concerned with improving the implementation of the necessary measures. In order to put an end to the continuously high number of violations of the ECHR in certain States, the Round Table’s organizers aimed at sharing Member States’ experience in the resolution of structural problems revealed in the area of (non-)enforcement of domestic court decisions. In addition, the reforms adopted or underway in some countries were analyzed and new proposals for reform presented.

The Round Table was organized in the context of the new programme for assistance to the Committee of Ministers in the supervision of the execution of ECtHR judgments. The reason for this new programme is the growing understanding among the members of the Committee of Ministers that complex structural problems revealed by judgments may be more effectively resolved on the basis of the Committee’s experience and through more intensive and direct contacts between the competent bodies and of the CoE and national decision-makers. The Committee therefore strongly promotes various initiatives to this effect. In this context, several Round Tables were already organized in 2005 and 2006.

➤ [eucrim ID=0703222](#)

Background: The Committee of Ministers’ Supervision of the Execution of ECtHR Judgments

Under Article 46 § 1 of the Convention, states “undertake to abide by the final judgment of the Court in any case to which they are parties”. This means that the respective states must take measures

in favour of the applicants to put an end to violations and erase their consequences; besides, they must take the measures needed to prevent new, similar violations.

The measures which states have to undertake can be split up into three different obligations: First, states often have to pay *just satisfaction* (normally a sum of money). Second, since the payment of just satisfaction is not always the adequate measure to eliminate all adverse consequences of the violation suffered by an injured party, the respective states often have to take so-called *individual measures* in favour of the applicant. The individual measures thereby depend on the nature of the violation and the applicant’s situation; including, e.g., the re-opening of unfair proceedings, the destruction of specific information gathered in breach of the right to privacy, or the revocation of a deportation order issued despite the risk of inhumane treatment in the country of destination. Third, it can additionally be necessary for the respective states to take *general measures* to prevent new, similar violations. For instance, this can mean the review of legislation, rules and regulations or the examination of judicial practice.

The control of these states’ behaviour is placed under the responsibility of the Committee of Ministers, which is the CoE’s decision-making body and comprises the Foreign Affairs Ministers of all the Member States, or their permanent diplomatic representatives in Strasbourg, France. It supervises the execution of judgments of the ECtHR in accordance with Article 46 § 2 of the ECHR as amended by Protocol No. 11. This work is carried out mainly at six regular meetings every year.

Although the states have considerable freedom in their choice of individual and general measures to meet these requirements, unless the Court itself directly requires certain steps to be taken, this freedom principally goes hand in hand with the monitoring by the Committee of Ministers, which guarantees that the measures taken are appropriate and actually achieve the outcome intended in the Court’s judgment.

➤ [eucrim ID=0703223](#)

Concrete Supervision Procedure

To enable the work of the Committee of Ministers, judgments are automatically forwarded to the Committee of Ministers when they become final. Once the Court’s final judgment has been transmitted to the Committee of Ministers, the latter invites the respective state to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken to abide by the judgment. Once it has received this information, the Committee examines it closely.

If the state concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a final resolution striking the judgment off its list of cases. In some cases, particularly if the state has not yet adopted satisfactory measures, so-called interim resolutions may prove appropriate. They usually contain information concerning the interim measures already taken and set a provisional calendar for the reforms to be undertaken. Both types of resolutions are public and available on the Committee of Ministers’ website.

If a state then still does not want to execute a judgment, the Committee of Ministers, which is also a political organ, can bring its weight to bear on the state concerned in order to execute the Court’s judgment, including the use of political sanctions.

More information about the detailed supervision procedure can be found in the “Rules of the Committee of Ministers for the supervision of the execution of judgments and of the term of friendly settlements” which was adopted by the Committee of Ministers on 10 May 2006:

➤ [eucrim ID=0703224](#)

Detailed Information about Pending Cases for Supervision

Detailed information about the cases can be found in different lists: There exist both (1) a list of *all* cases pending for supervision of execution and (2) a list of the *main* cases pending for supervision of execution. The following ID contains the links which refer to both lists.

➤ [eucrim ID=0703225](#)

Powerful Support by the Parliamentary Assembly

The Parliamentary Assembly of the CoE (PACE) strongly supports the Committee's work. Since 2000, several reports, resolutions and recommendations concerning specifically the implementation of ECtHR judgments have been adopted by the Assembly. In doing so, the Assembly has contributed to a quicker resolution of often difficult issues of non-compliance with the judgments of the ECtHR. PACE is regularly informed by the Committee of Ministers of significant developments in the area of execution of judgments of the ECtHR, both in its yearly activity report and in so-called written communications which are prepared under the authority of the Chair on the occasion of each part-session.

► eucrim ID=0703226

Specific Areas of Crime

Corruption

GRECO: New Reports Published

GRECO, the Group of States against Corruption, published its first Third Round Evaluation Report on Finland on 12 December 2007. As already reported, GRECO launched this third evaluation round in January 2007 (see eucrim 3-4/2006, p. 84, and eucrim 1-2/2007, p. 43 and 44).

► eucrim ID=0703227

Several other reports were also published, e.g., a joint First and Second Round Evaluation Report on the Ukraine on 29 October 2007, Second Round Evaluation Compliance Reports on Croatia (on 13 December 2007), Denmark (on 29 November 2007) and the Netherlands (on 20 November 2007), as well as two Addenda to First Round Evaluation Compliance Reports on Greece (on 13 December 2007) and Georgia (on 31 October 2007). Lastly, two Second Round Evaluation Compliance Reports were published on Albania (on 7 January 2008) and on the Former Yugoslav Republic of Macedonia (also on 7 January 2008).

► eucrim ID=0703228

GRECO: Programme of Activities for 2008 Released

At GRECO's 35th Plenary Meeting, which took place from 3 to 7 December 2007 in Strasbourg, France, the programme of activities for 2008 was approved. The programme contains an overview of the main activities of GRECO in 2008 and a provisional calendar. The programme also gives a brief introduction to the role and mission of GRECO, and it contains a list of activities carried out since the setting up of the institution in 1999.

► eucrim ID=0703229

Azerbaijan: AZPAC Ceremonially Launched

As to the new Anti-Corruption project in Azerbaijan, called AZPAC, the launching event took place on 10 December 2007 in Baku, Azerbaijan. The project is called "Support to the Anti-corruption Strategy of Azerbaijan" and part of the CoE co-operation programme in the South Caucasus. The two-year project will help to implement the recommendations made to Azerbaijan by the Council's Group of States against Corruption (GRECO). It is funded by a voluntary contribution from the United States Agency for International Development (USAID). See also eucrim 1-2/2007, p. 44.

► eucrim ID=0703230

Georgia: Start-Up Conference of GEPAC

In respect of the new Anti-Corruption Project in Georgia, GEPAC, the start-up event took place on 26 October 2007 in Tbilisi, Georgia. This project, entitled "Support to the Anti-corruption Strategy of Georgia", is also part of the CoE co-operation programme in the Southern Caucasus. It is likewise a two-year project which will help to implement the recommendations made to Georgia by GRECO. It is funded by a voluntary contribution from the Ministry for Development Co-operation of the Netherlands. See eucrim 1-2/2007, p. 44.

► eucrim ID=0703231

Turkey: New Anti-Corruption Project Launched

On 7 February 2008, the CoE launched a new technical co-operation project which will support the implementation

of the Turkish Code of Ethics across the public administration, develop codes of ethics for other categories of officials or holders of public office, develop systems for monitoring the effectiveness of prevention and other anti-corruption activities, enhance the coordination of anti-corruption measures and help implement the recommendations made to Turkey by GRECO. Entitled "Ethics for the Prevention of Corruption in Turkey", TYEC, it will last two years and is 90 % funded by the European Commission and 10 % by the CoE. See also eucrim 1-2/2007, p. 44.

► eucrim ID=0703232

Money Laundering

MONEYVAL: 10th Anniversary

From 3 to 6 December 2007, MONEYVAL, the CoE Committee of Experts on the Evaluation of Anti-Money Laundering Measures, celebrated its 10th anniversary during its 25th plenary session. Also, CoE Secretary General Terry Davis congratulated and underlined the importance of MONEYVAL's work.

► eucrim ID=0703233

MONEYVAL: New Report on Liechtenstein

On 5 March 2008, MONEYVAL published its Third Round Evaluation Report on Liechtenstein which analyses the implementation of international and European standards to combat money laundering and terrorist financing, assesses levels of compliance with the FATF 40+9 Recommendations (see eucrim 1-2/2007, p. 44) and includes a recommended action plan to improve the Liechtenstein anti-money laundering and combating the financing of terrorism system. This report, which consists of two parts, deserves closer attention because of the present massive tax evasion scandal in Germany and other countries involving Liechtenstein. The main findings of the report are:

- The report first points out that the financial sector in Liechtenstein provides primarily wealth-management services, including banking, trusts, other fiduciary services, investment management,

and life insurance-based products. There has been significant expansion recently in the non-banking areas, particularly investment undertakings and insurance. Approximately 90 percent of Liechtenstein's financial services business is provided to non-residents, many attracted to Liechtenstein by the availability of discrete and flexible legal structures, strict bank secrecy, and favourable tax arrangements within a stable and well-regulated environment. Liechtenstein's financial sector business creates by its very nature a particular money laundering risk, mainly in the layering phase of money laundering, in response to which the authorities and the financial sector firms have developed risk-based mitigating measures. Minimising the risk of abuse of corporate vehicles and related financial service products presents an ongoing challenge, as does the identification of the natural persons who are the beneficial owners of companies or trusts arrangements. The major criminal activities identified by the authorities as predicate offences for money laundering are economic offences, in particular fraud, criminal breach of trust, asset misappropriation, embezzlement and fraudulent bankruptcy, as well as corruption and bribery.

- As regards the legal system in Liechtenstein, the report evaluates that money laundering is criminalised broadly in line with international standards. All categories of listed predicate offences are covered, apart from environmental crime, smuggling, forgery and market manipulation; only fiscal offences, including serious fiscal fraud, are not predicate offences for money laundering. In contrast, the terrorist financing offence does not presently meet international standards and needs to be reviewed. The definition of the offence, especially the definition of "terrorist organisation", needs to be amended so that it fully covers all elements under the International Convention for the Suppression of the Financing of Terrorism. Furthermore, the financing of individual terrorists should be criminalized. Both in the case of money laundering and the financing of terrorism, there is no criminal liability of legal persons for financing of terrorism.

- With regard to criminal proceedings, there were no prosecutions or convictions for terrorist financing at the time of the assessment. Money laundering related investigations and proceedings are mostly initiated by mutual legal assistance requests and the reports of the financial intelligence unit (FIU). There have been just two prosecutions in Liechtenstein for autonomous money laundering and no convictions. This is due to the fact that most of the cases have links to other jurisdictions and the Liechtenstein prosecutors consider it more effective to refer the cases to those jurisdictions where the main criminal activity is alleged to have taken place and then provide strong support to the resultant prosecution. Furthermore, it is problematic that financial intermediaries may not inform others that a report has been submitted to the FIU on most of 20 days which is contrary to the FATF standards.

- However, the freezing of terrorist assets under UN Security Council Resolution 1267 is adequately addressed in Liechtenstein, covering almost all required procedural aspects to make compliance effective. There is no domestic terrorist list, but action has been taken on the basis of foreign lists. The procedure outside the UN Security Council Resolution 1267 context is unspecific.

- The report further works out the details of preventive measures regulations and identifies a number of shortcomings. For instance, Liechtenstein has established an overall risk-based approach which requires financial institutions to build and keep up-to-date a profile for each long term customer. The profile, which is completed on a risk-sensitive basis, includes provision of beneficial ownership information, the source of funds, and the purpose of the relationship. However, the legal provisions may give excessive discretion to financial institutions when applying the risk-based system. Regarding the inherent risk in much of the financial service business in Liechtenstein, there is a need for additional attention to the quality and depth of the identification of beneficial owners and the conduct of ongoing due diligence.

Detailed information about Liechtenstein's level of compliance with the FATF 40+9 Recommendations can be

found on the pages 222-232 of the report. The recommended action plan to improve the anti-money laundering and combating the financing of terrorism system can be found on pages 233-242 of the report.

► [eucrim ID=0703234](#)

MONEYVAL: New Report on the Principality of Monaco

On 22 February 2008, MONEYVAL published its Third Round Evaluation Report on the Principality of Monaco. The main findings of the evaluation report are that Monegasque authorities have made several changes to the legislation since the first evaluation in 2002: they amended, in particular, the provision of the Criminal Code criminalising money laundering, introduced additional customer identification measures, adopted legislation regulating electronic transfers, relations with politically exposed persons and the activity of correspondent banks, and ratified a number of international conventions. The Principality further has a satisfactory legal framework to combat money laundering and terrorist financing, though the evaluators regretted the fact that, in general, the legal provisions are not very detailed or otherwise supplemented by more precise secondary legislation or instructions. For example, there has been only one final conviction since the last evaluation and 24 cases were pending investigation.

► [eucrim ID=0703235](#)

MONEYVAL: New Report on Moldova

On 20 February 2008, MONEYVAL published its Third Round Evaluation Report on Moldova. While the two previous evaluation rounds highlighted a large number of shortcomings, some of them could have been improved through both the modification of the existing laws and the adoption of new ones and regulations. For instance, the offence of money laundering, currently in force, could serve as an adequate tool to combat money laundering if further refined and clarified. However, the offence of terrorist financing does not presently meet international standards and needs to be reviewed.

► [eucrim ID=0703236](#)

MONEYVAL: New Report on the Czech Republic

On 18 February 2008, MONEYVAL published its Third Round Evaluation Report on the Czech Republic. It comes to the conclusion that, despite some improvements, the criminalisation of money laundering still does not contain a broad definition and coverage of the offence and needs to be brought into line with international requirements. However, since the previous evaluation round, the Czech Republic has nonetheless experienced its first convictions for money laundering. As for terrorist financing, both the financing of terrorist acts and the financing of terrorist organisations have been criminalised. However, the financing of individual terrorists as such, is not covered.

➤ [eucrim ID=0703237](#)

MONEYVAL: New Report on Poland

On 15 January 2008, MONEYVAL published its Third Round Evaluation Report on Poland. The report states that, fortunately, the number of money laundering prosecutions and convictions has increased remarkably since the last visit to Poland in April 2002. It is of further interest that Poland has recently started a legislative procedure aimed at introducing into the Penal Code a separate offence on the financing of terrorism which is missing so far. An improvement concerning the legal framework covering provisional measures and confiscations was also reported. For more information, please visit:

➤ [eucrim ID=0703238](#)

MONEYVAL: New Report on Malta

On 28 November 2007, MONEYVAL published its Third Round Evaluation Report on Malta. Contrary to Poland, no final money laundering convictions had been secured in Malta, although Malta, in 2005, extended the criminal provision on money laundering under the Prevention of Money Laundering Act to any criminal offence, including the offence of terrorist financing. Furthermore, no prosecutions or investigations of the funding of terrorist activities have taken place yet. For more information, please visit:

➤ [eucrim ID=0703239](#)

Cybercrime

CoE Project against Cybercrime: Activities

Within the scope of the CoE project against cybercrime, several activities have taken place in the last half year in order to support European and non-European countries to accede and implement the Convention on Cybercrime or its Protocol on Xenophobia and Racism:

From 17 to 18 December 2007, a workshop on cybercrime legislation and training of judges took place in Plovdiv, Bulgaria. It was organised by the Ministry of Justice of Bulgaria in cooperation with the CoE and aimed at reviewing the effectiveness of the existing legislation on cybercrime (especially the current legislation against the provisions of the Convention on Cybercrime which Bulgaria ratified in 2005) and training judges in the application of current cybercrime legislation.

➤ [eucrim ID=0703240](#)

A first regional conference on cybercrime was held in Cairo, Egypt, from 26 to 27 November 2007. At the end of the conference, the four hundred participants adopted a declaration recommending that countries of the Arab region use the Convention on Cybercrime as a model to guide the development of national legislation on cybercrime. They recognize the Convention on Cybercrime as the global guideline for the development of cybercrime legislation and encourage the countries of the Arab region to set up specialized units for cybercrime investigations and so-called Computer Emergency Response Teams (CERTs). The declaration further contains statements concerning the fight against child pornography and the sexual abuse of children on the Internet, the use of public-private partnerships against cybercrime, and regional and international cooperation.

➤ [eucrim ID=0703241](#)

Further workshops and conferences took place from 7 to 9 November 2007 in Tomar, Portugal, from 29 October to 1 November 2007 in Jakarta, Indonesia, from 25 to 26 October 2007 in Makati City, Philippines, from 1 to 2 October 2007 in Bogota, Colombia, and from 10 to 14 September 2007 in New Delhi, India.

➤ [eucrim ID=0703242](#)

The CoE project against cybercrime is a global project to support European and non-European countries to accede and implement the Convention on Cybercrime (ETS No. 185) or its Protocol on Xenophobia and Racism (ETS No. 189) because of the need for a global legal framework against cybercrime. It will last from 1 September 2006 until 28 February 2009 and is being funded by the Council of Europe; additional voluntary contributions come from Microsoft.

➤ [eucrim ID=0703243](#)

CoE at the 2nd Internet Governance Forum

Some 2000 representatives from 100 countries, drawn from government, the private sector, expert groups and NGOs, attended the second meeting of the Internet Governance Forum (IGF) from 12 to 15 November 2007 in Rio de Janeiro, Brazil. The main issues discussed there were access to the Internet, its openness, diversity, security, and emerging issues.

The CoE was represented by Deputy Secretary General Maud de Boer-Buquicchio and several other CoE experts. In its submission to the Forum, the CoE first put forward its view on the benefits and challenges of this important tool for economic growth and social development. It underlined the public service value of the Internet and placed users' rights, in particular freedom of expression, and safety at the forefront.

The CoE further pointed out that it is in the vanguard of efforts to combat Internet crime and that it therefore acts with the support of its 47 Member States on the basis of key conventions on cybercrime, the prevention of terrorism, the protection of children against sexual exploitation and sexual abuse, and counterfeit medicines (this last convention is in the process of being drafted). These CoE conventions provide a legal basis in Europe and beyond, as countries that are not members of the Organisation may accede to them. In this context, the CoE finally called upon developing countries, where cybercriminal networks have been flourishing in recent years, to sign the Cybercrime Convention of 2001 which serves as a guide for any country developing comprehensive national

legislation on cybercrime and also as a framework for international co-operation between signatory countries.

► [eucrim ID=0703244](#)

The purpose of the IGF is to support the United Nations Secretary-General in carrying out the mandate of the World Summit on the Information Society with regard to convening a new forum for a multi-stakeholder policy dialogue.

► [eucrim ID=0703245](#)

Procedural Criminal Law

Justice Organisation

CEPEJ: 5th Anniversary

In December 2007, the CEPEJ celebrated its fifth anniversary. Congratulations came from Terry Davis, Secretary General of the CoE, who stressed that, thanks to the CEPEJ, the evaluation of judicial systems is now deeply rooted in the calendar of the European judicial community as a key element to reform. Jean-Paul Costa, President of the European Court of Human Rights, underlined the close link between the work conducted by the CEPEJ and the Court's own work: "High numbers of rulings against given states often indicate the existence of serious structural problems which undermine the credibility of the countries' judicial systems. All the various problems have a direct impact on the operation of our Court, as they result in thousands of cases being lodged in Strasbourg. By helping Member States to make their judicial systems operate more effectively, the CEPEJ helps to ease the burden on the Court."

► [eucrim ID=0703246](#)

At a special session on 5 and 6 December 2007 marking the 5th anniversary of the CEPEJ, the question "What do you expect from the CEPEJ in the five next years?" was discussed. Mr Philippe Boillat, Director General of Human Rights and Legal Affairs, who presented the conclusions at the end of the session, especially stressed that the already well-established ties between the CEPEJ and the European Court of Human Rights will certainly have to be further

reinforced. He further highlighted – *inter alia* – that the ties between the CEPEJ and relevant bodies of the EU will also have to be reinforced, that the SATURN Centre for the study and analysis of judicial time management has to be advanced and that the CEPEJ should additionally act as an early warning and alert body in order to identify structural weaknesses in judicial systems and allow anticipating new problems.

► [eucrim ID=0703247](#)

The CEPEJ, the CoE's Commission for the Efficiency of Justice, was established on 18 September 2002. Its aim is the improvement of the efficiency and functioning of justice in the Member States. It therefore analyses the results of their judicial systems, identifies the difficulties they encounter, defines concrete ways to improve both the evaluation of their results and the functioning of these systems, provides assistance to Member States, and finally proposes to the competent CoE's instances the fields where it would be desirable to elaborate a new legal instrument. The CEPEJ is composed of experts from all the 47 CoE Member States. Observers may be admitted to its work.

For more information about the concrete CEPEJ's work see [eucrim 1-2/2007](#), p. 46, and [eucrim 3-4/2006](#), p. 85-86.

► [eucrim ID=0703248](#)

CCPE: 1st Opinion on International Co-operation in Criminal Matters

The 2nd plenary meeting of the Consultative Council of European Prosecutors (CCPE) was held from 28 to 30 November 2007 in Strasbourg, France. During this meeting, the CCPE adopted its Opinion No.1 on "Ways of improving international co-operation in the criminal justice field". In it, the CCPE makes the following recommendations to the Committee of Ministers and the CoE's Member States:

- to act on the normative framework of international cooperation in keeping the priority on the work of updating the existing European conventions in the sphere of criminal justice, especially the European Convention on extradition, in accelerating the ratification and effective application of the relevant conventions, and in seeking to simplify

internal procedures to favour mutual assistance;

- to act on the quality of international cooperation, e.g., in developing appropriate training of prosecutors as well as other players in international judicial cooperation, in setting up in each Member State an appropriate structure to guarantee the specialisation of some prosecutors and judges as regards international cooperation, in issuing specialised documents or commentaries on the applicable human rights and standards in international criminal proceedings, and in improving the transmission of assistance requests;

- to extend exchanges between legal practitioners, e.g., in setting up at the level of the CoE structured cooperation and information exchange properly articulated with the European Judicial Network in criminal matters and Eurojust, in setting up in each country a 'specialised unit' entrusted with assisting to solve the difficulties met by practitioners of the requesting and requested states regarding judicial assistance requests, and in developing the exchange of liaison judges and prosecutors;

- within the framework of the CoE, to foster cooperation with third countries, international criminal courts, and relevant European and international institutions and organisations;

- to increase budgetary and human resources allocated to international cooperation in criminal matters within the courts and the prosecution offices.

► [eucrim ID=0703249](#)

In order to prepare this opinion, the CCPE, in co-operation with the Polish Ministry of Justice, organised a European Conference of Prosecutors which took place in Warsaw, Poland, from 4 to 5 June 2007. There, prosecutors from the 47 CoE Member States discussed ways of intensifying co-operation between prosecution services in criminal matters. The participants arrived at the conclusion that international co-operation in the field of criminal justice is a fundamental procedural tool enabling public prosecutors to perform their work and ensure that criminal justice is effective and that this co-operation therefore needs to be further developed and strengthened.

► [eucrim ID=0703250](#)

The CCPE was set up by the Committee of Ministers on 13 July 2005 to prepare opinions for the European Committee on Crime Problems (CDPC) on issues related to the prosecution service and promote the effective implementation of Recommendation Rec(2000)19 of 6 October 2000 on the role of public prosecution in the criminal justice system. It shall further collect information about the functioning of prosecution services in Europe.

Cooperation

New Activity Report for 2007

On 28 January 2008, a new activity report for 2007 entitled "Technical cooperation against economic crime" was published which summarises the results of the CoE's technical cooperation projects against economic crime in 2007. Its purpose is to make the CoE's work in this area more transparent and to inform partners of the activities implemented. Altogether 250 activities were carried out in 2007 under 13 projects. The combined budgets of all projects on economic crime ongoing in 2007 amounted to € 25 million while expenditure in 2007 exceeded € 3,7 million.

►eucrim ID=0703251

Ukraine: International Conference on Extradition

In the framework of the UPIC project, an international conference on extradition took place from 5 to 6 November 2007 in Kyiv, Ukraine. The aim of the conference was to review and discuss problematic issues in relation to extradition, to propose solutions, exchange best practice and improve cooperation in this field. The relevant jurisprudence of the European Court of Human Rights as regards extradition was also examined. More information about the

UPIC project can be found in eucrim 1-2/2007, p. 47; 3-4/2006, p. 86 and 1-2/2006, p. 22.

►eucrim ID=0703252

Ukraine: New Office Opened

On 26 October 2007, a CoE Office in charge of the co-ordination of CoE co-operation programmes with the Ukraine was established in Kyiv. The Office is headed by Mr. Ake Peterson, Representative of the Secretary General of the CoE for the co-ordination of co-operation programmes with the Ukraine. It will contribute to the implementation of a large number of projects and activities designed to support legal and institutional reforms in the Ukraine. The address of the Office is vul. B. Hmelnytskoho 70 A in Kyiv. The Information Office of the CoE remains at its previous address: vul. Ivana Franka 24A, Kyiv.

►eucrim ID=0703253

Legislation

Convention on Action against Trafficking in Human Beings in Force

The CoE's Convention on Action against Trafficking in Human Beings (ETS No. 197) came into force on 1 February 2008. Till this day, Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Latvia, Malta, Moldova, Norway, Portugal, Romania, and Slovakia have ratified the convention, which has been signed by a further 22 countries.

The Convention is a comprehensive treaty mainly focussed on the protection of victims of trafficking and the safeguarding of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking, whether national or transnational, whether or not they are related to organised crime. It

applies to whoever the victim is (men, women or children) and whatever the form of exploitation is (sexual exploitation, forced labour or services, etc). The Convention further provides for the setting up of an independent monitoring mechanism guaranteeing the parties' compliance with its provisions.

Trafficking will now be considered a criminal offence: traffickers and their accomplices will therefore be prosecuted. What is also new is the possibility to criminalise those who use the services of a victim if they are aware that the person is a victim of trafficking in human beings. The Convention further provides the possibility of not imposing penalties on victims for their involvement in unlawful activities if they were forced to do so by their situation.

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On the occasion of the entry into force of the Convention, the Member States that have already ratified the Convention made a Joint Declaration and urged other CoE Member States, non-member states and the European Community to become parties to the Convention as soon as possible.

►eucrim ID=0703255

As the CoE already decided in November 2007, it will set up in 2008 the independent monitoring mechanism to oversee the implementation of the CoE Convention on Action against Trafficking in Human Beings, the so-called Group of Experts on Action against Trafficking in Human Beings (GRETA), which will be composed of ten to fifteen independent experts. This quasi-judicial body will monitor the implementation of the Council's convention on human trafficking in the countries that have ratified it. The new body will carry out its evaluation in rounds; its members will serve in their individual capacity and be elected for a four-year term, renewable once, taking into account gender and geographical balance.

►eucrim ID=0703256

Criminal Law Protection of the EU's Financial Interests in Croatia

By Prof. Dr. Zlata Đurđević

I. Introduction

The accession negotiations between the Republic of Croatia and the European Union started on 3 October 2005, on the same day that the chief prosecutor of the ICTY, Carla del Ponte, confirmed that Croatia is fully cooperating with the Hague Tribunal. The main goal of the accession negotiations is the harmonization of Croatian legislation with the *acquis communautaire*. However, the duty of Croatia to adjust its legal system to the *acquis* dates from the earlier stage of the integration process. The association process for Croatia began on 29 October 2001 when it signed the Stabilization and Association Agreement with the EU. Thereupon, Croatia obtained economic benefits and access to the EU's pre-accession funds, but undertook commitments to fulfil four criteria set at the summits of EU leaders in Copenhagen and Madrid (political, economical, legal, and administrative). The process of alignment of the Croatian legislation with the *acquis* began with that agreement, i.e., four years before the beginning of the membership negotiations. It led to the development of administrative and judicial structures for effective implementation and enforcement of the *acquis*. This is important to mention because the substantial part of the *acquis* regarding the protection of the EU's financial interests was implemented by Croatia in this pre-negotiation phase.

The *acquis communautaire* is an ongoing development of a corpus of legal provisions and principles. The amount of rights and obligations that a candidate country as well as an EU Member State has to assume is growing with time. For this reason, the number of chapters which the *acquis* was divided into during the negotiations with Croatia was increased from 31 to 35, compared to the previous round of accession negotiations. In the first agenda that our negotiation team received from the European Commission, the PFI Convention and its protocols were placed in chapter 24 on "Justice, Freedom and Security", but afterwards these documents were transferred to chapter 32 on "Financial Control". However, this seemingly unimportant administrative shift indicates the "Janus nature" of the PFI instruments which show the Member States its criminal law face and the Commission its financial law face.

II. Accession Negotiations in the Acquis Chapter on Financial Control

The negotiation process in relation to the chapter on Financial Control has been running smoothly until now. The first phase

of negotiations – explanatory and bilateral screenings giving an overview of the degree of harmonisation of Croatian legislation with the *acquis communautaire* under this chapter – took place in May and July 2006. In September 2006, the Commission recommended the opening of accession negotiations with Croatia without setting any benchmarks or additional criteria, and the European Council opened negotiations for this chapter in November 2006.

The *acquis* under the chapter on Financial Control encompasses four main policy areas: (1) public internal financial control (PIFC), (2) external audits, (3) protection of the Euro against counterfeiting, and (4) protection of the EU's financial interests. With regard to the first two areas, the *acquis* does not consist of legislation but of international control and internal audit standards, as well as best practice measures of the EU¹ which a candidate country is expected to apply. In this context, Croatia already passed action plans in 2005 and, in 2006, implementing regulations; the code of ethics was adopted as well. Likewise, the ongoing training and certification process for internal auditors was established. In December 2006, a new law on the system of internal financial controls in the public sector was enacted,² the so-called PIFC Act, which has been described as an important milestone by the Commission.³ Before closing the chapter, Croatia still has to pass implementing legislation for the PIFC Act and safeguard the State Audit Institution's functional and financial independence.

The chapter on Financial Control in relation to the protection of the Euro against counterfeiting comprises only non-penal aspects, whereas the penal aspects in this area are dealt with in the chapter on "Justice, Freedom and Security". The first pillar aspects include several regulations and Council decisions.⁴ In 2006, progress was made in relation to the legislative alignment because Croatia adopted new legislation for reporting of counterfeiters to Europol and Interpol, and it introduced obligations for financial institutions to withdraw suspicious specimen of foreign currency as well as adequate sanctions in case of non-compliance. The National Analysis Centre for Banknotes and Coins will be established within the Croatian National Bank by the end of 2009.

The protection of the EU's financial interests is divided or, more precisely, comprised of non-penal and penal aspects – due to its operational indivisibility. The non-penal aspects refer to the regulation on the protection of the European Communities' financial interests,⁵ the regulation concerning on-the-spot

checks and inspections carried out by the Commission,⁶ and a set of regulations on reporting irregularities and the recovery of sums wrongly paid.⁷ These regulations are directly applicable. They focus on establishing adequate institutional structures and administrative and operational capacities for its enforcement. In order to improve its administrative capacity, Croatia in 2006 appointed a so-called “Irregularity Officer” and established the Anti-Fraud Coordinating Structure (AFCOS) for coordination and cooperation with the EU in preventing fraud. In accordance with the PIFC Act, the Irregularity Officer is a person within the Ministry of Finance who is responsible for informing and reporting any irregularities and suspicions of fraud to the State Attorney’s Office and the competent body in the Ministry of Finance.⁸

The Croatian AFCOS is, as in other Member States, a service for the coordination of cooperation between the relevant national bodies and OLAF or, in other words, an OLAF contact point in Croatia. It is set up as the “Office for the prevention of irregularities and fraud” within the framework of the Department of Budgetary Control of the Ministry of Finance.⁹ Its general task is to coordinate legislative, administrative, and operational activities in order to protect the financial interests of the EU. AFCOS shall exchange information with OLAF, participate in OLAF’s inspections and investigations, submit reports to relevant Croatian authorities, and play a role in the creation and implementation of a national strategy for the prevention of fraud and in the development of training programmes in this field. After the legal and administrative establishment, the EU now expects practical steps to be taken to render the Ministry of Finance an operational partner for OLAF.¹⁰

III. Criminal Law Protection of the EU’s Financial Interests in Croatia

The following considerations shall deal with the penal aspect of the EU’s financial interests in Croatia. The respective *acquis* consists of three conventions which are widely known as the PFI instruments: the Convention on the protection of the European Communities’ financial interests (PFI Convention)¹¹ as well as its two Protocols – the anti-corruption¹² Protocol¹³ (“first Protocol”) and the Protocol dealing with the liability of legal persons and money laundering (“second Protocol”).¹⁴

The distinctiveness of the *acquis* related to the criminal law protection of the EU’s financial interests is the legal nature of these instruments: they are “conventional” international treaties that have to be signed, ratified, and implemented according to the constitutional rules of each Member State. The PFI Convention and its protocols, as well as other third pillar conventions, are open to accession by any State that becomes a member of the EU.¹⁵ However, due to the accession process, the implementation of these treaties in Croatia, as was the case in all candidate countries, will be the reverse of the regular course of implementation of international treaties, namely that implementation follows ratification. As they are part of the

acquis, Croatia is obliged to already implement them during the negotiations for the accession, i.e., before officially signing and ratifying them.

The following assessment of the implementation measures in Croatia shall be divided into three main parts which are in line with the standard methodology for evaluation of the implementation of the PFI Convention and its protocols.¹⁶ The first part on substantive criminal law shall deal with the offences and punishments prescribed in all three conventions (fraud, corruption, and money-laundering), the second part shall encompass the general concepts of substantive criminal law, such as the criminal liability of heads of businesses and legal persons as well as issues of confiscation. Elements generally relating to criminal procedure, such as jurisdiction, extradition, and the *ne bis in idem* principle, shall be analysed in the third part.

1. Offences and Punishment for the Protection of the EU’s Financial Interests

a) EU Fraud

According to the screening report of the Commission¹⁷ of 28 September 2006 and the draft common position of the EU,¹⁸ the alignment of the Criminal Code with the PFI Convention and its protocols is one of the benchmarks for the provisional closing of chapter 32 on “Financial Control”. Croatia in its negotiating position expressed its intention to incriminate, by the end of 2007, all forms of actions to the detriment of the EU’s financial interests. In order to fulfil this commitment, the Croatian Parliament adopted amendments to the Criminal Code in October 2007 (hereinafter: 2007 Amendments).¹⁹ As in the majority of Member States, the Croatian legislation contains separate offences for the protection of expenditure and revenue from the EU budget. All offences are prescribed by the Croatian Criminal Code (CC).

Fraud regarding expenditure is described in the 1st and 2nd indents of Art. 1(1)(a) of the PFI Convention as the use or presentation of false, incorrect, or incomplete statements of documents and non-disclosure of information in violation of a specific obligation. These acts are covered by the standard offences of *fraud* (Art. 224 CC) and *fraud in economic operations* (Art. 293 CC), as well as a new offence of *special cases of fraud to the detriment of the EU’s financial interests* (Art. 224.b CC) introduced by the 2007 Amendments. The standard offences punish the conduct of a person who, with the aim to procure unlawful pecuniary gain for him- or herself or a third party (Art. 224), or for him- or herself or another legal entity (Art. 293), by false representation or concealment of facts, deceives another person by inducing him/her to thereby do or omit doing something to the detriment of his/her property or the property of another. The conduct of the perpetrator (*actus reus*), which consists of false representation or concealment of facts, corresponds to the conduct defined by the PFI Convention as false representation. According to the Croatian case

law, this includes the written and oral²⁰ presentation of false, incorrect, or incomplete statements. The omission by failure to disclose information is covered by the description of the concealment of facts.²¹ According to Croatian legal scholars and practitioners, the concealment of facts can be fraudulent only if the perpetrator has a legal or contractual obligation to inform someone of certain facts²², i.e., the perpetrator has to act in violation of a specific obligation envisaged in the second indent of Art. 1(a) of the PFI Convention.

A new offence of *fraud to the detriment of the EU's financial interests* (EU fraud) prescribes that perpetration of the standard offence of fraud (Art. 224) shall include false representation or concealment of facts relevant for a decision on subsidy, aid, or tax relief by which the EU's financial interests can be endangered. The wording of the offence implies that the offence of EU fraud is just a form of the existing offence of fraud, and therefore it contains the same normative elements as fraud.

The statutory requirements for all three fraud offences fall short in so far as the following three additional factual and mental elements are required: (1) the requirement of a specific aim of fraudulent behaviour, (2) the requirement of a subjective effect of “deceiving another”, and (3) the condition of an objective effect as regards the detriment of property. According to the Croatian law, the aim of an offender must be to acquire unlawful pecuniary gain for him-/herself or a third party or a legal person. Such an intention on the part of the offender is not envisaged by the Convention. Hence, it represents an additional subjective element. It can be compared with the requirement of enrichment in Austria,²³ Italy, and the Netherlands.²⁴ That the offence of EU fraud also requires this element is confirmed in the explanatory report of the 2007 Amendment where it is stated that the offender aims to acquire gain.²⁵

A further superfluous element of fraudulent conduct in view of the PFI Convention is the requirement of deceiving another person. The element of fraud in Croatia refers to the participation of the victim who is often considered as being naïve or greedy.²⁶ It has to be proven that the victim was deceived²⁷ and, so to say, had a false idea of the relevant facts induced by the perpetrator's conduct.²⁸ This requirement of deception on the part of victims also exists in some other countries.²⁹ Such a psychological element is contrary to the Convention because the establishment of EU fraud does not require any participation of the victim; likewise, the victim's idea about the perpetrator's acts should be irrelevant. According to the PFI Convention, only the behaviour of a perpetrator is relevant.

The required objective effect of deception is such that the deceived person does something to the detriment of his/her property.³⁰ Therefore, fraud in Croatian law is a material, concrete offence which is committed only if its consequence happens, i.e., detriment occurs. As far as subsidies are concerned, this means that the subsidy is indeed given to the perpetrator. According to the PFI Convention, the only effect of a fraudulent act should be “the misappropriation or wrongful retention of

funds”, whereas the appearance of a pecuniary detriment is not required.³¹ The offence of EU fraud also requires the occurrence of pecuniary detriment as § 2 of Art. 224.b CC states that a person shall not be punished for fraud if s/he voluntarily prevents the occurrence of detriment. The establishment of additional constituent elements of fraudulent offences in Croatian law narrows its application and fails to satisfy the minimal standards set up by the Convention.

Lastly, as regards the third indent of Art. 1(1)(a) of the PFI Convention (fraud committed through the misapplication of funds), Croatian law covers this alternative by the new offence of the *abuse of authority with regard to the EU funds* (Art. 292.a CC) which was introduced in 2007. This article targets anyone who uses the EU subsidy or aid entrusted to him/her contrary to its specific purpose. Contrary to the standard offence of the abuse of authority (Art. 292 CC), the new offence is not limited to a responsible person in a legal person, but it can also be committed solely by a natural person. Furthermore, the basic form of offence does not require the aim of acquiring unlawful pecuniary gain. The shortcoming of this offence definition is that it envisages in § 5 that a perpetrator shall not be punished if s/he voluntarily prevents the occurrence of detriment for the EU's financial interest; this means that the element of detriment is introduced. The non-compliance of the Croatian law in this regard is particularly visible as the PFI Convention for the commitment of fraud through the misapplication of funds (3rd indent of Art. 1(1)(a)) does not even require the effects of misappropriation and wrongful retention (only the 1st and 2nd indents of Art. 1(1)(a) do so). This is due to the fact that misapplication consists of the misuse of funds which, although legally obtained, may have been subsequently wasted or used for purposes other than those for which they were granted.³² Additional problems regarding this offence are attempt, which is not punishable, and penalty (see below).

The act of **fraud against the revenue of the EU budget** is prescribed in the 1st and 2nd indents of Art. 1(1)(b) of the PFI Convention and is equivalent to the forms of conduct of fraud against expenditure. However, it requires the effect of illegal diminution of the resources of the EU budget. Revenue fraud was covered in Croatia prior to October 2006 by the offence of *avoiding customs control* (Art. 298 CC). The offence could be committed by a person who carried a large quantity of goods or an object of great value across the customs line, thus avoiding measures of customs control. “Avoiding” could have meant the concealment of goods but also the failure to declare goods subject to customs controls in accordance with a specific obligation to declare goods at the customs border (as prescribed by the Customs Act). According to the Croatian case law, this offence could be committed regardless of whether the border was crossed at the official border crossing, whether goods had been concealed or not, and whether the customs officer had asked the perpetrator to declare goods or carried out measures of customs control.³³ Therefore, the offence included smuggling as well as the evasion of customs duties. It was required

that the goods had to be of a great value. The Supreme Court, in alignment with Art. 2(2) of the PFI Convention, set the threshold value at 4,000 Euros (30,000 kuna).³⁴ In addition, this offence could also be committed if the value of goods was less than 4,000 Euros but a large quantity of goods was involved. The criteria for the quantity of goods was that they could not possibly be intended for use in everyday life (e.g., a tenfold amount of the same trousers, thousands of cigarette boxes, etc.).³⁵ In 2006, Croatia aligned its Customs Act with the *acquis communautaire* and therefore customs duties now include EU duties.

This was the state of play at the time of the first and second screening in Brussels. However, in October 2006, an amendment of the Criminal Code came into force which limited the aforementioned offence to the carrying of goods whose manufacture or distribution are *limited* or *forbidden* across the customs line. The aim of the amendment was the decriminalisation of avoiding domestic customs duties and taxes, and such behaviour was dealt with as a misdemeanour, which fails to satisfy the level of protection of EU revenue required by the PFI Convention.

However, by means of the 2007 Amendments, a new provision for the criminal law protection of EU revenues was introduced in the offence of avoiding customs control (Art. 298 § 4 CC). It incriminates a person who, in the import-export business, also with EU countries, falsely represents quantity, quality, type, and purpose of goods. The main flaw of this provision is that the lawmaker of the 2007 Amendments overlooked the fact that the offence of avoiding customs control was no longer suitable for the protection of customs duties. Other weaknesses of the provision are that the origin of goods, which is often a basis for preferential customs duties, is left out and the perpetrator must aim to acquire unlawful pecuniary gain.

The third form of fraud in respect of revenue, described as the misapplication of a legally obtained benefit with the effect of illegal diminution of the resources of the EU budget (3rd indent of Art. 1(1)(b) of the PFI Convention), which deals with situations where the benefit was legally obtained (e.g., preferential customs duty based on a specific purpose of goods), but with the perpetrator subsequently having decided to change the purpose of goods and thus violating the condition for obtaining preferential customs duty, was not provided for in the 2007 Amendments. However, this form of fraud can be partly covered by the already existing offence of *abuse of authority in economic business operations* (Art. 292 CC) which is committed by a responsible person in a legal entity who, with the aim of acquiring illegal pecuniary gain in fulfilling obligations towards budgets and funds, withholds funds due to these ostensible obligations. Beyond the fact that this offence comprises the superfluous element of aim and can be committed only by a responsible person in a legal entity, it is doubtful whether Croatian courts will interpret it in the sense of the third form of revenue fraud. Therefore, it is necessary to prescribe anew an offence for this form of EU fraud.

The provision of Art. 1(3) of the PFI Convention, which requires the **incrimination of preparatory acts for EU fraud**, has been implemented in Croatia in a twofold way: first, through the offence of *document forgery* and, second, through the incrimination of preparatory acts of offences against the protection of the EU's financial interests. On the one hand, forgery of a document (Art. 311 CC) and forgery of an official or business document (Art. 312 CC) are prescribed as principle offences which cover intentional preparation or supply of false, incorrect, or incomplete statements or documents. These offences can be concurrently adjudicated with the offence of EU fraud. On the other hand, participation in (Art. 36 CC), instigation of (Art. 37 CC), and aiding and abetting (Art. 38 CC) of the offences applicable to Art. 1 of the PFI Convention are punishable. The instigator of a criminal offence shall be punished as if he/she committed it on his/her own. The same is true for a person charged with aiding and abetting but the punishment may be mitigated.

However, the incrimination of attempt became unsatisfactory after the 2007 Amendments. The attempt of every intentional offence, which foresees a punishment of at least five years of imprisonment, is punishable while the attempt of other criminal offences is punishable only if the law expressly provides for the punishment of an attempt (Art. 33 CC). For two offences, namely the basic form of fraud of the Croatian criminal code and the offence of avoiding of customs control, which are punishable by imprisonment of three years, there is an express provision that an attempt of these offences is punishable. Paradoxically, there is no such provision for the new offences of EU fraud and abuse of authority with regard to EU funds although they are also punishable by imprisonment of up to three years. This means that, contrary to the requirement of the PFI Convention, their attempt is not punishable.

Penalties provided for in the Croatian criminal law for all offences applicable to EU fraud are prison sentences of up to at least three years. Since the threshold for surrender under the European Arrest Warrant is punishment of three years, once the European Arrest Warrant is implemented, the commission of any of these offences could give rise to the surrender of persons without the need to verify double criminality. Concerning the severity of the penalties, Croatia has laid down effective, proportionate, and dissuasive penalties in line with Art. 2 of the PFI Convention. However, the 2007 Amendment prescribed lower penalties for the abuse of authority with regard to EU funds (up to three years of imprisonment) than for the abuse of Croatian budgetary funds (up to five years of imprisonment). This is not in line with the principle of assimilation which requires that Member States must ensure "that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance".³⁶

b) Corruption

Corruption which damages or is likely to damage the European Communities' financial interests has been criminalized

in Croatia by the general offences of passive and active bribery. Passive corruption comprises the offences of *accepting a bribe* (Art. 347 CC), *receiving a bribe in economic transactions* (Art. 294a CC) and *unlawful intercession* (Art. 343 CC). Active corruption is criminalised by the offences of *offering a bribe* (Art. 348 CC), *offering a bribe in economic or other transaction* (Art. 294b CC), and *unlawful intercession* (Art. 343 CC). The offences of receiving and offering a bribe in economic transactions were introduced in 2004 in order to extend the criminal zone of passive and active corruption to the private sector. As a result, responsible persons and heads of businesses in domestic and foreign legal persons were included. The conduct to be punished with these offences comprises requesting, accepting, and receiving an advantage of any kind, either directly or through an intermediary. Although there is no requirement that any of these offences should have damaged or were likely to damage the EU's financial interests, the offences are fully applicable to such acts, too.

In 2004, the notion of "official" (Art. 89 § 3 CC) was expanded to cover all categories of persons who are considered officials according to foreign or international law. It includes: (1) civil servants, representatives, and officials of another state or international organization of which Croatia is a member, (2) judges or officials of an international court whose judicial competence Croatia has recognised, and (3) foreign lay judges and foreign arbitrators. Although the Croatian law does not explicitly refer to Community officials, but only to officials of other international organisations, it cannot be interpreted differently to the effect that members of European institutions (Commission, European Parliament, and Court of Justice) are assimilated to their Croatian counterparts once Croatia becomes an EU Member State.

The Croatian law penalises passive and active corruption differently. In 2006, the parliament endorsed much more severe penalties for bribery offences, especially regarding passive corruption. Punishment for passive corruption ranges from six months to very severe eight years of imprisonment for serious corruption whereas the penalty for active corruption ranges from six months to three years. Once the European Arrest Warrant is implemented, all offences could give rise to the surrender of the perpetrator without verification of double criminality, except the offence of offering a bribe in an economic transaction in a less serious form; nonetheless, the latter does not exclude extradition.

In conclusion, although Croatia is not prescribing separate bribery offences for the protection of the EU's financial interests, the existing offences comply with the anti-corruption Protocol as the Croatian law comprises Community officials and officials of Member States, covers corruption in the private sector, and prescribes effective, proportionate, and dissuasive criminal penalties.

c) Money Laundering

Since 2000, money laundering is prescribed as a criminal offence that considers as predicate offences all possible offences

(Art. 279 CC). Thus, it includes the proceeds of fraud offences, including tax evasion and active and passive corruption, as required by the second PFI Protocol. The penalty for this offence is imprisonment from six months to five years and, if it has been committed by a member of a group or a criminal organization, the range of punishment is increased to one to ten years of imprisonment. However, the wording of the offence contains a gap which still remains to be closed in order to ensure compliance with EU requirements. The offence criminalises a person who "conceals the true source of *money*, objects or rights procured by *money* which s/he knows to be acquired by a criminal offence" which implies that the proceeds of the crime always have to be money. This is not in line with the EU framework decisions which lay down that proceeds of crime may consist of any form of property, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property (Framework Decisions 2003/577/JHA and 2005/212/JHA).³⁷

2. General Concepts of Substantive Criminal Law

a) Criminal Liability of Heads of Businesses

The PFI instruments require establishing the criminal liability of heads of businesses or any persons having power to take decisions or exercise control if offences affecting the European Community's financial interests were committed by a person under their authority. It covers the criminal liability of heads of businesses, not only on the basis of their personal action (perpetrator, associate, instigator, or participant) but also on the basis of failure to fulfil a duty of supervision or control (*culpa in vigilando*).³⁸ Member States are to introduce the criminal liability of heads of businesses in accordance with the principles defined by their respective national law (cf. Art. 3. of the PFI Convention). This means that the implementation can be satisfied by an assimilation clause.³⁹ Criminal liability of heads of business for offences affecting the EU budget has to be assimilated to the rules for comparable offences against national financial interests. Such an obligation leaves Member States considerable freedom to establish the basis for the criminal liability of decision-makers and heads of businesses.⁴⁰

Apart from the general rules on perpetration, instigation, and other forms of participation in criminal offences, the basis for a decision-maker's criminal liability in Croatia is the notion of "responsible person" and the offence of negligent performance of a duty (Art. 339 CC). A responsible person is defined in the general part of the Criminal Code as a person who is entrusted with particular tasks in the field of activities of a legal entity, a government body, a body of local self-government and administration, or a local self-government body (Art. 89 CC). Although the provision makes no difference between decision-makers and controllers, according to Croatian theory and practice, the element of "tasks in the field of activities of a legal entity" also applies to heads of businesses as well as supervision bodies. Almost all Croatian

offences against the EU budget prescribe that its perpetrator is a responsible person (*delicta propria*). Where this is not the case, such as in the offence of unlawful intercession (Art. 343 CC), a head of business can also be responsible for the offence of his/her subordinate according to the general criminal law rule of omission (Art. 25. CC).⁴¹

The offence of negligent performance of a duty (Art. 339 CC) can be committed by an official or responsible person who violates regulations, fails to perform mandatory supervision, or in any other way negligently performs his/her duty. However, the effect of this behaviour has to be a serious violation of the rights of a third person or a considerable damage to property, which is a redundant element according to PFI instruments.

Although the Croatian law does not provide for an explicit provision to ensure the criminal liability of heads of businesses for offences affecting the financial interests of the EU, it implements Art. 3 of the PFI Convention, assimilating it with the responsibility of heads of businesses for offences affecting national financial interests.

b) Criminal Liability of Legal Persons

The criminal liability of legal persons was introduced in 2003 in Croatia by the Act on the Liability of Legal Persons for Criminal Offences. The main characteristic of the approach is that the criminal liability of a legal person is to be derived from the culpability of the responsible person. According to the meaning of the Act, a responsible person is a natural person who is the head of the business of a legal person or is entrusted with particular tasks in the field of activities of that legal person. As a consequence, it includes a person who has a leading position within the legal person, who represents a legal person, or has decision-making or control powers. A legal person shall be punished for a criminal offence committed by a responsible person if it breaches the duty of a legal person or if the legal person acquired or intended to acquire illegal pecuniary gain for him-/herself or for another person. The liability of a legal person is also ensured in cases where a responsible person is liable for an attempt or as an accessory or instigator. Under the requirements prescribed by law, a legal person can be responsible for any criminal offence prescribed by the Criminal Code and any other statutes which prescribe criminal offences, including fraud, active corruption, and money laundering. The punishments for the legal persons are fines and judicial winding-up orders. In addition to these penalties, the Act provides for four security measures: (1) exclusion from the practice of certain activities or affairs, (2) exclusion from entitlement to permits, authority, concessions, and subsidies, (3) exclusion from contracts with beneficiaries of state and local budgets, and (4) forfeiture, as well as confiscation of pecuniary gain as a *sui generis* measure. It can be concluded that the Croatian criminal law on the criminal responsibility of legal persons is in compliance with Articles 3 and 4 of the 2nd Protocol: it ensures the criminal liability of legal persons for fraud, active corruption, and money laundering committed by decision-makers as well as employees in accordance with the requirements of the

2nd Protocol and prescribes all criminal sanctions and security measures envisaged in the 2nd Protocol.⁴²

c) Confiscation

The confiscation of instruments and proceeds is provided for by the security measure of forfeiture (Art. 80 CC) and the measure of confiscation of pecuniary gain acquired by a criminal offence (Art. 82 CC). *Instrumenta sceleris* and *producta sceleris* as well as proceeds of crime and property, the value of which corresponds to such proceeds, shall be confiscated by a court decision according to the procedure prescribed by the Criminal Procedure Act (CPA). The seizure of the instruments and proceeds of offences is ensured in some cases in the pre-investigatory proceedings. The temporary seizure of objects is one of the investigative measures (Art. 218-221 CPA) which can be carried out in the course of the criminal proceedings or as an urgent investigation measure before the institution of the criminal proceedings (Art. 184-185 CPA). The Act on the Office for the Suppression of Corruption and Organised Crime provides for the seizure of proceeds, instrumentalities, and property acquired by a criminal offence prior to the institution of the criminal proceedings according to provisions of distraint law. As a result, the aforementioned Croatian criminal law provisions satisfy Art. 5 of the 2nd Protocol as they enable the confiscation of instrumentalities and proceeds of property, the value of which corresponds to such proceeds for all possible criminal offences.

3. Elements of Criminal Procedure

a) Jurisdiction

The Croatian law recognises the territoriality principle and the principle of active personality in line with the requirements of the PFI instruments. The Croatian criminal legislation applies to anyone who commits a criminal offence within the Croatian territory (Art. 13 CC). A criminal offence is committed both at the place the perpetrator acts or ought to have acted and the place where the result fully or partially occurs and, in a case of punishable attempt, ought to have occurred according to the perpetrator's expectation (Art. 27 § 1 CC). The determination of *locus delicti commissi* according to the so-called "theory of ubiquity", which combines jurisdiction based on the place of commission and the place where the effects occur, covers fraud for which benefit was obtained in the Croatian territory, as required by Art. 4(1) of the PFI Convention. Jurisdiction over the participation in and instigation to commit the offence on the territory of another Member State or third country is also ensured as the offence is also committed at the place where the accomplice or instigator acts or ought to have acted or the consequence ought to have occurred according to the expectation of the accomplice (Art. 27 § 2 CC).

The Croatian law also provides for extra-territorial jurisdiction on the basis of the active and passive personality princi-

ple. A Croatian national shall be prosecuted and judged for the commission of all criminal offences, irrespective of where the offence was committed, under the condition of double criminality (Art. 14 § 2 CC). Art. 6(1b) of the 1st Protocol differentiates jurisdiction based on the offender who is a national and the offender who is an official. The situation in which an offender is a Croatian official but not a Croatian national is not covered by the active personality principle. Likewise, the Croatian law does not provide for jurisdiction if the offender is a Community official who is working for a Community institution with headquarters in Croatia (Art. 6 of the 1st Protocol).

Extra-territorial jurisdiction based on the passive personality principle is laid down only for Croatian nationals under the condition of double criminality but not if the offence is committed against a Community official or a member of a Community institution who is not a Croatian national. It should be emphasised that, in all cases in which Croatian law does not provide for jurisdiction required by the PFI instruments, it is possible for Croatia to opt-out and declare that it will not apply these rules.

b) Extradition

The Croatian law on extradition enacted by the Act on Mutual Legal Assistance in Criminal Matters⁴³ aligns with the 1995 Convention on simplified extradition procedure and the 1996 Convention on Extradition between the Member States of the EU as it introduces rules for simplified extradition, the request for extradition no longer being transmitted through diplomatic channels, i.e., through the Ministry of Foreign Affairs, and it provides for the securing of evidence and confiscation of property as forms of mutual legal assistance in criminal matters. However, Croatia's legislation is not in compliance with the Framework Decision on the European Arrest Warrant for the following reasons: the Constitution prohibits the extradition of Croatian citizens; the dual criminality principle is not limited and applies to all offences; the extradition procedure is judicial and governmental as it is conducted through the Ministry of Justice and the Minister of Justice ultimately decides whether extradition is granted or denied. The grounds for refusing extradition are: fiscal offences, political offences, offences against a Croatian national, and lack of evidence. However, as mentioned above, penalties for offences against the financial interests of the EU are high enough to give rise to extradition or surrender according to the Framework Decision on the European Arrest Warrant.

c) *Ne bis in idem*

In contrast to the issue of extradition, the Croatian law is aligned with the *ne bis in idem* principle as laid down in Art. 54 and 55 of the 1990 Convention implementing the Schengen Agreement of 14 June 1985 and taken over in Art. 7 of the PFI Convention, apart from the exception to the principle of territoriality provided for in Art. 7 § 2a of the Convention. This provision requires the application of the *ne bis in idem* rule or

prohibits prosecution if the acts took place in part in the territory of the state where the judgement was delivered. In such a case, before the 2007 Amendment, it was possible for a State Attorney to decide to apply the principle of territoriality and to put such an offender on trial in Croatia (Art. 15 § 1 CC).

In order to close this gap, the 2007 Amendment introduced in Art. 15. of the Criminal Code a provision which prohibits the institution of criminal proceedings if the state on whose territory the offence in part took place has delivered final judgement and the penalty is served or is being served or serving of the imprisonment is not possible. The flaw of the provision is that it applies the *ne bis in idem* rule only if the judgement of conviction is delivered pronouncing a sentence of imprisonment but not when another type of judgement is delivered. This is contrary to the Convention which, in Art. 7 § 1, includes any type of final disposal of the trial. It is also contrary to the case law of the European Court of Justice which decided in the *Gözütok & Brügger case*⁴⁴ that the *ne bis in idem* rule applies even when the prosecutor discontinues criminal proceedings without the involvement of a court, once the accused has fulfilled certain obligations and, in the *van Straaten case*,⁴⁵ that *ne bis in idem* applies to the judicial decision by which the accused is finally acquitted for lack of evidence.

IV. Conclusion

The analysis of the 2007 Amendment of the Croatian Criminal Code that should have been the implementing act of the PFI Convention in Croatia indicates that it did not completely fulfil its purpose. Although improvement has been made and Croatia has partly implemented the provisions of the PFI *acquis*, remaining gaps and loopholes hold no promise that the criminal law protection in Croatia satisfies all requirements of the PFI instruments. The reason for this legislative failure lies in the solely political purpose of the Amendment which is to satisfy the promise given to Brussels to implement the PFI instruments by the end of 2007, even if this means a formal fulfilment – without proper content. The Amendment was passed urgently and the customary steps in the legislative procedure for criminal law acts were disregarded.

However, since the beginning of the association process, Croatia has considerably increased its level of criminal law protection of the EU's financial interests. As, according to the European Commission report, "none of the Member States under scrutiny appears to have taken all the measures needed to comply fully with the PFI instruments",⁴⁶ it remains to be seen whether the European Commission will consider that the improvements which have been made are sufficient for closing the negotiating chapter 32 on Financial Control. Perhaps the Commission will take into account the overall level of the protection of the EU's financial interests in the EU Member States. Bearing this in mind, one cannot say that Croatia did not meet its benchmarks.

- 1 Such as: INTOSAI Internal Control Standards, Lima Declaration Of Guidelines On Auditing Precepts, INTOSAI – Auditing Standards, INTOSAI Code of Ethics.
- 2 Official Gazette of the Republic of Croatia No 141/ December 27, 2006.
- 3 European Commission, Accession negotiations, Croatia, Draft Common Position, Brussels, 31 May 2007, 4.
- 4 Council Regulations (EC) No 1338/2001, 1339/2001, 2182/2004, 2183/2004, Council Decisions 2001/923/EC, 2001/924/EC, 2003/861/EC, 2003/862/EC, Commission Decision 2005/37/EC.
- 5 Council Regulation (EC, Euratom) No 2988/95.
- 6 Council Regulation (Euratom, EC) No 2185/96.
- 7 Council Regulation (EEC) No 595/91, Commission Regulation (EC) No 1681/94, Commission Regulation (EC) No 2035/2005, Commission Regulation (EC) No 1831/94, Commission Regulation (EC) No 2168/2005
- 8 Art. 5 § 12 and Art. 36 of the PIFC Act.
- 9 Art. 3 of the Regulation amending Regulation on Internal Structure of the Ministry of finance, Official Gazette of the Republic of Croatia, No 138/ December 20, 2006.
- 10 European Commission, Accession negotiations, Croatia, Draft Common Position, Brussels, 31 May 2007, 6.
- 11 OJ C 316 from 27.11.1995, 49-57.
- 12 Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313 from 23.10.1996, 2-10).
- 13 See also *Pradel, Jean / Corstens, Geert (2002) Droit pénal européen*, Paris: Dalloz, p. 516.
- 14 Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 221 from 19.7.1997, 12-22).
- 15 Cf. Art. 12 of the PFI Convention, Art. 10 of the first Protocol, and Art. 17 of the second Protocol.
- 16 See for example Commission Staff Working Paper, Annex to the Report from the Commission "Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols", Brussels, 25. Oct. 2004, SEC(2004) 1299.
- 17 http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_32_hr_internet_en.pdf.
- 18 European Commission, Enlargement Directorate-General, Draft Common Position, Accession Negotiations Croatia, Negotiating chapter 32: Financial Control, Brussels, 31 May 2007, p. 7. (attached to the Council of the European Union, Brussels, 31 May 2007, 10291/07, Limite, ELARG 52)
- 19 Official Gazette of the Republic of Croatia No 110/ October 25, 2007.
- 20 See decision of the Supreme Court of the Republic of Croatia – VSRH Kzz 39/04-2, www.vsrh.hr.
- 21 County Court decision – ŽS Kc Kž 132/1998.
- 22 *Novoselec, Petar*, Kazneno pravo: opći dio, Zagreb: Pravni fakultet u Zagrebu 2006, 235.
- 23 See *Kert, Robert*, Straftaten gegen das Gemeinschaftsbudget und ihre Sanktionen nach dem österreichischen Recht, in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 29.
- 24 Annex to the Report from the Commission "Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols", Brussels, 25 Oct. 2004, SEC(2004) 1299, p. 19.
- 25 Ministry of Justice, Draft proposal on the Amendment Act on the Criminal Code, August 2007.
- 26 *Novoselec*, endnote 22, 234.
- 27 VSRH KZZ 25/04-2.
- 28 In Croatian case law, the proof that a victim was misled requires the establishment of facts such as whether the official bodies were required to check over the presented facts or whether they have had such possibility. In some cases, like if a victim did not have any idea of relevant facts or was indifferent, the obligation on the part of the „victim“ can exculpate the offender. VSRH Kzz 20/06-2; VSRH KZZ 25/04-2; *Novoselec*, endnote 22, 236.

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- 29 Compare with the general offence of fraud in Germany (§ 263 dStGB) and in Austria (§ 149 öStGB). See *Zeder, Fritz*, Umsetzung des Übereinkommens über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften im allgemeinen Strafrecht, in: *Finanzstrafrecht 1996-2002*, Wien 2006, S. 951.
- 30 See *Novoselec*, endnote 22, 237-238.
- 31 See *Novoselec, Petar*, Der „EU-Betrug“ und das kroatische Strafrecht, in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 19; *Zieschang, Frank*, Das Übereinkommen zum Schutz der finanziellen Interessen der EG und seine Auswirkungen auf das deutsche Strafrecht, *EuZW* 1997, S. 78-83 (80).
- 32 Explanatory Report on the Convention on the protection of the European Communities' financial interests, OJ C 191, 23 June 1997. Art. 1, § 1.
- 33 VSRH IV Kz-79/98.
- 34 VSRH Su-726-IV/97 from January 19, 2001.
- 35 County Court decision Bjelovar Kž-235/01-3.
- 36 Judgement of the ECJ of 21 September 1989, Case 68/88, *Commission v. Greece*, ECR I-2965, para. 24-25.
- 37 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 from 2.8.2003, 45-55 and Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ L 68 from 15.3.2005, 49-51.
- 38 See Explanatory Report on the Convention on the protection of the European Communities' financial interests, OJ C 191, 23 June 1997. Art. 3.
- 39 See *Tiegs, Heiko W.A.*, Betrugsbekämpfung in der Europäischen Gemeinschaft, Berlin 2006, S. 349.
- 40 Explanatory Report, as cited.
- 41 Article 25 prescribing the manner of perpetrating a criminal offence reads as follows: (1) A criminal offence can be committed by an act or an omission to act; (2) A criminal offense is committed by omission when the perpetrator, who is legally obligated to avert the consequence of a criminal offence defined by law, has failed to do so, and such a failure to act is tantamount in its effect and significance to the perpetration of such an offence committed by an act; (3) The punishment of a perpetrator who has committed a criminal offence by omission can be mitigated, except in the case of a criminal offence which can be committed only by failure to act.
- 42 More details on the criminal liability of legal persons in Croatia see *Đurđević, Zlata*, Criminal Liability of Legal Persons in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 73-89.
- 43 Official Gazette No. 178/04.
- 44 Judgment of the Court of Justice of 11 February 2003, Case C-187/01 i C-385/01, *Hüseyin Gözütok and Klaus Brügge*, ECR 2003, I-5689.
- 45 Judgment of the Court of Justice of 28 September 2006, Case C-150/05, *Van Straaten v Staat der Nederlanden, Republiek Italië*. Full text of the judgment available via eur-lex.europa.eu 3-4/2006, p. 64.
- 46 Report from the Commission Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols, Brussels, 25. 10. 2004, COM(2004) 709 final, 7.

The Effective Implementation of International Anti-Corruption Conventions

Bryane Michael and Habit Hajredini

I. Introduction

For over 10 years, organisations such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe (CoE) have been helping developing countries adopt legal measures to fight corruption. These efforts, however, have sometimes had less than the desired impact. The UN, OECD, and CoE conventions against corruption have been relatively ineffective because these conventions, while ratified by national parliaments, are not being implemented in the government agencies most prone to corruption – particularly the traffic police, security services, customs, and tax inspection. Figure 1 provides an overview of the three conventions discussed in this article and the ways in which they are supposed to be implemented. As shown in the figure, two of the conventions rely on the national judicial system – particularly on government prosecutors – to implement their provisions (the CoE Civil Law Convention, in contrast, does not). However, national authorities can engage in a number of practical steps that can bolster the effectiveness of these international conventions. As it is not possible to address all such practical steps in detail, this article will focus on a few aspects of an effective implementation of the aforementioned international anti-corruption instruments.²

Part II of this article covers the basic points that should (or should not) be included in executive regulations governing law enforcement agencies. Part III discusses methods of discouraging civil servants from taking bribes. The fourth part examines ways in which countries can finance additional law enforcement obligations imposed by the international conventions against corruption. In Part V, a concrete example is given of how some of the issues raised in the previous parts can be applied within the international legal framework. The issues are illustrated on the basis of the international corruption scandal involving the French oil company Elf-Aquitaine. Finally, Part VI provides concluding observations and suggestions.

II. Executive Regulations for Law Enforcement Agencies

Three points should be dealt with regarding executive regulations that tackle corruption: the distinction between bribes and gifts, the problem of unnecessary regulation, and the need for clear regulatory drafting to help compensate for the vagueness of the conventions themselves. The effective implementation of the conventions listed in Figure 1 requires, first, a reason-

able *delineation of offenses* covered by the legal definition of corruption. In developing countries, bribes are often confused with gifts. Such confusion has led most international conventions against corruption, including the UN Convention against Corruption, to prohibit (or at least regulate) gift-giving to civil servants.⁶ However, surveys about the public's perception of corruption often point to differing views about the giving of whiskey, chocolate, or small cash gifts. According to most of these surveys, many respondents consider the giving of such gifts to be ethical and permissible behaviour even though international guidelines for developing countries discourage this kind of activity. A *two-part test* can help civil servants and prosecutors to understand the difference between indictable bribes and gifts about which there should be no complaint: A "payment" (a bottle of cognac, for example, or a box of chocolates) is not "corrupt consideration" if (1) the gift does not coincide with the delivery of a service to which the public service user has a right and if (2) the civil servant could not anticipate *ex-ante* (i.e., before delivering the service) that the gift would be given. If both of these requirements are met, there is no linkage between the "payment" and the service delivery. Naturally, a fixed rule against accepting any gifts might be easier to implement, and cases in which one part of the test fails would require special attention.

Furthermore, executive regulations should reflect the fact that the effective implementation of international conventions against corruption often depends on the removal of *unnecessary regulation/legislation* in general. Often, the state engages in unnecessary anti-corruption programmes or provides problematic regulations that may even enhance corruption. In many cases, corruption results when regulations prevent economic actors from engaging in activity in which they would prefer to engage.⁷ For example, regulations that impede the cross-border import and export of products encourage traders to find black market methods of trading these products. The World Bank estimates that the effect of these "regulatory distortions" can be to increase the cost of goods from 5 % to 100 % in some countries!⁸ While such regulations obviously contribute to the creation of black markets, many other regulations are similarly counterproductive. For example, regulations specifically aimed at reducing corruption – such as rules about the rotation of staff, the declaration of civil servants' assets, or the signing of forms by multiple civil servants – can also encourage the development of black markets. An increasing number of documented cases shows that anti-corruption regulations and rules aimed at reducing corruption actually lead to an increase

Convention	Brief Description	Method of Implementation	Weaknesses
UN Convention against Corruption (2003) ³	Makes corruption a criminal offence in over 100 countries; provides provisions for asset restitution.	Relies on member state police and judicial systems to investigate and prosecute corruption.	Offers general guidance, includes no methods for financing the additional activities imposed on signatory states, repeats much of the work of previous regional treaties.
OECD Anti-Bribery Convention (1997) ⁴	Makes the bribing of foreign officials by legal and natural persons from OECD countries a criminal offence.	Relies on OECD member state prosecutors and courts to discover and convict corruption cases committed in foreign countries.	Provides little incentive for governments to harm their own companies in international competition by enforcing the Convention; provides no methods for financing the additional activities imposed on signatory states.
Council of Europe Civil Law Convention Against Corruption (1999) ⁵	Encourages legal and natural persons to sue for the harms imposed by corruption.	Relies on harmed parties to sue in civil courts for the value of the harm engendered by corruption.	Relies on self-interested individuals to “fight the system” as well as on an often corrupt judiciary.

Figure 1: Overview of the three international conventions against corruption, source: author

in corruption!⁹ Another negative aspect is that the enforcement of such regulations requires resources (and thus tax revenue). Increasing the number of regulations on civil servants is an almost visceral response to corruption; such an approach can – and often does – cost more than it benefits the civil service.

Although avoiding superfluous and vague agency-level anti-corruption programmes and/or regulations may seem to be a relatively minor problem, studies show that the conventions themselves are very *vague*. As a result, the development of specific and concrete supporting regulations is necessary. For example, a study of all 71 articles of the UN Convention against Corruption assessed the extent to which the articles in the Convention provide clear instructions as opposed to expressing general statements of principles.¹⁰ On a 5-point scale related to the “clarity” of each article of the Convention (where 1 signified that the article outlined a broad principle and 5 represented a concrete, specific, and well-defined obligation), the average clarity of the Convention was 2.5. In light of this situation, the lawyers and other specialists working in agencies such as customs or the police should write detailed department-level instructions to help implement these international conventions.

III. Increasing the Risk of Engaging in Corruption

Another important issue for the effective implementation of international anti-corruption requirements is to find ways of increasing the risk of engaging in corruption. A standard recommendation for legal reform in corruption-prone countries is to increase the risk to bribe-taking civil servants and bribe-giving private individuals of engaging in corruption.¹¹ In numerous countries around the world, engaging in corruption is low-risk behaviour. In Germany, for example (until 2000), companies

could claim tax deductions for bribes paid to foreign government officials. Currently, in the Ukraine, a civil servant convicted of engaging in corruption can be fined a maximum of only \$40,000. According to a large-scale survey, 27 % of the Bolivian population claims to have had experience with corrupt government officials, even though less than 10 officials are convicted of corruption offenses every year.¹² These examples show the low risk that bribe-takers and bribe-givers face when engaging in corruption. There are many possible ways to respond to this problem; three responses are recommended here: first, increase the liability of civil servant’s superiors; second, adopt alternative procedures with a lower burden of proof for certain types of corruption offences; and third, conduct so-called “integrity probes.”

One way to increase the risk of engaging in corruption is to adopt regulations that would make a bribe-taking government official’s boss liable (or legally responsible) for the corruption of his or her subordinates. The concept used in this context, *respondeat superior*, refers to the legal liability that an employee’s bosses and managers incur for the improper actions of their subordinate. Such legal liability is often already imposed, albeit haphazardly. For example, in October 2007, a Hungarian Member of Parliament was questioned by police for suspected corruption involving his staff.¹³ Making the Member of Parliament legally responsible for the corruption offences of his staff should increase his interest in monitoring their activities and hence make corruption all the more risky for them.

The *criminal* prosecution of corruption cases is difficult because of the high *burden of proof* required in order to obtain a conviction. The burden of proof requirement in criminal cases¹⁴ requires the prosecutor to show “beyond a reasonable doubt” (to use a famous phrase from the American and English legal systems) that the accused participated in corruption.

In other words, if even a 1% chance exists in the mind of the judge (or jury in the case of a jury trial) that the accused did not participate in the corrupt act, then the judge/jury has the duty to acquit the accused person. The high burden of proof called for by the international anti-corruption conventions reduces the ability of law enforcement agencies to stop individuals from engaging in corruption.

Law enforcement agencies would have more success implementing these international conventions – and thus stopping corruption – if they were to choose prosecutorial strategies that involve a less stringent burden of proof than that required in criminal proceedings. Accordingly, a prosecutor could choose to pursue certain offences as disciplinary or administrative infractions to which a less stringent burden of proof applies; this less stringent burden of proof would require the prosecutor to show only “on the balance of probabilities” (to again borrow a phrase from the legal community in the USA and UK) that the accused participated in corruption. In other words, if convinced that the accused is more likely guilty than not, the judge or jury – based on the evidence that investigators were able to collect – would be able to convict. In simple terms, if the judge or jury believes that there is a 51% chance that the accused took a bribe (or engaged in any other form of corruption), then the judge/jury is obliged to render a guilty verdict. However, because this level of proof is much lower than the burden of proof required in criminal cases, the sanctions imposed following conviction in such a proceeding would have to be less severe than those imposed on persons convicted of criminal activity. Such sanctions could involve small fines, a bad review in the convicted officer’s personnel file, or dismissal from work. Despite these lighter sanctions, the increased probability of a successful conviction would increase the risk of engaging in corruption.

Finally, so-called “*integrity probes*” could dramatically increase the risk to law enforcement officers and other government officials who engage in corruption. The British Customs Service has conducted such probes for years. In these probes, a plain-clothes individual working with the Customs Service tries to smuggle contraband. The individual notes whether the customs officials on duty find the contraband and waits for them to make suggestions or to solicit bribes. Many countries are concerned about using such integrity probes for fear that these probes are illegal or unconstitutional because they encourage government officials to commit crimes. Entrapment of this nature can be avoided if the officers consent to these probes at the start of their employment (to the extent they are statutorily permissible) and if the person who has the contraband is not the one to suggest that the situation can be handled through the payment of a bribe.

IV. Financing Anti-Corruption Measures

One of the most important issues in practice is the financing of state anti-corruption activities. On the one hand, the international conventions against corruption require effective

implementation; on the other hand, these conventions do not answer the question of how extra money can be provided to help realize the obligations they impose on governments. The UN Convention requires investigators to turn over evidence to foreign prosecutors in international corruption cases¹⁵ and to protect witnesses who observe corrupt transactions.¹⁶ The OECD Convention requires signatory states to impose “dissuasive” penalties for corruption – which are very expensive to implement as the cost of an investigation can run into several tens of thousands of dollars.¹⁷ Indeed, public budgets in developing countries are often too small to fund large-scale anti-corruption work. Even the OECD countries – which include the richest countries in the world – are failing to implement the OECD Convention because certain measures cannot be financed.¹⁸ As a result, it is crucial to generate funds. Funding could come from a number of sources, including proceeds of corruption that have been recovered by means of so-called “*qui tam* actions” (as will be explained below), civil damages imposed on corrupt parties, and fines imposed on negligent companies or organisations.

The international conventions against corruption would be more effective if they encouraged anti-corruption work to be *self-financing*. Allowing law enforcement agencies to keep (or claim from the budget) a portion of the value of the corruption that they successfully detect and prosecute would provide an incentive to fight corruption and would tie anti-corruption efforts to the amount of corruption affecting a particular agency. Such payments would also allocate resources to the investigator or even the private whistle-blower as well as to the agency that can best fight corruption. A good example can be given from Turkey: Turkish law enforcement agencies were at one time allowed to resell or keep a portion of the value of the contraband goods they found. While some countries have had good experiences using schemes such as this one, the policy of paying law enforcement officers based on the amount of crime and corruption they find can lead to “shake-downs” and more inspections than economically, socially, or legally desirable. However, rewards to departments and civil servants (in the form of promotion prospects or perquisites such as social housing or subsidies on public services) can be used to create incentives for law enforcement officials without encouraging excessive shake-downs of public service users.

The international anti-corruption conventions do not provide mechanisms for rewarding the investigation and prosecution of corruption. Few cases of corruption are successfully prosecuted because rewards are not provided to witnesses, plaintiffs, investigators, or prosecutors for participating in legal actions against corrupt officials. However, *qui tam* rewards can encourage individuals to report cases of suspected corruption. The term *qui tam* derives from the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*”, meaning “he who sues for the king as well as for himself”. *Qui tam* provisions allow individuals to sue those who harm the State and to claim a share of the damages paid by the offender. The damages that a whistle-blower can be awarded in a *qui tam* ac-

tion concerning corruption may include the value of the bribes paid as well as the value of revenue the State loses due to corruption. In the United States, such *qui tam* rewards have allowed the government to reclaim over \$12 billion since 1986.¹⁹

Fines levied on companies potentially engaged in corruption represent another manner in which cash-strapped prosecutors' departments can raise the funds needed to continue investigating and prosecuting the corruption targeted by the international anti-corruption conventions. At present, companies engaging in corruption do not pay for the damage their corrupt activities cause. For example, the global engineering company Siemens paid over € 400 million in bribes to win telecommunications contracts.²⁰ The harm to the purchasing governments' agencies and, ultimately, to the consumers who received Siemens products (which were presumably of inferior quality to those of the company that would have won the contract had Siemens not paid the bribe) was certainly much larger than the € 400 million Siemens paid in bribes. Nevertheless, Siemens is not required to pay damages to these aggrieved parties (in the form of money to the individuals and agencies harmed by corruption).

Because proving corruption remains difficult – mainly due to the high burden of proof in criminal cases and the difficulty in punishing legal persons – the imposition of fines on companies for failing to take sufficient precautions against corruption must be considered. Such “negligence fines” would punish companies for failing to engage in activities that help prevent corruption in the course of their operations. Clearly, if a company is accused of engaging in bribery or corruption – as in the above-mentioned Siemens case – prosecutors have a difficult time proving that individual natural persons physically handed out brown paper bags filled with cash bribes. However, prosecutors have an easier time showing that legal persons failed to monitor their staff and the way the staff spent company money.

V. Handling International Corruption Cases

Some of the issues mentioned above become much more difficult when cases are examined that play not only at the national level but at the international level as well. These cases show the possibilities provided by the international legal framework to find a suitable solution to the problem of international corruption. The following case will serve as an illustration of the application of the UN Convention against Corruption: In 2003, almost forty senior officials went on trial in Paris for corruption associated with the activities of the former French oil giant Elf-Aquitaine.²¹ The case involved the payment of kickbacks amounting to almost € 200 million to public officials in Gabon, Cameroon, Congo-Brazzaville, Russia, Spain, Germany, and other countries. According to investigators, senior company officials transferred over €150 million into their own personal (foreign) bank accounts. The accused (and later convicted) senior oil executives testified that the French presi-

dent and several foreign heads of state directly participated in (or at least had active knowledge of) the illegal activities.

The prosecutorial strategies presented in the previous part illustrate the remedies that prosecutors could have sought if the Elf-Aquitaine case had taken place in 2008 rather than 1993. Today, the UN Convention against Corruption, which entered into force in December 2005, would allow for the restitution (return) of the funds collected by the foreign officials who received bribes and kickbacks from the French oil company. In the Elf-Aquitaine case, these assets included € 6 million in jewellery, five antique statues worth about € 40,000, and a € 23m pied-à-terre in Corsica.²² However, the UN Convention does not indicate who should receive these recovered funds. The claims of four possible beneficiaries should be considered: First, a case could be made that the funds should be turned over to the French investigators and prosecutors who investigated the case. Rewarding successful anti-corruption work clearly directs resources to their most efficient use and provides further encouragement to investigate corruption (although the agency rather than the individuals would most likely receive the cheque). Second, the direct victims of Elf-Aquitaine's corruption could be compensated. Bribes and kickbacks to foreign officials presumably came from the company's shareholders and customers. As such, any funds recovered should be divided among these victims. Third, the individuals harmed by such corruption could be compensated – the consumers who paid higher prices at the gas pump and the company's competition who lost contracts to the French oil giant are obvious injured parties. Fourth, the funds should be spent on the poverty-stricken Africans who most need these funds (as a general principle, public funds go to those who need them most). As government agencies begin filing petitions with foreign governments in order to recover assets located in foreign countries and purchased with the benefits of corruption, they will need to decide which of the four beneficiaries mentioned above should be the preferred recipient of restituted funds.

Another issue to consider in the hypothetical application of the UN Convention against Corruption to the Elf-Aquitaine case is that of jurisdiction. What if Russian investigators – and not French investigators – had discovered the corruption committed in the Elf-Aquitaine case? How should the French authorities treat claims from Russian courts for Russian assets located in Paris? The UN Convention does not clearly define how countries should co-operate on asset recovery.²³ In general, however, requests for the restitution of assets can be handled in four ways. First, the country receiving the request (France in the Elf-Aquitaine example) could translate the request into a property seizure order and arrange for the transfer of the property (or the proceeds after sale) directly based on the request. Second, the French authorities could request to review the evidence used by the Russian court before they process the request to seize the Russian-financed assets held in Paris. Third, the French authorities could decide to render assistance only if their law enforcement officials participated in the trial in Russia. Fourth, the French authorities could refuse all re-

quests. These four possibilities can be referred to, in order, as: foreign jurisdiction, translated judgment, joint judgment, and no foreign (local) jurisdiction.

The Elf-Aquitaine example illustrates how the UN Convention against Corruption could be used today to correct injustices which used to be unresolvable in the past. The UN Convention provides for increased international co-operation and assistance (allowing for easier sharing of evidence and facilitating extradition). However, the Convention does not clearly define how such arrangements are to be made (necessitating either more detailed national implementing legislation or agency-level regulation where such rule-making has been delegated to the law enforcement agency). The UN Convention is a useful tool for fighting corruption and for recovering the proceeds of corruption (which can then be used to fund additional law enforcement activity).

VI. Conclusive Remarks

How can the signatory states to the international conventions against corruption help ensure their effective implementation? While an answer has many dimensions, this article looked at specific areas where practical steps could be incorporated into agency-level regulation. This article argued for a clearer legal delineation between bribes and gifts, the removal of unnecessary regulation, and the introduction of clear regulatory drafting to help compensate for the vagueness of the conventions themselves. Other suggested measures include increasing the liability of a civil servant's superiors, charging suspects with non-criminal corruption offences so as to employ a burden of proof lower than that required in criminal cases, and implementing "integrity probes." The increased burden (in terms of the cost of enforcement) imposed by the international anti-corruption convention on executive agencies – particularly

law enforcement agencies – could be paid for from recovered proceeds of corruption, *qui tam* rewards, civil damages imposed on corrupt parties, and fines imposed on negligent companies or organisations. In order to illustrate how these remedies might be applied in corruption cases of an international dimension, the Elf-Aquitaine case, which took place prior to the entry into force of the UN Convention, was used as a hypothetical – showing how the new legal framework would provide for better outcomes (in terms of convicting guilty parties and recovering funds) than were possible in the past.

As a recommendation, officials working in executive agencies (such as customs, police, or tax) need to draft regulations implementing the international anti-corruption standards. Each article of these regulations should address a separate issue contained in the national anti-corruption law (which enacts the three international conventions examined in this article). Experience in Eastern Europe indicates that such an implementing regulation usually runs no longer than about 20 pages. The agency should circulate the draft regulation (or rule as these regulations are sometimes known) among interested public service users and should then publish the draft rule in the country's version of the Federal Register (to use the US example) or as a green paper (as it is practised in the UK and by the EU Commission). For example, the country's customs service would consult major importers and exports and any business associations that have a direct interest in trade and customs issues. The important parts of the regulation should be widely advertised. For example, part of the regulation in the border guard service could call – on the basis of the OECD Anti-Bribery Convention – for signs to be placed at border crossing points informing border crossers (in the English language as the *lingua franca* of the 21st century) that a bribe paid at the border makes the crosser a criminal in his or her home country if the person comes from a North American, European, or East Asian country such as Japan or South Korea.

1 The authors would like to thank the colleagues from the Max Planck Institute for Foreign and International Criminal Law, Thomas Wahl, Dr. Emily Silverman, Dr. Marianne Wade, and Indira Tie, who heavily edited this article and helped us to crystallise our ideas for this piece. Naturally, any substantive or grammatical errors remain our own responsibility.

2 This article distills some ideas from a much longer academic and technical text written for legal scholars. The text is available at: <http://www.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps150.pdf>

3 United Nations Convention against Corruption, published at http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf. The UN Convention was adopted by the United Nations General Assembly on 31 October 2003 (Resolution 58/4). It entered into force on 14 December 2005.

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14 Most corruption offenses are now categorised as crimes under the UN, OECD and CoE, conventions against corruption.

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 16 Art. 32-33 of the United Nations Convention against Corruption.
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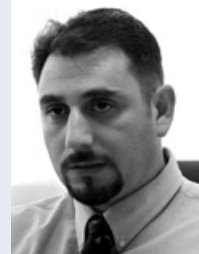
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The Implementation of the European Arrest Warrant in the Republic of Slovenia

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I. Introduction

The following article will first give an overview of the legislative implementation of the European Arrest Warrant in Slovenia (II.). Despite the fact that the first Slovenian law implementing the EU Framework Decision on the European arrest warrant had been adopted in April 2004, a new Act was recently adopted in October 2007. It introduced only slight changes but regrettably did not use the opportunity to fully align with the Framework Decision (in particular as regards the institution of a central authority that would most likely improve the effectiveness of the EAW procedure). Furthermore, this article will go into the proceedings before the Constitutional Court which raised the question of the constitutionality of the Slovenian law on the European Arrest Warrant; however, the Constitutional Court unfortunately did not decide on the merits of this legal instrument (III.). Ultimately, the author will also relate some of the experiences of Slovenian judges collected through interviews conducted with them (IV.).

During the Slovenian accession process, the first step taken towards the implementation of the Council's Framework Decision 2002/585/JHA of 13 June 2002 on the European arrest

warrant and the surrender procedures between Member States (hereinafter: FD EAW) was the amendment of the Constitution of the Republic of Slovenia (hereinafter: CRS) in 2003.¹ With the newly introduced Article 3a CRS, Slovenia partly transferred a part of its sovereignty to the EU, providing *inter alia* for the following: "Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations."² Next, Art. 47 of the Constitution was amended since it previously explicitly forbade the extradition of Slovenian nationals to foreign countries. The newly adopted Art. 47 CRS³ now provides for extradition as follows: "No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of Art. 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organization"⁴.

An extensive debate had been held on the question of whether Slovenia should implement the Framework Decision on the European arrest warrant in the form of a special statute or as an amendment of the Code of Criminal Procedure (hereinafter:

CCP) since Slovenian national law already contained provisions on extradition in the CCP. The legislator decided on the first option and passed a special act. Therefore, Slovenia implemented the FD EAW by adopting the Act on the European Arrest Warrant and Surrender Procedures (hereinafter: AEAW) which came into force on the day of Slovenia's accession to the EU (1 May 2004).⁵ The rules on the form of the European arrest and surrender warrant were published in May 2007.⁶

However, this legislation did not last long. On 26 October 2007, the National Assembly adopted the Act on International Co-operation in Criminal Matters between the Member States of the European Union (hereinafter: AICCM),⁷ regulating cooperation under international law in criminal matters with EU Member States and replacing the provisions of the Act on the European Arrest Warrant and Surrender Procedures and the rules on the form of the European arrest and surrender warrant of 2004. The AICCM was adopted with the purpose of regulating the substance of cooperation in criminal matters between the Member States (MS) wholly, transparently, and efficiently in one single act. It also changed some solutions adopted by the AEAW. Besides the EAW, the AICCM also implemented some additional EU Framework Decisions in the criminal law field.⁸

II. Legislative Implementation of the EAW in Slovenia

In the general part, the AICCM emphasizes four general principles which guide the implementation of the EAW in Slovenian law (Articles 3-6 AICCM):

- the principle of mutual recognition,
- the principle of speciality,
- the principle of aid effectiveness,⁹ and
- the principle of accelerated proceedings.

The AICCM does not apply in cases where cooperation in criminal matters is regulated differently by another EU act entailing direct effect or by other international agreements between the MS. The Act also provides for the subsidiary use of the Code of Criminal Procedure (CCP) or other national criminal law legislation. The CCP's provisions on extradition remain in force since they have to be applied in cases of extradition in relation to third states.

1. Scope of the EAW in Slovenia

The second part of the Act is entirely dedicated to procedures of the European Arrest Warrant (Articles 8-46 AICCM). By defining for which criminal offences it is possible to execute the surrender of a requested person, the AICCM mostly follows the FD EAW.

The surrender can be granted or issued (on the proposal of the state prosecutor or by a competent judge)¹⁰ for criminal offences (1) prosecutable in the issuing state *ex officio*, punishable with a custodial sentence of at least 12 months or (2) for the execution of the custodial sentence or other security or

similar measure executable in connection with the custodial sentence of imprisonment of at least 4 months. In both cases, the act has to be punishable according to Slovenian law as well (double criminality – Articles 8(1) and 40 AICCM). In the case of any of the 32 categories of criminal offences for which the double criminality check has been abolished, the Slovenian legislator strictly followed the provisions of the FD (Articles 2(2) FD EAW, 8(2) AICCM).

We can see that the Slovenian legislator strictly followed the provisions of the FD when providing for the conditions for execution of the EAW regarding criminal offences for which the double criminality check has been abolished, but somewhat altering the scope of criminal offences for which the double criminality check is still in power. The FD EAW does not mention “prosecutable *ex officio*” criminal offences, but merely defines them by the severity of punishment. The Slovenian legislator, however, limited to a slight extent the scope of criminal offences for which Slovenia will execute the EAW, namely to those prosecutable *ex officio*.

It is probably interesting to know that the Slovenian law distinguishes between different types of prosecution: (1) for the great majority of the offences, the competent prosecutor is the state prosecutor; (2) for certain criminal offences (the ones with a personal element, e.g. slander), the substantive criminal law explicitly provides for private-law prosecution; or (3) criminal prosecution on the basis of a motion of the victim. In case criminal prosecution is based on a motion, it is up to the victim to file a motion for the prosecution to begin but, from then on, the competent prosecutor is the public prosecutor. It is not clear why the Slovenian legislator introduced the “*ex officio*” criteria as one of the conditions for the EAWs to be issued or executed, but we can presume that the purpose was to try to avoid surrender for minor criminal offences, the prosecution of which was not entrusted to the professional judgment of the public prosecutor. One cannot yet assess the consequences of this limitation since we do not yet have data on how this prosecution is organized in all 27 MS.

2. Formalities for the Execution of EAWs

It is a requirement that the issuing state must translate the EAW into either Slovenian or English. If the requested person is already in pre-trial detention, then the Slovenian judge can order that the EAW is to be translated into Slovenian in order to speed up proceedings (Art. 15 AICCM). The judicial authority competent in the execution of the EAW is an investigating judge from the district court responsible for the area in which the requested person resides or is located (Art. 13 AICCM). In cases where the requested person consents to being surrendered, it is the investigating judge who makes the decision (Art. 21(1) AICCM). In cases where the requested person does not consent to the surrender, a panel of three district court judges makes the decision to permit or refuse the surrender after it receives a reasoned proposal from the investigating judge (Art. 22(4) AICCM).

Upon receiving the EAW, the competent investigating judge must first formally check the EAW to establish whether the EAW contains all the required information (Art. 17(1) AICCM implementing Art. 8(1) FD EAW). If all the requirements are met, the investigating judge must schedule the hearing and no other check is provided for. The newly adopted AICCM changed the provisions of the AEAW in one respect in that it is now obligatory for the investigating judge to issue an arrest warrant for the requested person. Before the change of legislation, the arrest of the requested person was not obligatory. It was up to the investigating judge to decide whether the requested person was to be arrested or whether it was sufficient to summon him/her only to the hearing. Unfortunately, the legislator did not provide the reasoning for implementing such a change.

3. The Surrender Procedure

Upon arresting the requested person, the police must advise him/her that the arrest is pursuant to an EAW and inform him/her of the country that is requesting the surrender and why it is doing so. The arrested person must be advised immediately that he/she is not obliged to make a statement, that he/she has a right to the immediate legal assistance of an attorney freely chosen, and the competent authority is obliged, if so requested, to inform his/her next of kin of the detention. If the requested person is not a Slovenian citizen, he/she must also be advised that the competent authority is obliged, if so requested, to inform his/her country's consulate of his/her detention (Art. 18(1) AICCM). As soon as possible, within 48 hours at most, the person must be brought before the investigating judge for a hearing. When the person is brought in, the investigating judge must once again inform him/her of his/her rights, then inform the person of the meaning of the principle of speciality and the possibility to consent to surrender. The requested person is then questioned as to the possible existence of grounds for non-execution (Art. 19(2) AICCM). If reasons for suspicion exist that the requested person might flee, the investigating judge can order pre-trial detention according to the rules of the national CCP (Art. 23(2) AICCM).

The procedure on executing the EAW cannot continue without the requested person being present. At the hearing following the arrest of the requested person, the presence of the state prosecutor is obligatory (Art. 19(2) AICCM). The requested person must have a legal counsel for the entire duration of the surrender procedure – from the time he/she is brought before the investigating judge, or from the first hearing to decide on the surrender, to the surrender itself. If the requested person does not engage a legal counsel, the president of the competent court appoints one *ex officio* (Art. 16(1) AICCM).

According to the provisions of the AICCM, the requested person specifically has the right to request the warrant to be translated into his/her native language or into another language he/she understands (Art. 16(2) AICCM). The requested person also has the right to request an interpreter according to the

CCP provisions. All surrender decisions must be treated as a matter of urgency; in this respect, the Slovenian implementation law directly follows the time limits of the FD EAW.¹¹

4. Grounds for Refusal

The Slovenian law distinguishes between mandatory and optional grounds for refusal of the surrender of a person. Specifically, these grounds are laid out in the following. The surrender of a requested person *must* be refused in all of the cases provided for by the FD EAW:

- if a warrant has been issued for a criminal offence covered by an amnesty in the Republic of Slovenia, under the condition that a domestic court is competent to prosecute (Art. 9(1) AICCM);
- if the warrant has been issued for a criminal offence for which the requested person has already been finally acquitted or convicted in Slovenia, in another Member State, or in a third country, on condition that, in the event that a sentence was passed, the sentence has been served or is being served, or that, according to the legislation of the country in which the sentence was passed, the sentence can no longer be executed (principle of *ne bis in idem* – Art. 9(2) AICCM);
- if a warrant has been issued for a criminal offence for which criminal proceedings against the requested person in Slovenia were conclusively terminated or the charge finally rejected, or if the competent state prosecutor rejected the criminal charge because the suspect met the agreed conditions in the settlement procedure or fulfilled the tasks imposed to lessen or rectify the damaging consequences of the criminal offence in accordance with the instructions of the state prosecutor and the provisions of the act regulating the criminal procedure (Art. 9(3) AICCM);
- if the warrant has been issued for a criminal offence committed by a requested person who is under the Slovenian domestic age limit for criminal responsibility (Art. 9(4) AICCM), that is, 14 years of age (Art. 71 Criminal Code);¹²
- if the warrant has been issued for a criminal offence for which prosecution or the execution of a sentence have become statute-barred, under the condition that a domestic court is competent to prosecute or execute the sentence (Art. 9(5) AICCM);
- if the warrant has been issued for a criminal offence that is not punishable in domestic criminal legislation and the exceptions from the second paragraph of Art. 2 of the FD may not be applied (double criminality principle – Art. 9(6) AICCM);
- if criminal proceedings are taking place against a requested person in Slovenia for the same criminal offence for which the warrant was issued, if this criminal offence was committed against the Republic of Slovenia, or if the criminal offence was committed against a Slovenian citizen, and no financial guarantee has been provided to enforce the victim's indemnification claim (Art. 9(7) AICCM);
- if there are reasonable grounds for concluding that the warrant was issued for the purpose of instigating criminal prosecution against and sentencing the requested person on the basis

of his/her sex, race, faith, ethnic origin, nationality, language, political conviction, or sexual orientation, or if his/her chance of a fair trial would be significantly impaired for any of these reasons (Art. 9(8) AICCM),¹³ and

- if the issuing judicial authority has not given certain assurances, defined in Art. 5 FD EAW and Art. 11 AICCM (Art. 9(9) AICCM).

Art. 10 AICCM provides grounds for optional non-execution. The surrender of a requested person *may* be refused for the following reasons:

- if criminal proceedings are taking place against the requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued and if it would clearly be easier for criminal proceedings to be held in Slovenia (Art. 10(1) AICCM);
- if a request for investigation has been rejected in the Republic of Slovenia in a final decision taken to this effect because no reasonable grounds were adduced to support the suspicion that the requested person committed the criminal offence for which the warrant was issued (Art. 10(2) AICCM);
- if the warrant has been issued for the execution of a custodial sentence and the requested person is a citizen of the Republic of Slovenia or a Member State residing in the territory of the Republic of Slovenia, or a foreign person with a permit for permanent residence in Slovenia, if the requested person so wishes and provided that the domestic court agrees to execute the judgement of the court of the issuing Member State in accordance with domestic law (Art. 10(3) AICCM);
- if the EAW has been issued for criminal offences that, according to domestic criminal law, are dealt with as if they had been committed outside the territory of the Republic of Slovenia (Art. 10(4) AICCM) or if the EAW has been issued for criminal offences committed outside the territory of the issuing Member State but domestic criminal law does not permit prosecution for the same offence when committed outside the territory of the Republic of Slovenia (Art. 10(5) AICCM).

Ultimately, Slovenian law provides for the possibility to postpone surrender as an exception for serious humanitarian reasons, in particular if it is likely that surrender would clearly seriously threaten the life or health of the requested person (Art. 34(3) AICCM).

A closer analysis reveals that the Slovenian legislator decided to organize the grounds for mandatory and optional non-execution in a manner different to that of the FD EAW. The Slovenian legislation first introduces some more mandatory grounds for the non-execution other than those provided by the FD EAW: e.g., ground for a mandatory non-execution of the EAW on the basis of discrimination which is not provided for by the FD EAW (Art. 9(8) AICCM). Secondly, it makes some optional grounds provided for in the FD EAW mandatory: e.g., Art. 4(4) FD EAW (where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law)

became a mandatory ground for the non-execution (Art. 9(5) AICCM). Thirdly, Slovenian law sometimes splits the grounds for optional non-execution into two parts: one part is covered by a mandatory ground and the other by an optional ground for the non-execution. For example, an optional ground from Art. 4(2) FD EAW (where the person who is the subject of the European Arrest Warrant is being prosecuted in the executing Member State for the same act as that on which the European Arrest Warrant is based) has been split into two parts: a mandatory ground is covered by Art. 9(7) AICCM (if criminal proceedings are taking place against a requested person in Slovenia for the same criminal offence for which the warrant was issued) and an optional ground by Art. 10(1) AICCM (if criminal proceedings are taking place against the requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued and if it would clearly be easier for criminal proceedings to be held in Slovenia).¹⁴

III. Constitutional Court Case

Until now, one interesting case regarding the EAW has been brought to the Constitutional Court of the Republic of Slovenia.¹⁵ The applicant (the requested person and his attorney) claimed that the former law implementing the FD EAW, namely the AEA, was not in line with the Slovenian Constitution. The applicant claimed that the then valid AEA was unconstitutional because it breached Articles 23, 25, and 29 of the Constitution of the Republic of Slovenia. Art. 23 CRS guarantees the right to judicial protection.¹⁶ The applicant claimed that, according to the well-established constitutional doctrine, the right to judicial protection has to be effective and not merely formal. In the case of the EAW, this would mean that the judicial protection can only be effective if the court can perform an in-depth reflection on the merits and not only a formal check.¹⁷ The right to judicial protection was therefore breached by the fact that the procedure of deciding on the European Arrest Warrant allows only for a formal check and the court is not allowed to check the legal basis or the evidence of the case. The same logic applies to the right deriving from Art. 25 CRS – the right to legal remedies. The right to legal remedy has to be effective which means that the appellate court must be able to decide on the merits of the case and not only do a formal check. Art. 29 CRS contains legal guarantees in criminal proceedings.¹⁸ Since there can be no doubt that, in the case of an EAW, the concept of a ‘criminal charge’ can be applied, the rights guaranteed in Art. 29 CRS should also apply to the EAW procedures. The applicant claimed that the right of Art. 29(4) CRS had been breached – namely the right to produce evidence to his benefit – since the court deciding on the EAW did not assess the evidence or the probability that the criminal offence in question was committed.

It would have been very interesting to see how the Constitutional Court would have answered all these assertions but, unfortunately, the application¹⁹ was rejected by the Constitutional Court since the requested person had already been surrendered

to the issuing Member State. Art. 24 of the Constitutional Court Act namely provides that only a person holding a so-called 'legal interest' may file a request.²⁰ Since the applicant had already been surrendered, the Constitutional Court held that he no longer had a legal interest in the case and therefore rejected the request as inadmissible. The decision was criticized in the academic journals.²¹ The commentators claimed that the Constitutional Court did not show enough courage in tackling the question of the jurisdiction of the Slovenian constitution within the legal framework of the European Union.²²

IV. Final Remarks

It is unusual that the new legislation on the EAW was introduced so soon after the initial implementing law had been adopted (see I.). Although the new law repeats or only slightly changes the provisions of the old law, the legislator unfortunately did not seize the opportunity to improve some solutions, the most notorious being the problem with the central authority (according to Art. 7(2) FD EAW): Slovenian law still does not provide for it. However, the notification to the Council designates²³ the Ministry of Justice as being competent to act as the central authority to assist the competent judicial authorities if difficulties arise in transmitting the arrest warrant. At present, it is only SIRENE²⁴ (managed by the Slovenian Interpol Unit) which performs, at least in part, the role of a central authority. It maintains the register of EAWs, but only when the whereabouts of the requested persons are unknown; otherwise they are sent directly to a competent judicial authority. When a request is executed (the person is surrendered), the EAW is also entered into the SIRENE system. Therefore, if a certain judicial authority wants to know whether there was a warrant issued for a certain person, there is no Slovenian authority which can provide the relevant information in cases in which the whereabouts of the person are known and the EAW proceedings are in progress. There is also no central registration of outgoing EAWs. Judicial authorities as well as the police are also lacking an authority to provide advice or expertise in this matter.

The exact number of executed EAWs issued by Slovenian authorities is therefore not available, due to the continuing lack of a central authority for the proceedings within the Slovenian system. However, the Slovenian Ministry of Justice has mandated the Institute of Criminology at the Faculty of Law of the University of Ljubljana to conduct a study of all the EAW files that Slovenia has either issued or executed. A more detailed analysis will thus be available at the end of 2008. The researchers have also conducted interviews with the investigating judges and established that the judiciary in Slovenia is generally quite satisfied with the way surrender procedures function. The judges consider the procedures to be much quicker and more efficient in comparison to those required for formal extradition. Most judges remark that the judge-to-judge communication, unfortunately, still does not work since most countries still communicate with them through the central authority or even through Interpol, despite the fact that the foreign court is sometimes only few kilometres across the border. Such proceedings prolong the surrender unnecessarily, sometimes even for months.

Some judges also complained about how the scope of checking the legal context of the EAW differs from state to state. Slovenian investigating judges find it very frustrating that they cannot check whether the offence can reasonably be subsumed under one of the 32 listed offences for which the double criminality check has been dropped, even in cases where the description is very vague and the category is broad. However, there have been cases in which Slovenia was an issuing state for one of the listed offences, such as fraud, and the executing judicial authority of another EU Member State *did* in fact request information from our judicial authority regarding the factual side of the offence, hence questioning the application of the legal norm. This is one example which shows that some states thus obviously still check the factual and legal context, even regarding one of the above-mentioned 32 offences, and assume they have the right to do so. There is still a lot to be learned about the empirical side of how the principle of mutual recognition works.

1 Official Journal of the Republic of Slovenia (hereinafter: O.J.) No. 24/03 from 7 March 2003.

2 For the complete text see: http://www.us-rs.si/en/index.php?sv_path=6.

3 Constitutional Act Amending the First Chapter and Articles 47 and 68 of the Constitution of the Republic of Slovenia, O. J. 24-899/2003.

4 C. Ribičič, *Položaj slovenske ustave po vključitvi v EU* (The Position of the Slovenian Constitution after joining the EU). *Pravna praksa*, V. 25, no. 29-30, 2006, pp. II-VI.

5 O.J. No. 37/04 of 15 April 2004.

6 O.J. No. 51/04 of 7 May 2004.

7 O.J. No. 102/07 of 9 November 2007.

8 The AICCM has also implemented the FD of 13 June 2002 on joint investigation teams (2002/465/JHA); the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA); the Joint Action of 29 June 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union on the creation of a European Judicial Network

(98/428/JHA); the FD of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (2005/214/JHA); the FD of 22 July 2003 on the execution in the EU of orders freezing property and evidence (2003/577/JHA); the FD of 24 February 2005 on confiscation of crime-related proceeds, instrumen-

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talities and property (2005/212/JHA); the FD of 6 October on the application of the principle of mutual recognition to confiscation orders (2006/783/JHA); the Council Decision of 21 November 2005 on the exchange of information extracted from the criminal records.

9 Art. 5 AICCM provides that the competent authorities of the Republic of Slovenia are obliged within the legal limits of their powers to act in such a way that most accomplishes the goal of cooperating with other MS to the greatest possible extent.

10 The competent authorities for issuing an EAW are state prosecutors or district courts which can issue it *ex officio* as soon as the conditions mentioned above are met (Art. 40 AICCM).

11 See Art. 17 FD EAW.

12 This ground will certainly prove to be an obstacle to surrender since the age limit for criminal responsibility is substantially lower in some of the Member States than in others.

13 S. *Alegre/M. Leaf*, *European Arrest Warrant: A solution ahead of its time?*, *Justice*, London, 2003, pp. 29-31.

14 For more detailed analysis, see K. *Šugman*, Slovenian national report on the implementation of the EAW on: <http://www.eurowarrant.net/> (5.1.2008)

15 U-I-14/06, from 22. 6. 2006. There was one more case (Up-261/06 from 11.4.2006) brought to the Constitutional Court but was not even admitted to the procedure since the applicant did not use the right legal remedy.

16 Art. 23(1) CRS: "Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law."

17 Both the FD EAW and the AEAW provide only for the duty of the judge to check the EAW formally: whether the EAW contains all the required information (Art. 16(1) AEAW implementing Art. 8(1) FWD). If all the conditions are met the investigating judge must schedule the hearing and no other check is provided for. Therefore, the judge, cannot and must not check the evidential base of the EAW nor he/she can assess the question whether the acts for which the EAW was issued can reasonably be qualified as one of the 32 categories enumerated in Art. 2(2) FD EAW.

18 Art. 29 CRS (Legal Guarantees in Criminal Proceedings: (1) Anyone charged

with a criminal offence must, in addition to absolute equality, be guaranteed the following rights: (2) the right to have adequate time and facilities to prepare his defence; (3) the right to be present at his trial and to conduct his own defence or to be defended by a legal representative; (4) the right to present all evidence to his benefit; (5) the right not to incriminate himself or his relatives or those close to him, or to admit guilt.

19 The legal remedy is called "Request for assessment of the constitutionality and legality of a law".

20 Art. 24 Constitutional Court Act: (1) Anyone who demonstrates legal interest may lodge a petition that the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority be initiated.

(2) Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position.

21 B. *Kovačič Mlinar*, *Je ZENPP v neskladju z Ustavo?* ("Is the AEAW in accordance with the Constitution?"), *Pravna praksa*, 25, no. 14, 2006, pp. 13-14.

22 B. *Kovačič Mlinar*, *Pomanjkanje poguma pri odločitvi o pobudi za oceno ustavnosti ZENPP* ("Lack of courage while deciding on the Request for assessment of the constitutionality of the AEAW"), *Pravna praksa*, 25, no. 37, 2006, p. 15;

A. *Erbežnik*, *Ustavno sodišče RS ter ENPP* ("Constitutional Court of the Republic of Slovenia and EAW"), *Pravna praksa*, 27, no. 1, 2008, pp. 22-24.

23 Slovenian notification concerning the EAW

http://www.eurowarrant.net/documents/cms_eaw_2_1_EJN537.pdf (20. 10. 2005)

24 The Schengen information system (SIS) was set up to allow police forces from the Schengen countries to access data on certain individuals (e. g. suspects wanted for arrest or extradition, missing persons etc.) and on goods which have been lost or stolen. The SIS is supplemented by a network known as SIRENE (Supplementary Information Request at the National Entry). It allows communication between the SIRENE offices in every Schengen State. The SIRENE offices serve as the intermediaries between the national authorities responsible for the data on the SIS (judges, police).

The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant

Professor Dr. Asbjørn Strandbakken

I. Introduction

On 28 June 2006, the Council Presidency signed a judicial agreement on behalf of the EU on the surrender procedure between Member States of the EU and Norway and Iceland, respectively.¹ The outcome of this agreement will provide possibilities to apply to a very large extent the provisions of the Framework Decision on the European Arrest Warrant (hereinafter: FD EAW) in cases involving Norway and Iceland in relation to the European Union. It is difficult to say when exactly the agreement will be in force since all contracting parties must accept it first in order for it to enter into force. Therefore, it will be some time before Norwegian courts have to deal with problems arising from surrender procedures.

However, among the Nordic countries, there is a long tradition of cooperation in the field of criminal law. The principle of mutual recognition of judgments was introduced among the Nordic countries in 1948, long before the EU put it on the agenda at the meeting in Tampere in 1999.² Later, new instruments were developed, e.g., on the simplification of the extradition process in 1963, the transfer of criminal prosecution in 1970, and the agreement on police cooperation in 1972. In the last few years, the European Union has played a more important role, also regarding the cooperation among the Nordic countries.³ However, the impact of this development has taken different forms since two of the countries, Norway and Iceland, are not members of the Union. The cooperation between Denmark, Finland, and Sweden is primarily governed by the

instruments introduced by the Union, and the cooperation between Iceland/Norway versus the three other Nordic Member States is still based on the inter-Nordic framework.

When the Nordic extradition process was adopted in the 1960s, it was regarded as a smooth tool for more effective cooperation between the states. After the introduction of the European Arrest Warrant, for which the Nordic framework might have been an inspiration,⁴ the original extradition process between the Nordic countries seemed to be old-fashioned compared with the process under the European Arrest Warrant. Today, we have two sets of regulations on extradition in the Nordic states: extradition between Denmark, Finland, and Sweden can be based on the European Arrest Warrant, while extradition to or from Norway/Iceland has to be built on the legislation from 1963.

Some commentators have criticized the fact that the European Arrest Warrant has gone too far when it comes to the States' obligation to surrender citizens. This criticism has not been an obstacle in that the Nordic countries have decided to develop a new tool for extraditions which will be even more effective than the EAW. The new instrument is named the Nordic Arrest Warrant and, for the time being, each of the Nordic countries has started the legislative process to introduce this particular arrest warrant into its domestic law. The Nordic Arrest Warrant will probably come into force in 2008. In this article, I will give a brief overview of the content of the new Nordic legal tool in the field of extradition.

II. The Nordic Arrest Warrant (NAW)

The European Arrest Warrant (EAW) was adopted on 13th June 2002.⁵ As a follow-up to the creation of this instrument, the Nordic Ministers of Justice, at a meeting on Svalbard/Norway on 25th June 2002, decided that the Nordic extradition acts should be revised based on the EAW.⁶ It was a basic principle for this revision that extradition between the Nordic countries should at least be at the same level of efficiency as the EAW.

The convention for the revision was adopted at the Nordic Ministers of Justice meeting in Skagen/Denmark on 21st June 2005 and signed by the competent authorities in Copenhagen on 15th December 2005. Based on this convention (hereinafter: NAW Convention⁷), each of the Nordic countries has to implement the convention by adopting new extradition acts.

Compared with the existing Nordic legislation on extradition, the Nordic Arrest Warrant (NAW) will differ on four points: First, the term "extradition request" will be replaced with "arrest warrant" and the term "extradition" will be replaced with "surrender". Second, the new instrument ends the system in which the states had the option of whether an extradition request shall be granted or not; now, the receiving state of an arrest warrant will be obliged to arrest the said person and surrender him to the state which has instituted the warrant. Third, governmental authorities shall not be involved in the

process but the prosecuting (judicial) authorities themselves shall take the decision on surrender. It is further worth mentioning that only if the arrested person does not give his consent is a court required to make the decision. Fourth, the time limits for enforcement of an arrest warrant will be shortened.

In sum, the procedure concerning extradition is far simpler compared with the present extradition process between the Nordic countries. According to the Ministry of Justice of Norway, the new system will be an effective tool in combating cross-border crime. As already mentioned, the right to judicial review will be maintained in cases in which the said person does not consent to the surrender.

The Norwegian Ministry of Justice additionally emphasized, that there is a need for the new instrument due to the increasing rate of organized and cross-border crime. Effective combating of crime in an area of free movement of persons and goods requires that there are no obstacles to investigation and prosecution in each state. If any such obstacle should be in place, a particular state might be regarded as a safe haven for criminals. At the same time, the preamble to the convention states that it is built on the principles of freedom, democracy, respect for fundamental human rights, and a high degree of trust in each other's legal systems. The rhetoric used followed the same line as is often used when introducing new and far-reaching measures in the area of criminal law within the European Union. So far, this rhetoric has had the requested effect in the Norwegian parliament. Parliamentarians were convinced that amendments to the Norwegian criminal law are necessary in order to prevent Norway from being regarded as safe harbour for foreign criminals.

Compared with the EAW, the NAW goes even further on six points. First of all, the double criminality clause has been completely abandoned (Article 2 para. 3 of the NAW Convention). Thus, the receiving state will be unable to refuse the arrest with the argument that the said act is not criminalized in the receiving country. For instance, Norwegian or Danish citizens shall be surrendered to Sweden if they have bought sexual services in Sweden, even if this is not a criminal act in Norway or Denmark.⁸ Even though the limitation of the double criminality clause in the EAW has been criticised, the criticism had no impact on the Nordic countries' effort to create an even more far-reaching tool in the field of extradition.

Furthermore, in comparison to Article 2 para. 1 of the FD EAW – which requires that an arrest warrant may be issued for acts punishable by the issuing state by a custodial sentence or detention order for a maximum period of at least 12 months – there is no such requirement in the NAW. The act for which the arrest warrant is issued need not contain a certain level of custodial sentence or a detention order (Article 2 para. 1 of the NAW Convention). It is sufficient that the act is punishable with such a sanction. Surrender can also take place for several acts as long as only one of them fulfils this condition (Article 2 para. 2 of the NAW Convention).

There is no exception in the surrender of nationals which means that foreigners as well as nationals of the executing state shall be surrendered. The exception for non-execution due to the fact that the act is a political offence, which is included in the Nordic extradition legislation from 1963, has been abolished in the NAW Convention. However, even if the states are obliged to execute a NAW as a starting point, there are some reasons for mandatory non-execution of the warrant (Article 4 of the NAW Convention). The exceptions listed in Article 4 are actually the same as those listed in Article 3 of the EAW. However, the list of grounds for optional non-execution in Article 5 of the NAW Convention does not include some exceptions of the correspondent article of the FD EAW; as a consequence, the grounds for optional non-execution in paragraphs 1, 4, and 7 lit. b of article 4 of the FD EAW were not included into the NAW Convention.

When it comes to the surrender procedure, the content and form of the Nordic Arrest Warrant is actually the same as that of the European Arrest Warrant (cf. Article 7 of the NAW Convention and Article 8 of the FD EAW). In a similar way as the EAW, the NAW gives the said persons certain rights in the course of the procedure (Article 9 of the the NAW Convention, Article 11 of the FD EAW), and it is also possible to keep the person in detention during the surrender procedure (Articles 10 of the NAW Convention and the FD EAW respectively).

The two instruments diverge when it comes to the time limits. While the 1963 instrument for extradition between the Nordic countries does not include any time limits for the execution of an extradition request, the introduction of time limits in the EAW was one of the major novelties – a big step forward in speeding up the extradition process. In general, the time limits are far more stringent in the NAW compared with the EAW. Time limits are laid down in Article 17 (for a decision to execute the European Arrest Warrant) and Article 23 (for the surrender) of the FD. In cases where the requested person consents, the final decision on the execution of a request shall be taken within a period of 10 days after consent has been given (Art. 17 para. 2 of the FD EAW). In contrast, the time limit

according to the NAW is 3 days in these cases (Article 14 para. 2). In cases without consent, the EAW sets a time limit of 60 days (Article 17 para. 3 of the FD), while the NAW Convention puts the limit at 30 days (Article 14 para. 3). As regards the time limits for the surrender of the person requested, the FD EAW sets a time limit of no later than 10 days after the final decision on the execution (Art. 23 para. 2 of the FD), whereas the NAW Convention puts the time limit at no later than 5 days (see Article 19 para. 2).

Finally, the EAW and the NAW differ when it comes to possible prosecution for other offences committed prior to the surrender. Under the NAW regime (Article 23 of the Convention), the person who is surrendered can be prosecuted for offences prior to his or her surrender to a wider extent than under the parallel provision of the EAW framework (Article 27 of the FD EAW). While Article 27 of the FD EAW is framed as an exception, Article 23 of the NAW Convention states as a principle that prosecution may take place for other offences committed prior to the surrender and then makes certain exceptions.

III. Closing Remarks

Even if the European Union will play an essential role in the future when it comes to harmonization and cooperation in the field of criminal law, the conditions are favourable for developing an even closer cooperation between the Nordic countries.⁹ Today, a system with mutual recognition and enforcement of judgments exists, but this system can be improved and extended to other judicial decisions.¹⁰ For instance, when it comes to wiretapping of mobile phones, it would be an improvement if such a decision could apply to the whole Nordic area, whether or not the phone owner moves from one country to another.¹¹ In addition, other aspects of police cooperation could be subject to improvement.¹² The solid foundation for this potential improvement is the mutual trust that exists between the Nordic countries. Against this background, it is worth mentioning that the implementation of the Nordic Arrest Warrant has not been met with any critical public debate so far.



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<http://www.jur.uib.no/ansatte/joras/default.html>

1 Council Decision 2006/697/EC, OJ L 292, 21.10.2006, p. 1-19.

2 See Fredrik Wersäll, *Straffrättsligt samarbete i ett gränslöst Norden NTfK 2006* p. 124.

3 See Wersäll (note 2) pp. 122-123.

4 See Wersäll (note 2) p. 122.

5 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA); OJ L 190, 18.7.2002, p. 1-18.

6 See Wersäll (note 2) p. 123 who, criticising that the EAW was the model for the initiative, suggested that it would be better to improve the common Nordic legislation on extradition in order to improve the extradition process.

7 The Nordic arrest warrant is published in Norwegian at: <http://www.regjeringen.no/upload/JD/Vedlegg/Vedlegg%20II%20h%C3%B8ringsnotat%20arrestordre.pdf>. In Danish as Bilag B at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=88198>.

8 The Norwegian Government has stated that, before 2009, it will put forward a proposal with a similar statute than Sweden that criminalizes the act of buying sexual services.

9 See Wersäll (note 2) p. 123. See also Wersäll (note 2) pp. 124-126 on the vision of a Nordic area without borders and unconditional recognition of judicial decisions.

10 See likewise Wersäll (note 2) p. 124.

11 See likewise Wersäll (note 2) p. 125.

12 See further Wersäll (note 2) pp. 125-126.

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