

SUCCESSOR TO AGON



Focus: Evidence Gathering and Joint Investigation Teams

Dossier particulier: La collecte de preuves et les équipes communes d'enquête

Schwerpunktthema: Beweissammlung und Gemeinsame Ermittlungsgruppen

Eurojust and Its Role in Joint Investigation Teams

José Luís Lopes da Mota

The Collection of Evidence by OLAF and Its Transmission to the National Judicial Authorities

Dr. Joaquín González-Herrero González / Maria Madalina Butincu

The Difficulties of Joint Investigation Teams and the Possible Role of OLAF

Stefan de Moor

Gemeinsame Ermittlungsgruppen – Herausforderungen und Lösungen

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Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda

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Imprint

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Editorial

Dear Readers,

It is a pleasure for me to address the readership of the eucrim journal. This issue is focusing on evidence gathering and JITs (Joint Investigation Teams), a relatively new judicial cooperation instrument and a tool which will help us put many criminals behind bars.

Cooperation is the key word in Europol's activities. As one of several institutions fighting international crime within and beyond the borders of the EU, Europol is committed to working together with other law enforcement agencies in a spirit of mutual support and shared responsibility.

Europol's main goal in the coming years will be to use its unique capabilities and strengths to make a real difference to the internal security of the Member States and the safety of their citizens. Europol will strengthen its capabilities further by capitalising on the benefits brought by the European Council Decision which makes Europol an EU agency in 2010. The Council Decision will consolidate Europol's position at the centre of the new internal security arrangements and information pathways in the EU. This will enable Europol to become an even greater pioneer of change, identifying and responding to new threats, and developing new techniques.

The rapid development of society in general and, more specifically of technology, has transformed business as well as criminal opportunities. A truly global operating environment capable of transcending borders has been created. Organised crime groups take advantage of this and use, for example, the internet as a tool for communication, distribution and the direct targeting of victims in society. Criminal groups are evolving also, from their traditional monolithic business structures. They have turned into flexible, multinational, multi-ethnic enterprises which make use of professional facilitators often hidden in the legitimate economy. Such complex new challenges to law enforcement demand a smarter response particularly through more effective international cooperation. Some of the most capable answers to these criminal threats are the 'European Arrest Warrant' and 'Joint Investigation Teams'. To match the criminals we have to make better use of these and other cooperation instruments. Similarly we have to use our common knowledge to identify the key vulnerabilities in organised crime in order to hit the criminals where it hurts

them most. Recently Europol and Eurojust supported a successful JIT with the Bulgarian police and the Spanish Brigada Investigación del Banco de España. This is a good example of the capabilities of Joint Investigation Teams. A criminal group of 17 people, behind the distribution of more than 82.000 counterfeit euro notes with a face value of more than 16 million euro, was disrupted. Our role was to deliver operational analysis, technical support and operational coordination.

Everyday our analysts are trying to turn high quality analysis into major operational successes by identifying and disrupting criminal networks. When these are identified, the next step is to bring them to court and to stop their illegal activities. Ministers and EU citizens expect us to protect them and to produce results. The 'Stockholm Programme' foresees an internal security strategy for the EU which aims to strengthen cooperation in police and law enforcement matters. Exploiting the full potential of Europol is called for especially in regard to Europol involvement in major cross-border operations and Joint Investigation Teams. Synergies still have to be developed between national, European and international bodies. In the EU greater levels of cooperation should exist between relevant agencies, including Europol, Eurojust, Frontex and OLAF. We have to complement each other's strengths and avoid duplication of work.

Furthermore, it is important to continue encouraging the use of JITs with both national prosecutors and investigators as part of the team. We have to make use of the ability to build mutual trust between practitioners from different jurisdictions working together and deciding on investigative and prosecution strategies. Together we are better.

Rob Wainwright
Director of Europol



Rob Wainwright



European Union

Reported by Sabrina Staats, Dr. Els de Busser and Cornelia Riehle*

Foundations

The Stockholm Programme

Successive Drafts of Stockholm Programme

On 16 October 2009, the Swedish Presidency presented the first draft of the Stockholm Programme. JHA Counselors as well as Coreper exchanged views on the draft programme in several meetings. Following the redrafting of the text, the Presidency presented a second draft on 23 November 2009.

The programme is to replace the expiring Hague Programme and to specify the framework for EU police and judicial cooperation for the period 2010–2014 (for preparatory work, see also eucrim 1-2/2008, pp. 4-5).

The Presidency would like the programme to focus even more than the previous programmes on the balance between ensuring security and safeguarding the rule of law and the rights of the individual. For example, the programme would like, on the one hand, to improve police cooperation by making better use of Europol and by preparing an EU information management strategy for the

future exchange of information. On the other hand, the programme foresees the strengthening of the rights of defendants in criminal proceedings as well as the rights of victims of crime and the improvement of data protection and privacy.

Another focus of the new programme will be cooperation in migration and asylum matters, meaning that more legal channels for labour immigration to the EU should be opened, including closer cooperation with the countries of origin and transit when it comes to dealing with illegal immigration.

With regard to judicial cooperation, continuing efforts should be made to enhance mutual trust in the legal systems of the Member States by establishing minimum rights as necessary for the development of the principle of mutual recognition. For example, setting up a system by which to obtain cross-border evidence, based on the mutual recognition principle, should be further pursued.

Changes that have been made in the second draft programme include an explanation of the impact of the Lisbon Treaty on JHA, a clear reference to the principle of proportionality in the section on criminal law as well as the in-

roduction of a new system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition. Additionally, the European Council, in the new draft programme, invites the Commission to develop a comprehensive anti-corruption policy, in close cooperation with GRECO. The text continues by stating that the Union should accede to GRECO in the future.

The final version of the Stockholm Programme was presented at the JHA meeting on 30 November/1 December 2009 and at the General Affairs and External Relations Council (GAERC) on 7-8 December 2009. The programme has been officially adopted at the European Council session on 10-11 December. (ST)

► eucrim ID=0903001

EP Discussed Draft Stockholm Programme

On 8 October 2009, the draft Stockholm Programme was discussed at a joint meeting in the European Parliament, which included the Civil Liberties Committee, the Constitutional Affairs Committee, and the Legal Affairs Committee as well as representatives from national parliaments. The MEPs criticised the draft Programme in many ways, demanding a more extensive approach to the issue of guaranteeing procedural rights and claiming the loss of proportionality when it comes to the invention of increasingly preventive measures. In addition, some MEPs are missing a judicial response to terrorism. Others claim that the element of security has been watered down. The draft resolution prepared by

* If not stated otherwise, the news reported in the following sections cover the period July – October 2009

the above-mentioned committees were put to the vote on 12 November 2009 at a joint committee meeting in Brussels. On 25 November the resolution was put to a plenary vote during a session in Strasbourg and adopted. (ST)

►eucrim ID=0903002

Introducing JHA Priorities for the Coming Years: The Commission's Proposal

To start the formal process for the adoption of the Stockholm Programme, the Commission presented a Communication to the Parliament and the Council on 10 June 2009 on the priorities and goals in the area of freedom, security and justice that need to be covered by the Stockholm Programme. The Communication is the Commission's contribution to the Stockholm Programme – the new multi-annual EU-programme in the area of justice and home affairs (see above). The Commission grouped the future challenges and its respective policies under the subheadings: “A Europe of rights”, “A Europe of justice”, “A Europe that protects” and “A Europe of solidarity”. In these subgroups, the Commission particularly highlights the following objectives:

- Promoting and protecting fundamental rights, e.g., as set out by the European Convention of Human Rights;
- Establishing a comprehensive personal data protection scheme;
- Improving efficiency in police cooperation, e.g., by strengthening the role of Europol;
- Promoting a dynamic and fair immigration policy and cooperating more closely in combating illegal immigration and illegal employment;
- Furthering the implementation of mutual recognition and strengthening mutual trust;
- Providing easier access to justice.

The Commission is to set up an action plan on the implementation of the Stockholm Programme soon after its adoption. (ST)

►eucrim ID=0903003

EDPS on the New Programme

On 10 July 2009, the European Data Protection Supervisor, Peter Hustinx, presented his elaborate opinion on the above-mentioned Communication from the Commission on the area of freedom, security and justice. The EDPS expressly supports the focus on the protection of fundamental rights and takes this objective as the main angle of his analysis. The EDPS supports the call for a comprehensive data protection scheme and welcomes the intention of the Commission to reaffirm some basic principles of data protection.

Furthermore, the Peter Hustinx expresses his interest in the developments towards an efficient EU information management strategy and is looking forward to seeing this project further elaborated in the Stockholm Programme. (ST)

►eucrim ID=0903004

Opinion of the Fundamental Rights Agency

On 28 July 2009, the Fundamental Rights Agency (FRA) gave its opinion on the above-mentioned Communication from the Commission regarding the Stockholm programme. Overall, the FRA comes to the conclusion that the proposed programme does not fully meet its responsibilities when it comes to establishing awareness and protection of fundamental rights. The agency particularly stresses the need for continuous evaluation of the programme in the future as well as the need for *ex-ante* assessments of new EU legislation based upon the programme, in order to identify early possible negative fundamental rights implications. Following its own thematic priorities, the FRA briefly comments on the four sections of the Communication, especially emphasising the need to:

- Promote awareness of fundamental rights in Europe by investing more money in awareness-raising programmes;
- Recognise the rule of law as the key to mutual recognition and a strong common

reading of fundamental rights protection as a precondition for mutual trust;

- Fight discriminatory profiling, enhance public trust in the police, and guarantee privacy;
- Continue the work towards a Common European Asylum System and improve cooperation in migration matters.

In its conclusions, the FRA underlines its role as a source for evidence-based policy advice as well as its commitment to follow the Stockholm Programme during its lifespan and to contribute to a successful implementation of the proposed objectives. (ST)

►eucrim ID=0903005

Reform of the European Union

Ireland says “YES” to the Lisbon Treaty

In a second referendum on 2 October 2009, Ireland voted on the ratification of the Lisbon Treaty and the Irish voters overwhelmingly approved of the new treaty (67% to 33%). Herewith, the Irish population overturned its rejection of the treaty in the first Irish referendum on the Lisbon Treaty in June 2008. Ireland was the only Member State constitutionally obliged to put the treaty to a public referendum. In order to come into effect, the treaty must be ratified by all 27 Member States.

After the Irish referendum and Poland's conclusion of the ratification process, the last country to ratify the treaty was the Czech Republic, which completed the process on 3 November 2009. (For the ratification process of the Lisbon Treaty, see also eucrim 1-2/2008, pp. 5-7 and eucrim 3-4/2007, p. 73-75). (ST)

►eucrim ID=0903006

Poland Concludes the Ratification of the Lisbon Treaty

On 10 October 2009, Poland concluded the ratification of the Lisbon Treaty. Polish President Lech Kaczynski signed the ratification instrument in the presence of President of the Council Fredrik

Reinfeldt, President of the European Commission José Manuel Barroso, and President of the European Parliament Jerzy Buzek at a ceremony in Warsaw. In his speech, Lech Kaczyński emphasised the enlargement of the EU, stressing that the EU should not close its doors to countries that wish to join. He particularly named the Balkan countries, the Ukraine, and Georgia as potential new Member States. With the Polish approval, the road to the new treaty was cleared by 26 of 27 Member States. (ST)

► eucrim ID=0903007

Czech President signs the Lisbon Treaty

On 3 November 2009, the Czech Republic was the last Member State to sign the Lisbon Treaty. With the signature by Czech President Vaclav Klaus, the Treaty of Lisbon has now been approved by all EU countries. Klaus signed the treaty after the Czech constitutional court announced its decision that the document, which had already been ratified by all 26 other EU countries, does not violate the country's constitution. The treaty is expected to officially become law in December 2009. (ST)

► eucrim ID=0903008

Schengen

SIS II – State of Play

In the previous eucrim issues, the EU's ongoing struggle to give life to the second generation of the Schengen Information System (SIS II) was reported on several times (see eucrim 1-2/2009, pp. 3-4; eucrim 1-2/2008, p. 8; and eucrim 3-4/2007, p. 70/73). Now, on 17 September 2009, the Commission decided to lay down the date for the completion of migration from SIS I+ to SIS II (Commission Decision 2009/724/JHA). In its decision, the Commission states that the previous date for implementing SIS II, which was set for September 2009, is no longer realistic due to various issues identified in the testing phase. The

new date for the migration from SIS I+ to SIS II is now set to be no later than 30 June 2010. (ST)

► eucrim ID=0903009

Concerns Over Delay of SIS II

At the JHA Council on 23 October 2009, the members of the Mixed Committee (the EU plus Norway, Iceland, Liechtenstein, and Switzerland) discussed the progress made in the development of the SIS II and the Visa Information System (VIS). The ministers expressed their concern at the delays in the implementation of SIS II and requested the respective Commission working parties to report back to the Council at its next meeting on 30 November/1 December.

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On 22 October 2009, the Parliament adopted a resolution on the progress of SIS II and the VIS. The Parliament expressed deep concerns at the delay in the start of operations of both the SIS II and VIS systems and stressed that especially SIS II should become operational as soon as possible since its task is to ensure security for European citizens by improving and making more efficient border control. In the resolution, the EP also addresses the option of a potential imposition of penalties on the contractor for the delays and technical errors that led to the failure of the earlier tests. The Parliament also asks the Commission to explain its reasons for maintaining confidence in the current contractor and its ability to fulfil the contract without further delay. (ST)

► eucrim ID=0903011

Serbian, Montenegrin and Macedonian Citizens to Travel Without Visas

On 15 July 2009, the Commission presented a proposal for a Council Regulation amending Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of the EU and those whose nationals are exempt from that requirement. The Commission plans to allow Serbian, Montenegrin,

and Macedonian citizens to enter the EU without visas, while Bosnian, Albanian, and Kosovan citizens shall still require them. (ST)

► eucrim ID=0903012

Institutions

European Court of Justice (ECJ)

Elections at the ECJ

On 7 and 8 October, the judges of the ECJ elected among their numbers their president and the presidents of the Chambers. On this occasion, the Court appointed the First Advocate General.

On 7 October 2009, the judges of the ECJ re-elected Mr. Vassilios Skouris in accordance with Article 7 of the Rules of Procedure of the Court of Justice as president of the ECJ for the period 7 October 2009 to 6 October 2012. Mr. Skouris has been a judge at the ECJ since 8 June 1999 and the president of the ECJ since 7 October 2003.

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Also on 7 October 2009, the judges of the ECJ elected the presidents of the chambers of five judges for a period of three years. Mr. Antonio Tizzano has been the Advocate General at the ECJ from 2000 to 2006 and a judge at the ECJ since May 2006. He now is the president of the 1st Chamber. Mr. José Narciso da Cunha Rodrigues, a judge at the ECJ since 2000, is now the president of the 2nd Chamber while Mr. Koen Lenaerts, who has been serving as a judge at the ECJ since 2003, is now the president of the 3rd Chamber. The new president of the 4th Chamber is Mr. Jean-Claude Bonichot, who joined the ECJ in 2006.

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Following the elections on 7 October 2009, the judges of the ECJ elected the presidents of the chambers of three judges and appointed the first Advocate General on 8 October 2009. The following were elected for a period of one year:

Mr. Egils Levits as president of the 5th Chamber, Ms. Pernilla Lindh as president of the 6th Chamber, Ms. Rosario Silva de Lapuerta as president of the 7th Chamber, and Ms. Camelia Toader as president of the 8th Chamber. Also, on 8 October 2009, the Court appointed Mr. Paolo Mengozzi as First Advocate General for a period of one year. (ST)

►eucrim ID=0903015

OLAF

Ombudsman Asks for Investigation of Financing of EP Buildings

The European Ombudsman, P. Nikiforos Diamandouros, has made two recommendations to the European Parliament and OLAF regarding the financing of European parliament buildings. Following complaints from a journalist, the Ombudsman asked the Parliament to deal with the complainant's request for access to documents related to the external financing of the Willy Brandt, József Antall, and Altiero Spinelli buildings in Brussels. The complainant had asked the Parliament in November 2006 for access to documents relating to the financing of the Willy Brandt and the József Antall buildings, which was denied. The Parliament argued that some of the requested documents were held by the private developer of the buildings, and other documents could not be disclosed because they contain confidential information.

The Ombudsman now called the Parliament to clarify its statements concerning the legal framework for the financing of the buildings and asked the Parliament to give access to all requested documents or to give convincing explanations for not doing so.

In 2002, the complainant had alerted the Commission to certain irregularities related to the financing of the Parliament's Altiero Spinelli building. Basically, the Parliament had agreed to pay a company for services relating to the financing of the building's acquisition

without publishing a call for tender concerning these services. OLAF opened an investigation and closed the case in 2006, without recommending any further follow-up. The complainant then turned to the Ombudsman, claiming that OLAF had failed to examine the case properly.

OLAF replied that, since no irregularity had been established that could give rise to disciplinary or criminal proceedings, there was no need for an in-depth investigation. Not convinced, the Ombudsman called on OLAF to reconsider the results of its investigation. (ST)

►eucrim ID=0903016

European Citizen Sentenced for EU Aid Fraud in Paraguay

On 1 September 2009, the Supreme Court of Paraguay confirmed in the last instance the condemnation of a Spanish national and his Paraguayan accomplice for defalcation of EU aid funds and sentenced them to three years of imprisonment. The relevant EU-funded project had been designed to improve the drinking water supply in 50 communities in Paraguay. The judgement is related to a European Anti-Fraud Office (OLAF) investigation which was triggered in 2004 by initial information received from the European Commission (EuropeAid). In the course of the investigation, it was established that the co-directors of the project had authorised payments of € 2.3 million from project funds to a private foundation in Paraguay with no involvement in the project. The main beneficiary of this money was a person close to the European co-director of the project. (ST)

►eucrim ID=0903017

Europol

Europol Deputy Director

On 23 October 2009, Antonius Driessen (The Netherlands) was appointed as Deputy Director of Europol. His term

runs from 1 November 2009 until 31 October 2013. Prior to his appointment, Antonius Driessen was Head of the National Criminal Investigation Department of the Netherlands' national police force "Korps Landelijke Politie Dienst" (KLPD). (CR)

►eucrim ID=0903018

Europol Anniversary Publication: Ten Years of Europol

Following the celebration of Europol's 10th anniversary on 1 July 2009 (see eucrim 1-2/2009, p. 5) an Anniversary Publication on "Ten Years of Europol: 1999–2009" is now available from Europol's website. The publication recounts how the idea of Europol was born and how it has developed from the Europol Drugs Unit to the European Police Office. It describes the Office's development and challenges in the first five years, especially under the Hague Programme. In addition, the development concerning the emerging cooperation with third states is presented. The third chapter outlines how the organisation is about to develop into a EU Agency and, finally, Europol's vision for the coming years. The last chapter of the publication offers a short description of the structure of the law enforcement in each EU Member State. (CR)

►eucrim ID=0903019

Europol Work Programme for 2010

At its meeting on 23 October 2009, JHA Ministers endorsed the Europol Work Programme for 2010. The Work Programme is Europol's annual business plan that translates the organisation's strategy into annual objectives. The 2010 Work Programme identifies 17 objectives structured in a Strategy Map. Objectives for the year 2010 are, for instance, to:

- Build on core capabilities in the areas of information exchange, operational analysis, strategic analysis;
- Support operations;
- Share knowledge. (CR)

►eucrim ID=0903020

The Future of Europol and EU Law Enforcement

The Swedish Minister of Justice, Beatrice Ask, invited European home affairs ministers to meet at Europol on 1 October 2009 to discuss the future of Europol and EU law enforcement cooperation. The first part of the meeting dealt with the future police cooperation in the EU and was thus linked to the Stockholm Programme (see above). The second part of the meeting dealt with matters that are more specifically linked to Europol and the development of its operational cooperation. Discussions were based on three working documents dealing with the following issues:

- The first question concerned Europol's role in a "Europe that Protects". The objective of this discussion was to identify Europol's concrete role in the EU Architecture for Internal Security. In this context, the Ministers were asked how Europol's capabilities could be strengthened to provide added value and operational support to the Member States in the areas of criminal analysis, information exchange, and operational coordination as well as how the Member States could support Europol in delivering these aims.

- Secondly, Ministers were asked to suggest measures for improved cooperation between relevant EU agencies – such as Europol, Frontex, Eurojust, and Cpol – to implement the EU law enforcement priorities. The Presidency asked how the operational support of these agencies at the EU and national levels could be improved and overlaps between their activities avoided. In its working paper, the Presidency suggested that the agencies should jointly discuss possible measures for improved cooperation and report back to the Council.

- The third point on the agenda raised the question of how synergies between the JHA sector and the European Security and Defence (ESDP) sector could be developed in order to ensure maximum optimisation of resources in the EU's efforts to fight against organised crime.

For this, the Swedish Presidency had already initiated discussions to improve cooperation between the European Police Chief's Task Force (EPCTF) and the Article 36 Committee. The Presidency invited the Ministers to identify possible areas where the JHA sector could play an increased role, to reflect upon ideas to improve their cooperation, and to enhance their interrelationship.

- Finally, Ministers were asked to think of possible ways by which civilian EDPS missions could contribute to increased EU internal security. (CR)

► eucrim ID=0903021

Europol Terrorism Situation and Trend Report (TE-SAT) 2009

Europol published its third EU Terrorism Situation and Trend Report (TE-SAT) for the year 2009.

The TE-SAT is a public report produced annually by Europol on the basis of information provided and verified by the competent law enforcement authorities in the Member States of the EU. It seeks to establish basic facts and figures regarding terrorist attacks, arrests, and activities in the EU. The 2009 TE-SAT provides a general overview of the situation in the EU in 2008. In the 2009 TE-SAT, the following overall key findings were found for the year 2008.

- According to the report, 515 terrorist attacks were carried out in the Member States and 1009 individuals were arrested for terrorism related offences.

- The majority of the suspects were arrested for membership in a terrorist organisation.

- Islamist and non-Islamist terrorist groups use different financing methods. Islamist terrorist groups generate more money than non-Islamist terrorist groups.

- The number of women arrested for terrorism-related offences remains low within the EU. Nevertheless, women play an important role as associates in supporting terrorist organisations.

- Modern communication techniques are a facilitating factor for all types of

terrorist and extremist organisations. Several terrorist and extremist organisations run their own websites in different languages.

- 359 individuals were tried on terrorism charges in the Member States in a total of 187 proceedings. 29% of the verdicts were acquittals.

In detail, the 2009 TE-SAT categorises, explains, and outlines specific key findings for the following types of terrorism: Islamist terrorism, Ethno-nationalist and separatist terrorism, left wing and anarchist terrorism, right-wing terrorism, and single issue terrorism. (CR)

► eucrim ID=0903022

Europol Cooperation with Third States

According to Europol's new legal basis, the Council Decision establishing the European Police Office (see eucrim 1-2/2009, p. 5), the Council has been given the task of setting up a list determining third states and organisations with which Europol shall conclude agreements. A draft list was prepared by the Europol Management Board and transmitted to the Council in June 2009. In this list, the Management Board identifies 25 non-EU states (Albania, Australia, Bolivia, Bosnia and Herzegovina, Canada, China, Colombia, Croatia, Former Yugoslav Republic of Macedonia, Iceland, India, Israel, Liechtenstein, Moldova, Monaco, Montenegro, Morocco, Norway, Peru, the Russian Federation, Serbia, Switzerland, Turkey, Ukraine, and the United States of America) as well as three international organisations (ICPO-Interpol, United Nations Office on Drugs and Crime, and the World Customs Organisation).

For these states and international organisations, Europol is to strive for the conclusion of operational cooperation agreements, meaning that the agreements shall allow for the exchange of personal data as opposed to mere technical or strategic agreements. Currently, there are seven operational agreements in place between Europol and third states

and one with an international organisation (Interpol). Strategic agreements are in place with another seven non-EU states and with three international organisations. Most of the listed third states and international organisations are already amongst those that have operational or strategic agreements in place with Europol. New states on the list with which Europol has no agreement so far or has only started negotiating include: China, India, Israel, Liechtenstein, Monaco, Montenegro, Morocco, Peru, the Russian Federation, Serbia, and Ukraine. (CR)

► [eucrim ID=0903023](#)

Draft Strategic Agreement with Ukraine

At its meeting on 23 October 2009, the JHA Council authorised the Director of Europol to conclude a draft agreement between Europol and Ukraine on strategic cooperation. (CR)

► [eucrim ID=0903024](#)

Negotiations on Operational Agreements with Colombia and FYROM

At their meeting on 23 October 2009, the JHA Ministers also adopted two decisions approving the authorisation of Europol to enter into negotiations with Colombia and the Former Yugoslav Republic of Macedonia with a view to concluding operational cooperation agreements. (CR)

► [eucrim ID=0903025](#)

Europol Service "Funnel Web"

The "COSPOL Internet Related Child Abuse Material Project" (CIRCAMP) promotes the use of a filtering system that uses blacklists to block Internet users' access to pay-per-view websites hosting child abuse material (Child Sexual Abuse Anti-Distribution Filter [CSAADF]). When users attempt to access such websites, they are confronted with a "stop page" that displays the article of the relevant penal code of their country, the logo of the national police, and a hyperlink to a page on Europol's website explaining the aims and objec-

tives of the filtering technology. Europol now provides a new service called "Funnel Web" to those registrants that wish to challenge their inclusion. Denied registrants now have the opportunity to click on a hyperlink, contained in the stop pages, which redirects them to the Europol website where they can fill in a form and send it to Europol. Europol will then cross-check the information contained in the form. Registrants will then receive the contact details of the respective law enforcement authorities in the Member States from which they may request reassessment of the content of the websites and, if appropriate, removal from the blacklist. (CR)

► [eucrim ID=0903026](#)

Eurojust

"Eurojust News"

Eurojust has published its first issue of "Eurojust News". This online newsletter will be published quarterly with the aim of informing those interested in Eurojust's activities and achievements.

The first issue is dedicated to the fight against terrorism. It explains the role and functioning of Eurojust's Counter-Terrorism Team and includes two interviews on Eurojust's role in the fight against terrorism; one with the EU Counter-Terrorism Coordinator, Gilles de Kerchove, and one with Armando Spataro, Deputy Chief Public Prosecutor in Milan and coordinator of the counter-terrorism branch. The newsletter finishes with a short outline on Eurojust's development since its establishment in 2001. (CR)

► [eucrim ID=0903027](#)

Annual Report 2008

The seventh Eurojust Annual Report for the year 2008 was recently published. It outlines Eurojust's operational activities, administrative novelties, and external relations.

The report sets out conclusions and recommendations in the following three

areas: Eurojust's casework, external relations, and internal issues.

Eurojust's casework:

- Increase of 10% in the number of cases referred to the College.

- Drug trafficking and crime against property or public goods, including fraud, constituted the largest percentage of the 50 different crimes registered at Eurojust.

- Association of Eurojust with further six Europol Analysis Work Files (AWFs), bringing the total to 12.

- Increase of the number of cases involving Europol and OLAF, in particular their participation in coordination meetings.

- Increase of requests issued under Article 6(a) of the Eurojust Decision compared to previous years.

- National Members asked their national authorities in 21 cases to consider setting up a Joint Investigation Team.

- Registration of 237 cases to facilitate the implementation of European Arrest Warrants. 4 cases dealt with conflicting EAWs. 28 cases of breach of time limits under Article 17 of the EAW Framework Decision were reported to Eurojust.

In the context of the casework, Eurojust encourages the Member States to provide more information on prosecutions and convictions for terrorist offences. Furthermore, Eurojust considers that its potential is still not being fully utilised, in particular in maintaining a proactive approach to coordination in more complex cross-border investigations and prosecutions with a view to assisting national authorities and achieving the best possible results.

External relations:

- A Memorandum of Understanding between Eurojust and Europol on the table of equivalence was signed and resulted in operational use of the secure communication link between both organisations.

- Eurojust and OLAF signed the practical agreement on arrangements of cooperation to enhance cooperation and exchange of information.

■ Eurojust signed cooperation agreements with Switzerland and the former Yugoslav Republic of Macedonia.

Eurojust's internal issues:

■ A secure e-mail system has been implemented in the Member States.

■ Between December 2007 and December 2008, a total of 229 queries made to the Schengen Information System (SIS) came from Eurojust National Desks.

■ The Case Management System (CMS) was enhanced and support to the operational work of the College continued, especially with the enlargement of the Case Management Team. A new version of the CMS was introduced and a further project, E-POC III+, launched to improve the usability of the system.

■ Eurojust was originally granted a budget of €20 million, increased by €4.8 million, representing a total operating budget of €24.8 million. It executed 97% of its commitments. (CR)

For the previous 2007 annual report of Eurojust, see eucrim 1-2/2008, p. 15.

► eucrim ID=0903028

European Judicial Network (EJN)

EJN Secure Connection

Following the decision made at its Plenary Meeting in Prague in July 2009, the EJN Secretariat started to invite its Contact Points to make use of the newly established EJN Secure Connection. The connection allows members of the EJN to transmit operational information and data with a security level equivalent to “Eurojust restricted”. This level of classification means that the unauthorised disclosure of the information or data could be disadvantageous to the interests of Eurojust, the EU, or one or more of its Member States. Contact points to the EJN are currently asked to register for an account at the EJN. The appropriate registration form and a manual that explains how to use the EJN Secure Connection are available on the EJN website. (CR)

► eucrim ID=0903029

FRONTEX

Working Agreement with CEPOL

In June 2009, Frontex (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU) and CEPOL (European Police College) signed a working agreement. The purpose of the agreement is to support the harmonisation of police and border guard officers’ training and promote cooperation at the EU level. The agreement particularly focuses on coordination and exchange of information in the following areas:

- training activities,
- joint training activities,
- contributions to the development of training material or common curricula,
- experts and trainers,
- use of facilities and additional logistical support,
- exchanging expertise and best practices. (CR)

► eucrim ID=0903030

Enhancement of Operational Capabilities

At its summit on 29-30 October 2009, the European Council reaffirmed the importance of strengthening Frontex and thus called for the enhancement of its operational capacities as well as progress in its development. The European Council agreed that such an enhancement should be based on three major elements:

- Firstly, the preparation of clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in “mixed flows”, in accordance with international law.
- Secondly, an increased operational cooperation between FRONTEX and countries of origin and transit.
- Thirdly, examination of the possibility of regular chartering of joint return flights financed by FRONTEX.

The Commission was asked to present proposals by the beginning of 2010. (CR)

► eucrim ID=0903031

Migration Report 2009

Frontex published its Migration Report 2009 on the topic “The impact of the global economic crisis on illegal migration to the EU”. This Tailored Risk Analysis, which was compiled in close cooperation between Frontex, the EU Joint Situation Centre, the International Organisation for Migration (IOM), and the International Center for Migration Policy Development (ICMPD) further elaborates the relationship between the economic crisis on the one hand and illegal migration and border management in the EU on the other. In the report, illegal migration to Member States is analysed as mainly income-generating migration, regardless of the initial causes or push factors. The report finds that the availability of work in Member States and the likelihood of crossing the border without being returned are the two most important factors affecting the scale of illegal migration flows to the EU while other factors, such as the situation in the countries of origin, apparently play a less significant role.

However, the report also emphasises that, given the complexity of the issue, its accuracy depends on whether the conclusions or forecasts are negatively affected by a number of persisting uncertainties (e.g., the actual timing of significant economic recovery; time-lag in migration-related indicators, etc). (CR)

► eucrim ID=0903032

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

EU-Liechtenstein Anti-Fraud Agreement State of Play

At the Economic and Financial Affairs Council meeting on 20 October 2009, the ministers discussed the progress made in negotiating an EU-Liechtenstein anti-

fraud agreement (for the foregoing development, see eucrim 3-4/2008, p. 93). Although Austria and Luxembourg are opposed to the agreement because they fear that their banks will be at a competitive disadvantage, the Council broadly agreed on the content of the draft text. The political reservations mostly concern the level of transparency foreseen for the exchange of information between the Member States and Liechtenstein.

The draft agreement tackles fraud as it relates to both direct and indirect taxation, giving a definition of fraud that covers natural and legal persons. The draft agreement also includes administrative cooperation in tax matters, particularly the exchange of information relevant to tax administrations. Administrative assistance shall no longer be able to be refused on the grounds that the information requested is held by a bank or an anonymous investment vehicle. The draft text (COM(2009) 644 and 648) also includes rules on judicial assistance for acts that are punishable under the laws of the parties. The Council is to come back to the draft agreement in December 2009. (ST)

➤ eucrim ID=0903033

Mutual Administrative Assistance in Customs Matters

On 29-30 October 2009, the Swedish Presidency of the EU, the Turkish Undersecretariat of Customs, and OLAF organised a conference on “Mutual Administrative Assistance in customs matters within the framework of the Union for the Mediterranean” in Istanbul, Turkey.

Delegations from all 27 Member States, 16 partners from across the Southern Mediterranean and the Middle East as well as representatives from Interpol, Europol, Eurojust, Marinfo North, and Marinfo South were invited to the conference.

The focus of the conference was on strengthening the fight against smuggling in the Mediterranean region, an important aspect in the creation of a Free

Trade Area between the members of the Euro-Mediterranean Partnership (formerly known as the Barcelona process) from 2010. Smuggling counterfeit goods not only has economic consequences but can also create public health and safety concerns.

With a view to the strengthening of mutual administrative assistance and operational customs cooperation, the conference resulted in a list of recommendations. These recommendations include, inter alia, active and timely prior consulting of partners before launching an operation – a process which equally implies a swift and structured exchange of reliable data through a secured channel and making the data accessible to all partners.

Additionally, all partners are invited to join an operational action for the Euro-Mediterranean region that is also supported by Europol and Interpol. (EDB)

➤ eucrim ID=0903034

VAT/Tax Fraud

Commission Proposes Measures for a More Efficient Cooperation between Tax Authorities

On 18 August 2009, the Commission adopted a proposal for a recast of the Regulation on administrative cooperation in the field of valued added tax ((EC) No. 1798/2003), which is to extend and reinforce the legal framework for the exchange of information and cooperation between tax authorities. One of the main elements of the proposal (COM(2009) 427 final) is the establishment of Eurofisc, a common operational structure allowing Member States to take rapid action in the fight against cross-border VAT fraud (for the “Eurofisc project”, see eucrim 3-4/2008, p. 94-95). Eurofisc is to organise the multilateral exchange of information with or without a prior request and to promote the exchange of information based on risk analysis procedures as well as strategic analy-

Seizure, Confiscation and Recovery Procedures to Protect the European Union Financial Interests

CSDPE, 4, 5 and 6 February 2010

On 4, 5 and 6 February 2010 the Union of European Lawyers (UAE) in cooperation with the European Anti-Fraud Office (OLAF), the Milan Bar Association and the Centre of European Criminal Law (CSDPE) will organise in Milan a conference on “Seizure, confiscation and recovery procedures to protect the European Union financial interests: the Community law and its implementation in the Member States”. The first part of the workshop will be devoted to a review of the European law on seizure, confiscation and recovery of assets and of the national law on the same topic in some Member States such as the Netherlands, Belgium, Austria, Germany, France, Spain, the UK; the legislation of important non-EU Member States, such as the United States, will be analysed also. The second session will be focused on the legal conditions to order seizure and confiscation of assets in the European legal systems and on the different kinds of seizures and confiscations. In the third part of the workshop, a case study on the implementation of seizure and confiscation to recover the money will be introduced. The session will analyse the role and the positions of all the involved parties: the Bar and the Judiciary, OLAF, national entities, Court of Auditors and the victim. The session of Saturday, February 6th 2010 will be of particular interest as it will be focused on an innovative topic: confiscation in the computer age, from “mouse pad” to “cloud computing”. The session will be chaired by IISFA – International Information Systems Forensics Association, Italian Chapter, with the participation of the magistrates of the “IT section” of the Prosecution Office of Milan. Simultaneous translation of the presentations will be ensured (Italian/French/English). This conference is organised in cooperation and with the support of the European Commission, OLAF under the Hercule II Programme.

For further information please contact the Centre of European Criminal Law (CSDPE)

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The Perspectives for a European Public Prosecution: Protecting the European Financial and Fundamental Interests

Paris, 11 and 12 February 2010

The Lisbon Treaty signed on 13 December 2007 has given a new impulse for further European integration in criminal matters, and it sets the ground for the creation of a European Public Prosecution to protect the financial and fundamental interests of the European Union. On 11/12 February 2010, the Court of Cassation will hold a Conference to bring together prominent actors of the transborder fight against crime, and in particular, Supreme Public Prosecutors, members of the European Commission, of the European Anti-Fraud Office, of the European Court of Human Rights, of the European Court of Justice, and of the European Parliament.

Three aspects will be envisaged: the reasons and arguments for the creation of a European Public Prosecution, how to strengthen existing tools, and finally, the institution and characteristics of a European Public Prosecutor.

This conference aims at raising the awareness of participants, judges and legal professionals from all Member States, to see the reality of transborder crime, to envisage the best available means to reinforce the existing judicial cooperation at the European level, and to foster a new cooperation between all stakeholders.

This conference is organised in cooperation with and with the support of the European Commission, OLAF under the Hercule II Programme.

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Peimane Ghaleh-Marzban,
Cour de Cassation, France

sis procedures. The proposal is part of a wider strategy to combat tax evasion and fraud, which the Commission presented and adopted on 1 December 2008 (COM(2008) 807, see eucrim 3-4/2008, p. 96-97). (ST)

► eucrim ID=0903035

Commission Proposes Measures for a Consistent Response to Carousel Fraud

On 29 September 2009, the Commission adopted a proposal amending Directive 2006/112/EC as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services.

The proposal aims at allowing Member States to fight carousel fraud in a consistent manner across the European Union. Charging VAT to the customer without accounting for it is a common form of fraud. Now, the taxable customer is, in principle, still allowed to deduct this VAT and the result is a refund from the treasury to the customer. This results in the situation that the treasury does not receive VAT on the supply, but instead must give the next trader credit for input VAT.

In a carousel fraud (or “Missing Trader Intra-Community fraud”, MTIC), goods that have been imported into one Member State are sold through a series of transactions before being exported again to another EU Member State.

Under a reverse charge mechanism, the supplier does not charge VAT, but the VAT is carried by the customer who, if a fully taxable person, deducts this VAT at the same time. In this way, the customer becomes liable for the payment of the VAT. In practice, customers would therefore declare and deduct VAT at the same time without effective payment to the treasury.

The proposal covers five categories of particularly fraud-sensitive goods and services, namely: computer chips, mobile phones, precious metals, perfumes, and greenhouse gas emission allowances. The proposal includes evaluation and reporting obligations for Member States in order to allow for a precise assessment of the efficiency of the measures. For the discussions over the introduction of the reverse-charge system, see also eucrim 1-2/2007, p. 22, and eucrim 1-2/2008, p. 17/18. (ST)

► eucrim ID=0903036

New Commission Study on VAT Gap in the EU

On 30 October 2009, the European Commission published a study on the gap between the amount of VAT that is due and the amount that is received in 25 Member States. The study is distributed in the framework of the Commission’s strategy to combat tax evasion and fraud. The study also includes an evaluation of these figures over a period of seven years per Member State. The estimated figures were realised by calculating the difference between the theoretical net VAT liability for the economy as a whole and the actual accrued VAT receipts. The theoretical VAT liability was calculated from national accounts data published by national statistical offices. It should be noted that for a number of Member States, these data were not available for the whole of the period covered in the study.

Furthermore, the basic data were obtained by relying on publicly available statistics provided by the Member States. The fact that only publicly available data were used can explain differences with the estimates that are made by national authorities since these authorities can make use of the information available to them. However, this information could not be disclosed to the authors of the study. In addition, since these data had not been gathered in order to analyse VAT liability, making a number of assumptions was necessary.

The study reached two significant conclusions:

- Firstly, the estimated VAT gap varies between 90 billion and 113 billion euros in the period 2000-2006 for the 25 Member States that were studied.
- Secondly, even though the methodology used did not allow distinguishing sectors that are particularly vulnerable for VAT fraud, it concluded that the VAT gap is not solely created by fraud but also includes legal avoidance and unpaid VAT liability due to insolvencies. (EDB)

► eucrim ID=0903037

Money Laundering

Belgium Fails in Fight Against Money Laundering

On 16 July 2009, the ECJ (Case C-574/08) decided that Belgium has failed in the fight against fraud and money laundering by not adopting all the laws, regulations, and administrative provisions necessary to fulfil the obligations of Directive 2006/70/EC. In particular, Belgium did not adopt the necessary laws as regards the definition of politically exposed persons and the technical criteria for simplified customer due diligence procedures as well as exemption on grounds of financial activity conducted on an occasional or very limited basis. (ST)

►eucrim ID=0903038

Organised Crime

European Organised Crime Threat Assessment (OCTA) 2009

The fourth European Organised Crime Threat Assessment (OCTA) for the year 2009 has just been published by Europol.

The 2009 OCTA assesses the threat of organised crime in the EU through a 3-D perspective: the analysis of the organised crime groups, of the criminal markets, and of their interaction within and without territorial entities denominated as criminal hubs. According to the report, the most significant criminal sectors are drug trafficking, trafficking in human beings, illegal immigration, fraud, counterfeiting and money laundering. The report explores developments in each of those areas also considering the impact of other factors such as criminal activities originating in external locations such as Western Africa, Belarus, the Middle East, Moldova, Russia, Ukraine, Turkey and Western Balkans. One of the key findings of the analysis done for the 2009 OCTA is the confirmation of the existence of five criminal

hubs with a wide influence on criminal market dynamics in the EU. A criminal hub is defined as a conceptual entity that is generated by a combination of factors such as proximity to major destination markets, geographic location, infrastructure, types of organised crime groups and migration processes concerning key criminals or organised crime groups in general. The five criminal hubs are:

- The North West criminal hub: this hub is a distribution centre for heroin, cocaine, synthetic drugs and cannabis products and extending its influence to the UK, Ireland, France, Spain, Germany and the Baltic and Scandinavian countries.

- The South West criminal hub: this hub's influence is felt especially in the criminal markets of cocaine, cannabis, trafficking in human beings and illegal immigration. The report finds that West and North West Africa as well as other parts of this continent have emerged as significant feeders for either the South West criminal hub or, increasingly, directly to important markets and distribution centres in the EU.

- The North East criminal hub: according to the OCTA, this area is and will continue to be strongly influenced by feeders and transit zones located just outside the eastern EU borders (the Russian Federation/Kaliningrad, the Ukraine and Belarus). Illicit flows may be traced from the East towards the West (women for sexual exploitation, illegal immigrants, cigarettes, counterfeit goods, synthetic drugs precursors and heroin) but also vice versa (cocaine and cannabis products).

- The Southern criminal hub: the report finds that the role of this hub is central in relation to cigarette smuggling, the smuggling and distribution of counterfeit products and the production of counterfeit euro banknotes.

- The South East criminal hub: it is explained that this area is based upon its geographical location between Asia and Europe. The importance of the Black Sea and related waterways define the hub logistically and are expected to cre-

ate opportunities for both legal trade and organised crime. According to the report, opiates reach Europe through the Balkan routes and the Northern Black Sea route across Central Asia and Russia. The significance of the port of Constanta in cocaine traffic is growing, and cocaine seems to be increasingly arriving into the EU via Turkey and/or the Balkans. This may also be the effect of the already well-established role of West Africa as a transit zone.

The second key outcome of the 2009 OCTA is the Organised Crime Groups (OCG) typology. OCGs in this OCTA typology are classified on the basis of the geographical location of their strategic centre of interest and their capability and intention. The following typologies have been set up: to use systematic violence or intimidation against local societies to ensure non-occasional compliance or avoid interferences (named VI-SO strategy); to interfere with law enforcement and judicial processes by means of corruptive influence (named IN-LE strategy) or violence/intimidation (named VI-LE strategy); to influence societies and economies (named IN-SO strategy). When an OCG does not rely on any of the above mentioned behaviours and focuses on eluding law enforcement attention, it is considered as having an EL-LE profile.

Furthermore, the 2009 OCTA offers detailed explanations on the EU criminal markets, an analysis of the above mentioned criminal hubs, the typology and general assessment of the OC Groups, an analysis on horizontal organised crime (money laundering), a threat assessment on OC in West Africa, and a reflection on the economic crisis. (CR)

►eucrim ID=0903039

Fighting Trafficking in Human Beings – State of Play

At the JHA Council Meeting on 23 October 2009, the Council discussed the progress made regarding the draft Framework Decision on preventing and combating trafficking in human beings and

protecting victims. The new framework decision is intended to replace Framework Decision 2002/629/JHA, and it aims to improve the existing instruments to combat trafficking in human beings and to protect victims. The development of an EU global action against trafficking in human beings is an important element of the Swedish Presidency and has been made the centre of attention at various conferences and meetings over the past months. The ministers expressed their will to reach a political agreement at the next JHA Council Meeting on 30 November/1 December 2009 and ordered the Council preparatory bodies to continue work in this regard. (ST)

► eucrim ID=0903040

Procedural Criminal Law

Procedural Safeguards

Strengthening Procedural Rights – Council Reached Agreement

At the JHA Council Meeting on 23 October 2009, the Council reached an agreement on a package of three documents aimed at strengthening the procedural rights of suspected or accused persons in criminal proceedings. Previous negotiations in 2007 on a Framework Decision strengthening these procedural rights had failed (see eucrim 1-2/2007, pp. 30-31). First of all, the Council agreed upon a *resolution*, previously presented by the Presidency on 1 July 2009, which identifies the main areas in which legislative or other measures are necessary. According to the text, these areas are:

- Translations and interpretation;
- Information on legal rights and information on charges;
- Legal advice and legal aid;
- Communication with relatives, employers, and consular authorities;
- Special safeguards for suspected or accused persons who are vulnerable;

- A green paper on pre-trial detention.

Following the step-by-step approach set out by the roadmap, the Council also agreed upon the *first legislative proposal* in this area, namely the Framework Decision on the right to interpretation and to translation in criminal proceedings, as well as an *accompanying resolution* that is to give the Member States guidelines on how to promote the effective application of the rights contained in the proposed FD on the right to interpretation and to translation. (ST)

► eucrim ID=0903041

The Right to Interpretation and Translation in Criminal Proceedings

Ensuring the right to interpretation and translation in criminal proceedings is one of the first rights of a list of procedural rights the Council agreed upon by resolution (see above). The right to understand the language of the proceedings is, for a suspect, a fundamental right guaranteed by the ECHR in order for him to be able to understand the criminal charges brought against him and the subsequent criminal procedure. Interpretation and translation of essential documents (e.g., a European Arrest Warrant) must therefore be provided free of charge. A set of common minimum standards regarding the translation of essential documents, the costs, the quality of the translation, etc. should facilitate the principle of mutual recognition.

These rules will apply to suspects, defined as all persons suspected in respect of a criminal offence until final conviction (including any appeal). Persons arrested or detained in connection with a criminal charge are also included.

It is important to note that the proposal is also applicable to European Arrest Warrant cases.

The proposal was presented by the Commission on 8 July 2009. A general approach was reached by the Council on 23 October 2009.

On the same date, the Council also arrived at a general approach regarding the accompanying resolution to foster the

implementation of this FD. This resolution presents guidelines for the Member States regarding the training and qualification of translators, their registration, etc. (EDB)

► eucrim ID=0903042

Admissibility of Evidence – Council Published Green Paper

The existing rules on obtaining evidence in another Member State are based on the principle of mutual legal assistance, on the one hand, and the principle of mutual recognition, on the other. The disadvantages of mutual legal assistance are that it is slow and it does not make use of standard forms when issuing a request for obtaining evidence located in another Member State.

The main disadvantage with the instruments based on mutual recognition is that they do not cover all types of evidence. In addition, the instruments provide for a large number of grounds for refusal to execute orders.

These shortcomings inspired the Commission to publish a Green Paper on 11 November 2009 on transferring evidence in criminal matters from one Member State to another and securing its admissibility.

This Green Paper aims at replacing the existing rules by a single instrument based on mutual recognition and covering all types of evidence.

With regard to the admissibility of evidence, the existing rules do not lay down common standards for gathering evidence. This can cause the existing rules on obtaining evidence to only function effectively between those Member States who have similar national standards for gathering evidence. It should therefore be studied whether the adoption of common standards for gathering evidence in criminal matters is a valid approach. In relation to this question, it should be studied whether general standards applying to all types of evidence should be adopted or more specific standards accommodated to the different types of evidence.

Member States and relevant stakeholders are requested to give their opinions on the validity of this approach and on specific matters, including whether specific rules for particular types of evidence should be adopted and whether it would be appropriate to apply the characteristics of mutual recognition instruments to all types of evidence. Responses should be received by 22 January 2010. (EDB)

►eucrim ID=0903043

Data Protection

EDPS Annual Report 2008

On 23 September 2009, the European Data Protection Supervisor, Peter Hustinx, presented his annual report. The report comes to the conclusion that most Community institutions and bodies are making good progress in ensuring compliance with data protection rules. Nevertheless, the EDPS intends to put more emphasis on measuring the level of compliance in practice, in particular through more systematic verifications on the spot as well as monitoring of the implementation of recommendations from prior checking. The report highlights various EDPS activities under his supervision and advisory role, such as submitting opinions on an increasing number of legislative proposals or his involvement in the development of new initiatives in the area of freedom, security and justice, e.g., the Data Protection Framework Decision in police and judicial cooperation in criminal matters. (ST)

►eucrim ID=0903044

Ne bis in idem

EP: Resolution on Conflicts of Exercise of Jurisdiction in Criminal Proceedings

On 8 October 2009, the European Parliament adopted a legislative resolution on the proposal of several Member States

for a Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (for the proposal, its contents, and first reactions, see eucrim 1-2/2009, 11-13). The main amendments by the Parliament were:

- Only judicial authorities (judges, investigating magistrates, or public prosecutors) are competent authorities, in contrast to the Council draft, which leaves the definition of the competent authority up to the Member States;
- The contacted authority shall be obliged to reply to a request within 30 days if the contacting authority has not submitted any reasonable deadline;
- An indicative list of factors that must be considered when reaching consensus shall be included; it should contain, e.g., the place where the major part of the crime was committed, the location of the suspected or accused person, and the possibilities for securing his or her surrender or extradition to another jurisdiction; any significant interests of victims and witnesses; the admissibility of evidence or any delays that may occur.

A new article shall be inserted to ensure certain procedural guarantees to the person formally charged, such as the right to be notified of exchanges of information and consultations between authorities of Member States and between authorities of a Member State and Eurojust, as well as of solutions chosen or any failure to reach agreement under the proposed Framework Decision. The right is also guaranteed to make representations as to the best placed jurisdiction before a solution is chosen as well as the right to appeal any decision taken in accordance with the proposed Framework Decision or, in case of failure to reach agreement, to have it re-examined. Member States shall furthermore ensure appropriate translation, interpretation, and legal aid.

The Parliament also called on the Council not to formally adopt the initiative prior to the entry into force of the Treaty of Lisbon so as to ensure full

control by the ECJ, the Commission, and Parliament in the finalisation of the Framework Decision. (ST)

►eucrim ID=0903045

Victim Protection

Better Support for Victims of Crime in the EU

At the JHA Meeting on 23 October 2009, the Council adopted conclusions on a strategy to ensure fulfilment of the rights of and to improve support to persons who fall victim to crime in the EU. The Council emphasised that the situation of victims in the EU should be given higher priority and that there is a need for a common strategy to guide future work in this area. The ministers set out guidelines for the strategy such as the need to respect the rights of both the victim and the accused or the protection of the victim from secondary and repeated victimization. In addition to these guidelines, the Council proposed certain actions that should be undertaken in future work in order to fulfil the aims of this strategy, e.g., giving training to personnel at law enforcement agencies, specialised services, and nongovernmental organisations that come into contact with victims of crime in their profession or voluntary work. (ST)

►eucrim ID=0903046

Specifying the Obligation to Promote Victim-Offender Mediation

On 8 June 2009, the National Council of Justice in Hungary (Szombathelyi Városi Bíróság) lodged a reference for a preliminary ruling (Case C-205/09) before the ECJ regarding the mediation between the victim and the offender in criminal cases as laid down in Article 10 of Framework Decision 2001/220/JHA. The questions that were referred concern the definition of “victim” in Article 1 (a) of the Framework Decision, the interpretation of the term “offences” in Article 10 (1) of the Framework Decision,

and the actual procedure of mediation in the context of criminal proceedings. It will be particularly interesting to see how the ECJ decides on the referred question as to whether the option of mediation in criminal proceedings must generally be made available or not. (ST)

►eucrim ID=0903047

Freezing of Assets

Case Sison – CFI Annuls Council Acts

On 30 September 2009, the Court of First Instance (CFI) delivered its judgment in the Sison case (T-341/07) and annulled several Council acts in so far as those acts concerned Jose Maria Sison (2007/445/EC, 2007/868/EC, 2008/343/EC, 2008/583/EC, 2009/62/EC and Regulation (EC) No 501/2009).

Jose Maria Sison, a national of the Philippines, has been living in the Netherlands since 1987. His application for refugee status and a residence permit had been rejected several times by the Secretary of State for Justice due to his connections to the Communist Party of the Philippines whose military wing was responsible for a large number of acts of terrorism in the Philippines.

On 11 July 2007, the CFI had already annulled a Council decision ordering the freezing of Mr. Sison's funds because that decision had been taken in breach of the rights of defence, the obligation to state reasons, and the right to effective judicial protection (see eucrim 3-4/2007, p. 105). Since June 2007, the Council has adopted several acts regarding the freezing Mr. Sison's funds, the latest being a regulation of June 2009. In these cases, the Council did not repeat its former negligence and communicated the grounds for the decisions to him. The Council considered, inter alia, that the previous national judgments on Mr. Sison's refugee status constituted decisions taken by competent national authorities to instigate investigations or prosecution for terrorist activity.

The CFI now decided that the national proceedings only concerned the refugee status and neither involved any conviction of Mr. Sison, nor warranted decisions to instigate investigations or prosecute for a terrorist act. Therefore, they could not constitute national decisions capable of serving as a basis for a Community decision to freeze funds. (ST)

►eucrim ID=0903048

EDPS on Restrictive Measures in Respect of Al Qaida and the Taliban

On 28 July 2009, the European Data Protection Supervisor (EDPS) published his opinion on the proposal for a Council Regulation amending Regulation (EC) No 881/2002 that imposes specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network, and the Taliban. In his opinion, Hustinx examines the different paragraphs in the light of data protection.

He particularly welcomes that the proposal explicitly takes into account the right to the protection of personal data. Nevertheless, he stresses the need for specifications in the proposal as to possible transfers of personal data to third countries and international organisations, which should also comply with data protection standards. The EDPS also criticizes that the proposal leaves unprejudiced the liability that may arise in cases of unlawful processing and publication of personal data. (ST)

►eucrim ID=0903049

Cooperation

Police Cooperation

"Prüm" Council Decision Extended to Norway and Iceland

At its meeting on 21-22 September 2009, the Council adopted a decision approving the signature and provisional application

of an agreement with Iceland and Norway on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. Based on Council Decisions 2008/615/JHA and 2008/616/JHA, which transposed the so-called "Treaty of Prüm" into the EU's legal framework, the agreement will allow EU Member States as well as Iceland and Norway to grant one another access rights to their automated DNA analysis files, automated dactyloscopic identification systems, and vehicle registration data. Some provisions will be applied on a provisional basis pending the formal conclusion of the agreement and its entry into force. For the Council Decisions transferring the Prüm legislation into the EU framework, see eucrim 1-2/2008, pp. 35-36 with further references. (CR)

►eucrim ID=0903050

Prüm Scheme in Force in Germany

On 31 June 2009, the German law implementing the so-called Treaty of Prüm and its EU counterpart, Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, entered into force. The law allows for direct applicability of the Council Decision.

With regard to the automated searching and comparison of DNA profiles and automated searching of dactyloscopic data, the designated German contact point for the supply of these data is the Federal Criminal Police Office (*Bundeskriminalamt*). For the automated searching of vehicle registration data, the national contact point designated to supply data for incoming requests is the Federal Motor Transport Authority (*Kraftfahrtbundesamt*) while the Federal Criminal Police Office remains the contact point for outgoing requests to the other EU Member States and signatories of the Treaty. The authorisation to process personal data in exceptional cases for purposes other than those for which it has been supplied is also given by the

Federal Criminal Police Office. Finally, the law designates the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragter für den Datenschutz und die Informationsfreiheit*) to observe the right to data protection and to guarantee the data subjects' rights to information and damages. The Federal Republic of Germany is liable for such damages. (CR)

► eucrim ID=0903051

Joint Police Centres

In February 2009, Austria joined the Dolga Vas Police Cooperation Centre where, today, the Slovenian, Hungarian, and Austrian police jointly carry out tasks defined in bilateral international treaties on police cooperation. The police authorities engage in regular exchanges of operative information in order to prevent cross-border crime, terrorism, and illegal migrations by enabling direct access to national databases containing DNA profiles, fingerprints, or motor vehicle owner registration. Cooperation with the Croatian law enforcement authorities has already begun. It is envisaged that Croatia will also join the centre.

Worth mentioning is also that two joint police units were established between Polish and Czech law enforcement authorities in Chotebuz (Czech Republic) in November 2008 as well as in Kudrowie Zdroju (Poland) in March 2009. (CR)

► eucrim ID=0903052

Judicial Cooperation

FD on Transfer of Proceedings in Criminal Matters – State of Play

As already outlined in the previous issue (eucrim 1-2/2009, pp. 15-16), in July 2009, Sweden, together with several other EU Member States, tabled a proposal for a Framework Decision on the transfer of proceedings in criminal matters. The draft Framework Decision aims at establishing common rules regu-

lating the conditions under which criminal proceedings initiated in one Member State may be transferred to another Member State (for more details on its content, see eucrim 1-2/2009). Its purpose is to increase efficiency in criminal proceedings and to improve the proper administration of justice within the area of freedom, security and justice by facilitating the transfer of criminal proceedings between competent authorities of the Member States.

At the JHA Council Meeting on 23 October 2009, the Council discussed the progress made in developing the FD. In particular, the ministers discussed the procedure for requesting the transfer of proceedings, the decision of the receiving authority, consultations between the requesting and the receiving authorities, and the cooperation with Eurojust and the European Judicial Network. The next institution to discuss the Framework Decision is the European Parliament (EP), where the FD is issued for the plenary EP sitting on 14 December 2009. (CR/ST)

► eucrim ID=0903053

EU-US Agreements on Extradition and on Mutual Legal Assistance

In the aftermath of 11 September 2001, the EU and the US began negotiating two agreements, one on extradition and one on mutual legal assistance. These agreements were signed in 2003. Now, more than 6 years later, on 23 October 2009, the Council approved the conclusion of these two agreements since all EU Member States and the US had finalised their ratification procedures.

The agreements provide that the EU Member States enter into or further develop bilateral treaties with the United States on extradition or mutual legal assistance respectively and that the provisions of the EU-US agreements are applied in relation to these bilateral treaties. All EU Member States have meanwhile done so.

The EU-US agreement on *extradition* outlines the scope of its applica-

bility in relation to existing bilateral agreements, clarifies the types of offences that are extraditable, and outlines the procedure for the transmission and authentication of documents as well as rules for temporary surrender, simplified extradition, and transit. Ultimately, it also significantly improves protection against the death penalty. The non-execution of the death penalty will no longer depend on case-by-case guarantees from the US; instead, extradition to the US will only be possible under the condition that the death penalty will not be imposed or, if for procedural reasons such a condition cannot be complied with, that the death penalty will not be carried out.

The agreement on *mutual legal assistance* outlines its scope with regard to existing bilateral agreements (which will remain in force but have been supplemented with so-called “written instruments”) and specifies rules regarding the identification of bank information. Furthermore, it contains provisions on the setting up of *Joint Investigation Teams*. The procedures under which such a team operates (composition, duration, location, organisation, functions, purpose, and terms of participation of team members) are to be agreed between the respective competent authorities. If the case does not require more central coordination, the competent authorities shall communicate directly. For investigative measures taken in a Member State that is involved in the team, no more requests for mutual legal assistance have to be submitted by the other states involved in the team.

Finally, the agreement on mutual legal assistance contains rules for the use of video conferencing for the taking of witness or expert testimony in a criminal proceeding, and it includes guarantees for the protection of personal data.

The EU-US agreements on extradition and mutual legal assistance are expected to enter into force on 1 February 2010. (CR)

► eucrim ID=0903054

EU-US Joint Statement on “Enhancing transatlantic cooperation in the area of Justice, Freedom and Security”

At a biannual meeting that took place in Washington from 26-28 October 2009, the USA (represented by Attorney General Eric Holder and Deputy Secretary of the Department of Homeland Security Jane Holl Lute) and the EU (represented by the Swedish Ministers for Justice, Beatrice Ask, and, for Migration and Asylum Policy, Tobias Billström, together with the Vice-President of the European Commission, Jacques Barrot) agreed on future cooperation in the area of justice and home affairs.

In light of the current development of the Stockholm Programme (see above), the meeting took the opportunity to renew the US-EU partnership for the next five years.

According to the joint statement, law enforcement cooperation shall be expanded and intensified in the area of serious transnational crime, especially with regard to trafficking in human beings, the smuggling of migrants, sexual exploitation of children, cyber crime, corruption, tracing and confiscating the proceeds and instrumentalities of criminal activity, and terrorism. Furthermore, cooperation between the US, Europol, and Eurojust shall be further strengthened.

Judicial cooperation shall be further enhanced by promoting the implementation of the recently signed EU-US agreements on extradition and mutual legal assistance as well as the conforming bilateral instruments.

The joint statement also underlines the importance of the effective protection of personal data as well as that the prevention of disruption of critical infrastructure functions, e.g., from cyber attacks, should be fostered and that working together internationally, e.g., through even closer cooperation between liaison officers be continued. Ultimately, the joint statement promotes closer cooperation to facilitate legitimate travel. (CR)

► [eucrim ID=0903055](#)

EU-Japan MLA Agreement

Following consultations that began in 2007, the EU has concluded an Agreement with Japan on Mutual Legal Assistance in Criminal Matters. The Council adopted a decision on the Agreement on 27 November 2009.

The Agreement is – like the EU-US agreements (see above) – based on the combination of Article 24 and Article 38 of the TEU. The Council therefore decided on 26-27 February 2009 to authorise the Presidency, assisted by the Commission, to open negotiations for this Agreement.

As no Member States of the EU have a bilateral mutual legal assistance treaty in place with Japan, this new Agreement will establish a more effective cooperation between the EU and Japan. The new instrument deals, inter alia, with the exchange of information, including providing information on bank accounts, the taking of testimony or statements, hearings by videoconference as well as the examination of persons, items, or places. Internal procedures still need to be completed before the Agreement can enter into effect.

► [eucrim ID=0903056](#)

European Crime Prevention Network

The European Crime Prevention Network (EUCPN) will hold its annual Best Practice Conference in Stockholm on 9-10 December 2009. The conference will also host the European Crime Prevention Award ceremony. The theme for this year’s conference and competition is: “Preventing crime and victimisation among children and young people. Current and future challenges – school, cyberspace and recruitment to criminal groups.” The EUCPN was set up in May 2001 by Council Decision 2001/427/JHA to promote crime prevention activity in the EU Member States and to provide a means through which valuable good practice in preventing crime – mainly juvenile, urban, and drug-related crime – could be shared. The network consists of contact points designated by

each Member State and the Commission. Currently, an initiative of several EU Member States to set up a European Crime Prevention Network to succeed the current network established by Decision 2001/427/JNA was issued and reviewed by the Council at its last meeting on 23 October 2009. The draft proposal for a Council Decision is the result of an external evaluation conducted in 2008-2009, which identified opportunities for strengthening the network, such as, for instance, the need for more participation in the activities of the network by the national representatives and strengthening of the Secretariat. Changes include amendments to the provisions dealing with contact points, the Secretariat, the structure of the board and its tasks, including the appointment of its chair. (CR)

► [eucrim ID=0903057](#)

European Arrest Warrant

Judgment of the European Court of Justice in *Wolzenburg* Case

The European Court of Justice delivered its judgment in case C-123/08 *Wolzenburg* on 6 October 2009 (for the report on the Advocate General’s opinion in this case, see also eucrim 1-2/2009, pp. 17-18). In this case, the German judicial authority had issued a European Arrest Warrant (EAW) against the German national Dominik Wolzenburg living in the Netherlands. According to Article 6 (5) of the Dutch law on the surrender of persons (*Overleveringswet*) implementing Article 4 (6) of the Framework Decision on the European Arrest Warrant (FD), the same grounds for non-execution are applicable to foreign nationals as to Dutch nationals if the foreign national is in possession of a residence permit of indefinite duration. In its preliminary ruling, the Court was asked three questions:

First, the interpretation of the legal notions “staying in” and “resident” of Article 4 (6) FD.

Second, whether the application of the grounds for non-execution laid down in that provision may be made subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration (which is – under Dutch law – issued by the Netherlands Minister for Justice).

Third, whether the Dutch law is compatible with the principle of non-discrimination of Article 12 TEC, which prohibits any discrimination on grounds of nationality within the scope of application of the EC Treaty.

While the first two questions were very similar to the question that had given rise to the ECJ's judgment in case C-66/08 "Symon Kozłowski" (see also eucrim 1-2/2008, pp. 36-37 and eucrim 3-4/2007, p. 110), the third question on Article 12 TEC has so far only been raised but has remained unanswered. Against the opinion of the Advocate General in this case, the Court found that Article 12 TEC must be interpreted as not precluding the legislation of the executing Member State providing for its competent judicial authority to refuse the execution of a EAW issued against one of its nationals regarding the enforcement of a custodial sentence. Such a refusal is – in the case of a national of another Member State having a right of residence on the basis of Article 18(1) TEC – subject to the condition that that person has lawfully resided for a continuous period of five years in the executing Member State.

The Court's conclusions are based on the following: With regard to the applicability of Article 12 TEC, the Court repeated its settled case-law ("Cowan"; "Garcia Avello"), according to which, in exercising its reserved competences, a Member State cannot undermine the rules of the EC Treaty, including the prohibition of any discrimination on grounds of nationality set out in Article 12 TEC. This case-law would also apply, *a fortiori*, where a Member State has implemented a legal measure of the Union, such as a Framework Decision,

because Article 47 TEU stipulates that nothing in the EU Treaty is to affect the rules of the EC Treaty. Finally, the Court recalled that Member States, when implementing Union law, were required to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States and general principles of Community law (see also "Advocaten voor de Wereld" in eucrim 1-2/2007, pp. 38-39.)

With regard to the issue of whether Article 12 precludes the Dutch regulation requiring a residence permit of indefinite duration in order to apply Article 4(6) FD to foreign nationals, the ECJ repeated that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. According to the Court, the condition of residence of a continuous period of five years for nationals of other Member States is objectively justified as it pursues the objective of Article 4(6) FD which is to enable the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society after serving his sentence. As a continuous period of five years was also precisely the length of time given in Article 16 of Directive 2004/38/EC, beyond which Union citizens acquire a permanent right of residence in the host Member State, and the same period was also used, for instance, in Article 4(7a) of Framework Decision 2008/909/JHA, the Court saw this difference in treatment as proportionate to the legitimate objective pursued by the Dutch law.

As regards the interpretation of Article 4(6) FD, the Court decided that, in the case of a citizen of the Union, the Member State of execution could not, in addition to a condition like the duration of residence in that State, make application of the grounds for optional non-execution of a European Arrest Warrant laid

down in that provision subject to further supplementary administrative requirements, such as possession of a residence permit of indefinite duration which is issued by the Netherlands Minister for Justice. The Court pointed out that neither Article 16 nor Article 19 of Directive 2004/38 contained such a requirement and therefore, it could only have declaratory and probative force but did not give rise to any right.

Finally, the Court saw no need to answer the question on what the duration of residence must be to fall under Article 4(6) FD, as its finding with regard to Article 12 TEC had already shown that a condition laying down a duration of residence of a period of five years was not precluded. (CR)

➤ eucrim ID=0903058

EAW – Final Report on the Fourth Round of Mutual Evaluations

At its meeting in June 2009, the JHA Council adopted the "Final report on the fourth round of mutual evaluations – The practical application of the European Arrest Warrant (EAW) and corresponding surrender procedures between Member States" (see also eucrim 1-2/2009, p. 18). The report, drawn up at the end of the fourth round of mutual evaluations, addresses the application in practice of the EAW and cooperation between Member States in this regard. The objectives of the report were to evaluate the practical processes operated and experienced by Member States when acting both as issuing Member State and as executing Member State and to assess relevant training provisions and provisions for defence. Overall, the report concludes that the EAW operates efficiently and that Member States have, for the most part, implemented the Framework Decision properly. Legal practitioners see an advantage in the EAW compared to the traditional extradition system and perceive it as a useful tool.

Furthermore, the report proposes 21 recommendations for action, either to the European Union as a whole or to its

individual Member States, *inter alia*, in the following areas:

- Restricting the mandate of non-judicial authorities. Non-judicial central authorities should play a role only with regard to administrative tasks.
- Promotion of direct communication among the national judicial authorities avoiding the use of other channels, such as the police, central authorities, or non-designated judicial authorities;
- (Continuation to) provide appropriate training on the EAW and foreign languages as well as to explore ways to promote training on EAW matters for defence lawyers. Financial support should be provided under the JHA financial programmes;
- Raise awareness of EAJ and Eurojust in the Member States in view of their possibilities in facilitating the application of the EAW;
- Considering a flexible approach to language requirements because only a handful of Member States accept an EAW in a foreign language;
- Recommendation to Member States to accept as valid EAWs transmitted by any secure means capable of producing written records and allowing their authenticity to be established;
- Possibly setting up common time limits (at the European Union level);
- Review of Member States' implementing legislation because there are still diverging tendencies in the transposition of the Framework Decision with regard to the optional and mandatory grounds for non-execution, e.g., additional grounds for non-execution had been introduced or optional grounds made mandatory. Furthermore, differences in treatment between nationals and non-nationals beyond those explicitly allowed in the Framework Decision were observed.
- Preparatory bodies are to continue discussing the issue of proportionality because, apparently, some Member States apply a proportionality test in each case, whereas others consider it superfluous. The solution for this is seen

in the institution of a proportionality requirement on the European level for the issuance (not execution) of any EAW.

- Preparatory bodies should also examine a solution for divergent legislation and practices as regards the execution of EAWs insofar as they relate to accessory offences;
- Resolving problems associated with the practical application of the speciality rule. The Council also decided to look into the possibility of removing the speciality rule in relations between Member States.
- Finding guidelines as to the scrutiny and flagging in SIS of alerts for arrest for surrender purposes as well as the implementation of Article 111 CISA;
- Examination of a mechanism for "provisional arrest" in urgent cases;
- Examination of a consistent application of Article 29 of the FD EAW in the preparatory bodies. Article 29 provides for specific provisions on the seizure and transfer of property, however, specific EU instruments have meanwhile been adopted (Framework Decisions on freezing orders, confiscation orders, European Evidence Warrant) and thus risk the emerging of different practices.

Each Member State has been asked to inform the Council by mid-2011 on the action and measures it has taken or will take in response to the recommendations. The recommendations addressed to the Council's preparatory bodies shall be further analysed. Focused meetings of EAW experts are to be held to continue examination of the identified issues and exchange practical experiences with a view to taking concrete action.

The Council Presidency has been asked to report on the progress made following implementation of the recommendations set out in the report. (CR)

► [eucrim ID=0903059](#)

Reference for a Preliminary Ruling of the Belgian Constitutional Court on EAW

On 24 July 2009 the Constitutional Court of Belgium decided to refer four

questions to the Court of Justice for a preliminary ruling. The case was lodged on 31 July 2009.

The Belgian Constitutional Court brought these questions before the CoJ in a case in which it received a question for preliminary ruling itself from the Court of First Instance of Nivelles regarding article 8 of the Belgian implementation law of the FD on the EAW.

The case concerns a Romanian citizen who is residing in Belgium with his family but has been sentenced in absentia by a Romanian court for offences committed in his home country. The Romanian authorities issued an EAW against him for executing his sentence (four years of imprisonment) in Romania.

The Belgian implementation law of the FD on the EAW includes a provision in Article 8 stating that the surrender of a person who is a Belgian citizen or residing in that state can be made dependent on the condition that the person shall be transferred to Belgium after his trial and will serve the sentence that was imposed on him in the state of prosecution, in Belgium.

The question whether this constitutes discrimination between on the one hand an EAW issued for the purposes of the execution of a sentence and on the other hand an EAW issued for the purposes of prosecution, is given another dimension as the sentenced person was not informed of the date and place of the hearing and still has a remedy.

The questions the Belgian Constitutional Court submitted before the CoJ are therefore the following:

- Is an EAW issued for the purposes of the execution of a sentence imposed in absentia, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of Article 4(6) of the FD of 13 June 2002 on the European arrest warrant and the surrender proce-

dures between Member States, but an arrest warrant for the purposes of prosecution within the meaning of Article 5(3) of the FD?

■ If the reply to the first question is in the negative, are Article 4(6) and Article 5(6) of the FD to be interpreted as not permitting the Member States to make the surrender to the judicial authorities of the issuing State of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing State in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing State?

■ If the reply to the second question is in the affirmative, do the articles in question contravene Article 6(2) of the Treaty on European Union and, in particular, the principles of equality and non-discrimination?

■ If the reply to the first question is in the negative, are Articles 3 and 4 of FD to be interpreted as preventing the judicial authorities of a Member State from refusing the execution of an EAW if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) of the Treaty on European Union?

Since Article 35(1) of the Treaty on European Union the Court of Justice has competence to rule on these preliminary questions regarding the interpretation and legality of framework decisions. (EDB)

► eucrim ID=0903060

Statute Barred European Arrest Warrant before the German Federal Supreme Court

On 6 April 2009, the Higher Regional Court (*Oberlandesgericht*) of Oldenburg, Germany submitted a reference to the German Federal Supreme Court

Conferences and Seminars Organised by the Academy of European Law (ERA) from February to June 2010

The editors of eucrim would like to draw the attention to the following conferences and seminars of ERA which will take place in the first half of 2010.

Annual Forum on Combating Corruption in the EU 2010: Incorporating Anti-Corruption Policy into the EU Accession Process

Trier, 25–26 February 2010

The objective of this annual forum will be to debate how best to ensure effective detection, investigation and prosecution of corruption, particularly affecting the EC's financial interests. The first morning session will be dedicated to an overview of the European and international legal framework for combating corruption and protecting the EC's financial interests, highlighting recent issues and comparing the UN rules and European legislation. The afternoon session will be devoted to EU anti-corruption policy with regard to accession and third countries. It will discuss the key elements of the EU's anti-corruption policy outlining the principles which underpin the EU's relations with accession and third countries in this policy area. During the second day, as in previous fora, workshop sessions will be organised. Examples of best practices and experiences of member states with specialised authorities for corruption will be shared. The role and contribution of OLAF will be outlined and concrete international and European cases presented in discussion groups. This forum follows on from "Combating corruption in the EU – annual fora" projects sponsored by the European Commission, OLAF under the Hercule Programme and implemented by ERA since 2006. Conference languages will be English, French and German and simultaneous interpretation will be provided for.

The Future of European Criminal Justice under the Lisbon Treaty – The End of the Third Pillar ?

Trier, 11–12 March 2010

At this seminar, experts from the EU and Member States will explain the changes brought about by the Lisbon Treaty in the field of criminal justice and discuss its added value and remaining challenges for future integration. One of the major changes of the Lisbon Treaty is that it will abolish the EU's pillar structure. The so-called "third pillar" of police and judicial cooperation in criminal matters will therefore be assimilated with other policy areas in the renamed Treaty on the functioning of the European Union. The implications of the Lisbon Treaty for police and judicial cooperation in criminal matters in the EU will thus be manifold. On the one hand, the institutional setting will change, for example by introducing the co-decision procedure, qualified majority voting, and enlarging the Court of Justice's jurisdiction to cover all areas previously within the third pillar. Moreover, the Treaty introduces the possibility for the EU to harmonise substantive criminal law. On the other, however, police and judicial cooperation in criminal matters will continue to be subject to a distinctive legal regime. The Member States will have the option to use an "emergency brake" or a "flexibility" procedure to proceed with enhanced cooperation. Furthermore, some Member States will maintain their right to opt out or in and there is a transitional period of five years before the area is fully "communitarised". Finally, the Lisbon Treaty paves the way for future steps such as the establishment of a European Public Prosecutor to combat crimes affecting the financial interests of the EU. Conference languages will be English, French and German and simultaneous interpretation will be provided for.

Towards E-Borders: The Impact of New Technologies on Border Controls in the EU

Trier, 22–23 April 2010

This seminar will take stock of the use and the impact of new technologies on EU borders and discuss European and national initiatives in the field. In recent years, the European Union has tried to make full use of the latest electronic technology to provide a way of collecting and analysing information on everyone who travels to or from the EU. The ultimate aim is to monitor internal and external borders to ensure greater security, effectiveness and efficiency. To this extent, the EU is currently working to develop and adjust surveillance and information systems such as Eurosur, Schengen

Information System (SIS I and II), Visa Information System (VIS), Passenger Name Records (PNR), entry/exit system, etc. Non-Schengen member states have also successfully delivered pilot projects which make full use of new technologies to ensure that controls at borders are continually adapted to maintain a high level of internal security. Firstly, Ireland recently approved the development of an Irish Border Information System (IBIS) which operates on the basis that passenger information collected by carriers prior to departure is sent to an Irish Border Operations Centre where it is screened. Secondly, the United Kingdom implemented the Iris Recognition Immigration System (IRIS), a biometric entry system, which recognises the unique iris patterns of a person's eye to allow quick entry for pre-registered passengers at selected ports in the UK. The roles of Frontex and Europol in ensuring greater security at EU borders will also be discussed. The conference language is English.

Evaluating Counter-Terrorism Legislation and Jurisprudence: Second Biannual Conference

Trier, 7–9 June 2010

This three-day conference focuses on counter-terrorism legislation and jurisprudence in the European criminal justice area. The Convention on the Prevention of Terrorism (CETS No. 196), the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and the recently amended Framework Decision on combating terrorism penalising public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are just some examples of EU counter-terrorism instruments that recently entered into force and that practitioners have to apply or will need to apply in the very near future. The objective of this conference is to present and discuss the latest counter-terrorism legislation in the European criminal justice area and its implementation in the member states. Legal practitioners from all backgrounds – judges, prosecutors, police officers, defence lawyers as well as ministry officials and academics – will illustrate and analyse the impact these new instruments have when working with terrorist cases, the problems that arise when applying them and the added value they may offer. The second important focus of this conference will be the case-law of the European Courts in Luxembourg and Strasbourg and especially of the national courts of the member states in counter-terrorism cases. Conference languages will be English, French and German and simultaneous interpretation will be provided for.

Summer Course on European Criminal Justice

Trier, 28 June–2 July 2010

This course is intended as an introduction to EU criminal law and to the instruments for cooperation in criminal justice:

- EU policy in criminal matters: from Maastricht to Lisbon
- The role of the European institutions and the European Court of Justice and the interplay with national criminal law
- Mutual legal assistance and mutual recognition (Convention on Mutual Legal Assistance, the European Arrest Warrant, mutual recognition as regard to sanctions and gathering of foreign evidence, the European Evidence Warrant)
- EU legislation regarding serious cross-border crime (organised crime, terrorism, money laundering, trafficking in human beings)
- Police cooperation in the EU (Schengen Convention, Joint Investigation Teams, data exchange)
- Organisation of police and criminal justice cooperation (European Judicial Network, Eurojust, Europol, OLAF)
- Defence rights in the EU
- The future of European criminal justice under the Lisbon Treaty

Participants will have the opportunity to prepare in advance through an e-learning course via the ERA website, and to deepen their knowledge through case-studies and workshops during the summer course. The conference language is English.

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

► [eucrim ID=0902061](#)

(*Bundesgerichtshof*) for interpretation concerning the application of the law on time limits in relation to the execution of European Arrest Warrants. The case concerns a German citizen who committed several offences (theft and destruction of property) in Poland, after which a Polish district court issued a European Arrest Warrant against him.

Thus, the issue in this case is whether the surrender of a German citizen based on a European Arrest Warrant issued by a Polish authority for offences committed in Poland that are, however, statute barred under German law (while Germany also has jurisdiction in the case), can be refused although Polish authorities have carried out acts to interrupt the period of limitation. The main legal question is now whether these acts of a foreign state are accepted under German law, as a result of which Section 9 No. 2 of the German Law on International Assistance in Criminal Matters (LIACM) would not be applicable. Section 9 allows the non-surrender due to the lapse of time of the underlying offence (see also Article 4 para. 4 of the FD EAW).

However, before the German Federal Supreme Court had the opportunity to decide on the question (the case is still pending), the German Federal Constitutional Court (*Bundesverfassungsgericht*) took a precedent decision on the matter. In a ruling of 3 September 2009 that referred to an extradition of a German-Greek national upon a Greek EAW, the Federal Constitutional Court decided that foreign acts which may interrupt the lapse of time are not to be recognised under Article 9 of the LIACM in connection with the relevant provisions on time limitation of the German criminal code. The Federal Constitutional Court referred to its famous 2005 decision on the EAW where it reasoned the high importance of the fundamental right of citizenship and the right to be tried within one's own legal system. In addition, the Federal Constitutional Court draws a comparison with the rules of international private law as regards the insti-

tution of “substitution” and concludes that these rules cannot be transferred to criminal law. It should be emphasized that the Federal Constitutional Court’s ruling actually applies only to German nationals. It remains to be seen whether the Federal Supreme Court will decide in another way. (EDB)

➤ [eucrim ID=0903062](#)

European Supervision Order/ Transfer of Sentenced Persons

European Supervision Order

At its meeting on 23 October 2009, the Council adopted the Framework Decision on the application, between the Member States of the European Union, of the principle of mutual recognition of decisions on supervision measures as an alternative to provisional detention (for the Commission’s original proposal, and the development of the subject matter, see [eucrim 3-4/2006](#); pp. 74-75, [eucrim 3-4/2007](#), p. 110; [eucrim 1-2/2008](#), p. 44; [eucrim 1-2/2009](#), p. 19). The framework decision lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention in the pre-trial stage. It also includes provisions on how Member States should monitor supervision measures imposed on a natural person and how they should surrender the person concerned to the issuing state in case of breach of these measures. (CR)

➤ [eucrim ID=0903063](#)

Law Enforcement Cooperation

Joint Investigation Teams: Funding by Eurojust

Since July 2009, Joint Investigation Teams (JITs) are eligible for direct and targeted financial support from Eurojust. Joint Investigation Teams are investiga-

tion teams based on Article 13 of the Convention on Mutual Legal Assistance in Criminal Matters of 2000 or on the equally worded Framework Decision of 13 June 2002 on Joint Investigation Teams. They must be set up on the basis of an agreement between two or more Member States and/or other parties for a specific purpose and limited duration. The novelties of this concept include possibilities for an immediate exchange of information; the presence of JIT members during house searches, interviews, etc. on the territory of the other participating Member States; and involvement of Eurojust and Eurojust in providing direct support and assistance. In order to also assist JITs financially, Eurojust has applied for and received a grant from the Commission under the programme “Prevention and Fight against Crime.” The grant allows for the financial and logistical support of JITs until 31 December 2010.

In order to receive funding from Eurojust, interested parties need to follow the following procedure:

Applicants should submit an application for financial assistance to the JIT Project Manager at Eurojust. The application form can be found on Eurojust’s website (see also the attached link to this news). The application can be submitted no earlier than 12 and no later than four weeks prior to the cost being incurred. Upon receipt of the application, the JIT Project Manager at Eurojust will acknowledge the applicant via e-mail, indicating the date of receipt. If the application is successful, a specified amount will be reserved pending the submission of a request for reimbursement. The reserved funds will remain available until 6 weeks after the cost has been incurred. Funds can be allocated for a specific activity and made subject to a guarantee regarding the availability of funds. However, as the grant received by Eurojust is limited in nature and duration, it is not possible to secure the allocation of the entire operational budget of a JIT. (CR)

➤ [eucrim ID=0903064](#)

Joint Investigation Teams Manual

On 23 September 2009, Eurojust and Europol published the first Joint Investigation Teams Manual. The manual informs practitioners of the legal basis and requirements for setting up a JIT and dispenses advice as to when it can be usefully employed. The manual explains the concept, legal framework, and requirements for a JIT. The structure of a JIT is outlined, including explanations of the roles of the team and the team leader. The manual illustrates a JIT operation and explains the role that Eurojust and Europol can play in a JIT. Each chapter not only cites the relevant legal basis but also offers explanations on the legal text, advice on best practices, and recommendations drawn from existing experience.

Furthermore, the manual provides advice on how to draft the written JIT Agreement. A model agreement with suggestions for phrasing is attached to the manual. In the last chapter, the manual gives an overview of the EU Member States’ national laws implementing JITs. For the future, regular updates responding especially to practical casework are planned. (CR)

➤ [eucrim ID=0903065](#)

EURODAC Access by Law Enforcement Authorities and Europol

On 10 September 2009, the Commission adopted a proposal for a Council Decision aiming at authorising law enforcement authorities and Europol to consult the EURODAC database for the purpose of fighting terrorism and serious crime, such as trafficking in human beings and drug trafficking.

Originally, EURODAC was established by first-pillar Regulation EC No. 2725/2000 in December 2000 in the field of asylum and immigration. Its automated fingerprint identification system has been in operation since 2003. By allowing Member States to compare the fingerprints of asylum seekers and illegal immigrants, the purpose of the system is to make it possible to determine the

Member State responsible for examining an asylum application. All EU Member States plus Norway, Iceland, and Switzerland are currently participating in the system.

The proposed Council Decision would authorise the comparison of fingerprints that are contained in EURODAC with fingerprints contained in the databases of national law enforcement authorities or Europol for the purpose of the prevention, detection, and investigation of terrorist offences and other serious criminal offences, including trafficking in human beings and drugs.

The proposal contains procedures and conditions to request such a comparison. Member States have been asked to designate the authorities that will be authorised to access EURODAC data. According to the proposal, these authorities must be responsible for the prevention, detection, or investigation of terrorist offences and other serious criminal offences and may not be dealing specifically with national security issues. Furthermore, each Member State has been asked to designate a single national body to act as its verifying authority. The task of this authority will be to ensure that the conditions for requesting comparisons of fingerprints with EURODAC data are fulfilled, and only this authority will be authorised to forward requests for comparison of fingerprints to the National Access Point.

As regards Europol, the Commission proposes that Europol set up specialised units to verify and request comparisons with EURODAC data. To ensure the protection of personal data, the proposal would apply Framework Decision 2008/977/JHA and include further provisions regarding, for instance, deadlines for deletion and data security. It explicitly prohibits the transfer or making available of personal data obtained by a Member State or Europol from the EURODAC central database to any third country, international organisation, or private entity established in or outside the European Union (without prejudice

to the respective regulations applying under the Dublin Regulation). Lastly, Member States and Europol are obliged to take the necessary measures to ensure that any breach of the Decision is punishable by penalties, including administrative and/or criminal penalties.

It is expected that it will take approximately two years to negotiate the legislative proposals in the Council of Ministers and the European Parliament. (CR)

► [eucrim ID=0903066](#)

EURODAC Access by Law Enforcement Authorities and Europol: Opinion of the EDPS

On 7 October 2009, the European Data Protection Supervisor (EDPS) published his opinion on the amended proposed legislation concerning the establishment of “EURODAC” (which stands for European Dactyloscopie) and on the access of law enforcement to the database.

The EDPS’ analysis of the legitimacy of the proposals led him make several recommendations. The EDPS expressed serious doubts as to whether these proposals are legitimate and whether legislative instruments should be adopted on the basis of these proposals. He bases his doubts on a number of following considerations.

Although a better exchange of information is an essential policy goal for the EU, and governments need appropriate instruments to guarantee the security of their citizens, within Europe, the citizens’ fundamental rights must be fully respected. According to the EDPS, the EU legislator needs to ensure this balance.

While measures to combat terrorist offences and other serious offences can be a legitimate ground to allow processing of personal data (provided that the necessity of the intrusion is supported by clear and undeniable facts) and the proportionality of the processing is given, this is all the more required since the proposals – in his opinion – concern a vulnerable group of asylum applicants in need of special protection as they are fleeing from persecution. According to

the EDPS, the precarious position of this group must be taken into account in the assessment of the necessity and proportionality of the proposed action. The EDPS also points out the risk of stigmatisation.

Consequently, the EDPS recommends assessing the legitimacy of the proposals in a wider context:

Firstly by analysing the tendency of granting law enforcement access to the personal data of individuals that are not suspected of any crime and whose data have been collected for other purposes.

Secondly, by evaluating the need for a case-by-case assessment of every proposal of this kind and for a coherent, comprehensive, and future-oriented vision, preferably related to the Stockholm programme.

Thirdly, by scrutinising the need to first implement and evaluate the application of other new EU instruments that permit consultation by one Member State regarding fingerprints and other law enforcement data held by another Member State.

Finally, by analysing the urgency of the proposal in relation to the changing legal and legal policy environment.

Looking at the compatibility of the proposals with Article 8 ECHR, the EDPS questions the change of purpose of the EURODAC system and underlines that merely stating the change of purpose in a legislative proposal does not constitute such a change. Moreover, according to the EDPS, a legislative change does not in itself lead to a different assessment of whether the proposals are necessary in a democratic society, proportionate, and otherwise acceptable, notably in view of the rules on purpose limitation in Directive 95/46/EC.

Ultimately, the EDPS emphasises that the necessity of the proposal should be proven by the demonstration of substantial evidence of a link between asylum applicants and terrorism and/or serious crime. He sees this as not achieved in the proposals. (CR)

► [eucrim ID=0903067](#)

Europol Information Exchange with Civilian ESDP Policy Missions: EULEX Kosovo

A new type of mechanism is currently being built up concerning the exchange of personal data between the EULEX Kosovo Mission and Europol via the Europol National Units of volunteering Member States. The ESDP Mission EULEX Kosovo was chosen for this type of data exchange for two reasons:

First, Europol has so far been unable to negotiate an operational agreement directly with the Kosovan authorities even though it has been shown that activities of criminal organisations with roots in the region have a strong impact on the EU.

Secondly, EULEX Kosovo is the only civilian ESDP Mission with an executive mandate that allows it to conduct criminal investigations.

As ESDP Missions do not have the legal personality required by the Europol Convention to directly sign cooperation agreements for the exchange of personal data, an alternative solution by which to exchange the data via Europol National Units of volunteering Member States has been found. The responsibility for the lawfulness of the collection and further processing of the data exchanged between Europol and EULEX remains with the Member States, which today are Finland, Sweden, and the UK. Personal data has been exchanged between Europol and EULEX since April 2009. Since August 2008, Europol has obtained the legal possibility of exchanging non-personal data with all civilian ESDP (European Security and Defence Policy) Missions via the General Secretariat of the Council. Information exchange includes activity reports, crime trend analysis, and specific situation reports. Existing civilian ESDP Missions include, for instance, EUPM Bosnia, EULEX Kosovo, EUPOL Afghanistan, EUPOL RD Congo, EU SSR Guinea Bissau, EUPOL COPPS, EUBAM Rafah, EUMM Georgia. (CR)

► [eucrim ID=0903068](#)



Council of Europe

Reported by Dr. András Csúri*

Foundations

European Court of Human Rights

News Feeds for Judgements and Decisions

The European Court of Human Rights launched additional RSS format news feeds on its Internet site – a facility that allows Internet users to receive automatic electronic updates on subjects of interest to them. Internet users can now subscribe to RSS news feeds for the Court's most recent judgments and decisions, in addition to the feeds introduced earlier for general news, webcasts of public hearings, and monthly information notes on cases of particular legal interest (see [eucrim 1-2/2009](#), p. 27). Users can choose to subscribe to the news feeds for judgments and decisions by level of importance or respondent State by accessing a special page on the Court's Internet site (www.echr.coe.int/echr/rss.aspx). The development aims to make information on the Court's work more easily accessible to the public and media as well as to legal specialists and applicants. In the near future, the Court also plans to publish translations of selected case-law into non-official languages.

► [eucrim ID=0903069](#)

Human Rights and Legal Affairs

"Corruption is a major human rights problem"

Corruption affecting key components of the justice system, such as the judiciary,

the police, and the penitentiary, is a serious problem in several European countries, one which goes hand in hand with political interference.

For this reason, Commissioner for Human Rights at the Council of Europe, Thomas Hammarberg, issued a statement on 5 October 2009 at GRECO's 10th anniversary conference. In this declaration, he stated that trust is the base for the effectiveness of any system of justice. The Commissioner emphasised that corruption, in particular, threatens the human rights of the poor and, therefore, stressed the necessity of a comprehensive programme to eliminate corruption in all public institutions. In his statement, he also accentuated the need to react clearly on corrupt practices in private business. As a basis, the Commissioner emphasised a concise legislation that criminalises acts of corruption and outlines clear procedures for the recruitment, promotion and tenure of judges and prosecutors; establishes codes of conduct to enhance the integrity and accountability of the judiciary; and promotes the protection of public service media from political dependence. Such independence requires freedom of expression as well as freedom of information, also as regards the functioning of the judicial system.

In addition to this, the viewpoint of the Commissioner from 31 August 2009 should be mentioned in which he expressed his concern over flawed enforcement or non-enforcement of domestic judicial decisions that undermine trust in

* If not stated otherwise, the news reported in the following sections cover the period July – October 2009

State justice. The Commissioner's presentation can be found via the following ID:
 >eucrim ID=0903070

Ethnic and Religious Profiling Clashes with Human Rights Standards

In his viewpoint, published on 20 July 2009, the Commissioner stated that "ethnic profiling" affecting members of minorities is a form of discrimination that is widespread in today's Europe. It happens, e.g., from being stopped more often by the police and asked for identification to being questioned and searched. This not only clashes with human rights standards but also often discourages people from cooperating in police efforts to detect real crimes. Furthermore, it has a detrimental impact on society in general as all social groups should have reason to trust the police. Also available at the Commissioner's website at:

>eucrim ID=0903071

Specific Areas of Crime

Corruption

GRECO: Third Round Evaluation Report on Albania

On 17 September 2009, the Group of States against Corruption (GRECO) published its Third Round Evaluation Report on Albania, focusing as usual on reports of the third evaluation round on the two topics: criminalisation of corruption (Theme I) and transparency of party funding (Theme II). The report addressed a total of 12 recommendations to Albania (5 on incriminations and a further 7 on the transparency of party funding). Their implementation will be assessed by GRECO at the end of 2010.

In the area of criminalisation of corruption, GRECO recognised that the criminal law of Albania complies to a large extent with the relevant provisions of the Council of Europe Criminal Law Convention on Corruption. Nonetheless,

the report identified several deficiencies in current legislation. Such deficiencies arise, e.g., in the restricted application of existing provisions with regard to bribery of foreign and international public officials. The report furthermore stressed the increase in maximum penalties for bribery offences in the private sector. GRECO pointed that several loopholes – such as the demand for dual criminality – exist with regard to the jurisdiction over offences of bribery and trading in influence committed abroad. Furthermore, the practical implementation of the relevant criminal legislation needs to be enhanced.

As regards the transparency of party funding, GRECO acknowledged Albania's current promising reform process, which aims to remedy the low level of transparency in Albanian political financing and is supported by the major political parties. The new Electoral Code, in force since January 2009, introduced a new system of transparency and monitoring of election campaign financing. The report stressed that concrete measures are necessary to effectively implement these new regulations. It is essential that an independent and powerful mechanism to monitor election campaign financing as well as general party funding be developed. This is needed in, e.g., the introduction of precise secondary legislation to the 2008 Electoral Code as well as the assessment of the new provisions. Furthermore, the Law on Political Parties must be aligned with the standards of the new Electoral Code in respect of transparency, supervision, and enforcement. GRECO asked the Albanian authorities to pursue their efforts to establish and implement a system of transparency of political financing.

>eucrim ID=0903072

GRECO: Joint First and Second Round Evaluation Report on Italy

On 16 October 2009, GRECO published its first evaluation report on Italy after the country became a GRECO member on 30 June 2007 (see eucrim 1-2/2007,

p. 43). The report refers to the topics of the first and second evaluation round that refer to the guiding principles of the Council of Europe's anti-corruption framework (see eucrim 1-2/2008, p. 50). The report on Italy addressed 22 recommendations to the Member State whose implementation will be assessed by GRECO in the second half of 2011.

The report indicated that, despite the clear commitment of judges and prosecutors to deal effectively with corruption, the latter is perceived, in Italy, as a pervasive and systemic phenomenon that affects numerous sectors of activity, in particular urban planning, waste management, public procurement, and the health sector.

GRECO pointed out the need to articulate an effective preventive policy on corruption, which will require a long-term approach and sustained political commitment. The report stressed that combating corruption must become a matter of culture and not only just a matter of rules.

Further measures are recommended to tackle the often excessive length of judicial proceedings as well as to improve access to official documents as well as to strengthen the transparency and ethics of public administration. The above-mentioned measures are of particular relevance with respect to internal auditing, the enforceability of deontological provisions, the prevention of conflicts of interest, and whistleblower protection.

The report furthermore expressed concern over the immunity granted for the four highest political offices in Italy, as introduced by Law 124/2008 – the so-called "Lodo Alfano". (*On 7 October, shortly before the release of Greco's Report, the Italian Constitutional Court declared the "Lodo Alfano" unconstitutional because it is in breach of Article 3 and 138 of the Italian Constitution. Editor's note*)

In the private sector, GRECO stressed the importance of strengthening the accounting and auditing obligations for all types of companies and of ensuring that

the corresponding sanctions are effective, proportionate, and dissuasive.

► [eucrim ID=0903073](#)

GRECO: 10th Anniversary Conference

On 5 October 2009, GRECO celebrated its first ten years of existence with a high-level conference that brought together a large number of Ministers and Secretaries of State as well as representatives from its 46 Member States. Furthermore, representatives of several non-Member States, international organisations, and civil society took part in the conference. The need for enhanced cooperation among all international stakeholders in the fight against corruption was once again stressed by the speakers with a view to avoiding duplication and encouraging synergies in this effort.

GRECO agreed to send a message to the UN offering its support and willingness to participate in the Third Session of the Conference of States Parties to the United Nations Convention against Corruption which took place in Doha, Qatar from 9 to 13 November 2009.

► [eucrim ID=0903074](#)

GRECO: 44th Plenary Meeting

During its 44th Meeting from 6 to 8 October 2009, the Plenary examined and adopted the Third Round Evaluation Report on Malta (the publication of which is pending authorisation by the Maltese authorities) as well as the addenda to the Second Round Compliance Reports on Albania, Croatia, Netherlands, Spain, and the former Yugoslav Republic of Macedonia. GRECO also held a tour de table on corruption in sports.

► [eucrim ID=0903075](#)

Money Laundering

MONEYVAL: Third Public Statement on Azerbaijan

Since 2006, MONEYVAL has been concerned with deficiencies in the AML/CFT regime in Azerbaijan, in particular with

its non-compliance with MONEYVAL's reference documents. Therefore, two public statements were already issued at its 28th and 29th Plenary Meetings (on 12 December 2008 and on 20 March 2009) respectively. These first and second public statements remain in effect. (see also [eucrim 1-2/2009](#), pp. 32-33).

On 24 September 2009, at its 30th plenary meeting in Strasbourg, MONEYVAL issued a third public statement in respect of Azerbaijan under Step VI of its Compliance Enhancing Procedures. In this statement, the body welcomed the progress achieved with the adoption of additional measures to finalise the legal framework in Azerbaijan. MONEYVAL stated, however, that the new preventive AML/CFT structure is not, as yet, operational, but is expected to be so by December 2009. Azerbaijan will report back to MONEYVAL's 31st plenary in December 2009 on further progress.

► [eucrim ID=0903076](#)

Russia: MOLI-RU2

The latest developments within the follow-up project MOLI-RU 2 that aims at further developing Russia's AML/CTF system in view of both practice and legislation (see also [eucrim 1-2/2007](#), p. 45 and [eucrim 1-2/2009](#), p. 33) were:

From 21-22 October 2009, an international seminar for detectives specialising in AML and terrorist-financing offences took place in Nizhny Novgorod. The target audience were (senior) detective officers for most serious crimes, in particular those specialised in the investigation of offences providing an economic basis for terrorism as well as for money-laundering. The purpose of the meeting was to discuss the key elements of an anti-money laundering and terrorist financing regime, to present investigation methods, and to provide useful information on financial institutions.

Also worthy of mention is the training course on banking compliance and related issues in cooperation with the Financial Technology Transfer Agency (ATTF) that took place in Luxemburg

from 27 to 30 October 2009. The key objective was to raise awareness of the latest AML trends and typologies as well as to discuss laws, regulations, and the role of the private sector in countering money laundering. The course welcomed senior AML/TF compliance officers from the largest Russian banks, such as AlfaBank, or Gazprombank, etc. A second course, in Luxemburg in cooperation with the ATTF, will follow.

► [eucrim ID=0903077](#)

Procedural Criminal Law

CEPEJ: Approval of the Scheme for Evaluating Judicial Systems – 2008–2010 Cycle

At their 1067th meeting on 8 October 2009, the Minister Deputies approved the 2008 activity report and the revised scheme for evaluating judicial systems – 2008–2010 cycle, which was adopted in June 2009 (cf. [eucrim 1-2/2009](#), p. 34). The Explanatory Note aiming to assist the national correspondents and other persons entrusted with replying to the questions of the scheme was also accepted. The network of the European Commission for the Efficiency of Justice (CEPEJ) national correspondents is to collect judicial data in their own country and transmit it via the electronic form by 31 December 2009. The received data will be further collected and analysed by experts. The next evaluation report on judicial systems will be published in mid-2010.

► [eucrim ID=0903078](#)

CEPEJ: 4th Plenary Meeting of the Network of Pilot Courts

The members of the CEPEJ Network of Pilot Courts (NPC) met in Strasbourg for their fourth plenary meeting on 10 September 2009. They agreed on several points regarding their operational cooperation. Regarding the NPC, they include the setting up of a European observatory

of judicial timeframes (SATURN Centre), the quality of justice, participation in the regular activities of the CEPEJ, and the dissemination of information on CEPEJ's activities. The NPC have been invited to test the implementation of some tools from CEPEJ within the Court. These tools concern, for instance, the collection of data relating to the length of procedures in judicial systems as well as to the organisation of satisfaction surveys by the Court's users. In addition, CEPEJ was especially invited to organise the work of the pilot courts in clusters and to appoint one CEPEJ expert per cluster entrusted with the task of following up this work. Furthermore, CEPEJ was invited to urge Member States to organise the translation of the relevant CEPEJ documents into non-official languages and to organise CEPEJ's Guidelines such that those aimed at individual courts can be easily identified.

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In other relevant developments, the CEPEJ working group on Execution met in Strasbourg on 15 and 16 October 2009 to prepare the draft guidelines and quality standards on enforcement in order to ensure an effective implementation of Recommendation (2003) 17. (cf. eucrim 1-2/2009, p. 34). The 14th meeting of the Bureau of the CEPEJ took place on 7 October 2009 in Strasbourg. Members examined the state of play of the work underway and prepared the next mid-term activity programme of the CEPEJ.

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CCPE: Fifth Meeting of the CCPE-GT and the Eleventh Meeting of the Bureau

The 5th meeting of the Consultative Council of European Prosecutors Working Groups (CCPE-GT) was held in Strasbourg from 29 to 30 September 2009. The members discussed Joint Opinion No. 4 of the CCPE and the CCJE (Consultative Council of European Judges) on the "Relations between judges and prosecutors" and the work programme of the CCPE for 2010. At the request of the Lisbon Network of judicial training

institutions of the Council of Europe, the CCPE-GT will discuss the concept paper on the institutionalisation of cybercrime training for judges and prosecutors prepared in co-operation with the Project on Cybercrime. The 11th meeting of the Bureau discussed the state of preparation of the 4th plenary meeting of the CCPE, which will take place in Ljubljana, Slovenia from 18 to 20 November 2009.

► eucrim ID=0903081

Legislation

Monitoring CoE's Trafficking in Human Beings Convention: General Information

In eucrim 1-2/2009, p. 36, GRETA – the new monitoring body for the Council of Europe's Convention on Action against Trafficking in Human Beings – was introduced. In the following, the monitoring mechanism of the Convention shall be briefly explained:

The Convention entered into force on 1 February 2008 and proper monitoring is a key factor for its effectiveness, credibility, and impact.

The monitoring mechanism of the Convention consists of two pillars. GRETA (the Group of Experts against Trafficking in Human Beings), on the one hand, is a body composed of independent and highly qualified experts. The Committee of the Parties, on the other hand, is composed of representatives of the governments. GRETA will regularly publish reports and conclusions (the first of which is expected to be adopted by the beginning of 2011) on each Party's implementation of the Convention. This will happen on the basis of country visits as well as dialogues with governmental authorities, members of parliament, civil organisations, and the victims themselves. (See also eucrim 1-2/2009, p. 36)

The Committee of the Parties' main functions are more political and aim to

make recommendations to an affected State, concerning the measures to be taken to follow up GRETA's conclusions as well as to act as an international observatory on the prevention and combating of trafficking in human beings.

► eucrim ID=0903082

GRETA/Committee of the Parties: Third Meeting

From 22 to 25 September 2009, GRETA (The Group of Experts on Action against Trafficking in Human Beings) held its third meeting in Strasbourg where discussion continued on the preparation of the questionnaire for the first round of evaluation regarding the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties.

The Committee of the Parties of the Convention held its third meeting on 21 September 2009 in Strasbourg. On this occasion, the Committee elected Ambassador Zurab Tchiaberashvili (Georgia) as Chair and Ambassador Thomas Hajnoczi (Austria) as Vice-Chair, both for a first term of office of one year. The Committee exchanged views with the President of GRETA and continued its discussion on the European Commission Proposal for a "Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims". It also considered possible topics for thematic debates relating to trafficking in human beings.

Noteworthy is also that, on 3 September 2009, Slovenia became the 26th state to ratify the Convention, which will enter into force for Slovenia on 1 January 2010.

► eucrim ID=0903083

European Union Ministerial Conference "Towards EU Global Action against Trafficking in Human Beings"

In the context of the relationship between the EU and the CoE in the fight against trafficking of human beings, the European Union Ministerial Conference "Towards EU Global Action against

Trafficking in Human beings” should be highlighted. The conference took place in Brussels from 19 to 20 October 2009. On this occasion, Thorbjørn Jagland, the new Secretary General of the Council of Europe (in office since 1 October 2009) called on the EC to become party to the Council of Europe Convention against Trafficking in Human Beings.

The cooperation with the European Union in the area of combating trafficking in human beings is an integral part of the shared priorities, as listed in the Memorandum of Understanding between the Council of Europe and the European Union and signed in May 2007. (For the Memorandum, see eucrim 1-2/2007, pp. 41-42 and eucrim 1-2/2008, pp. 46-47). The Memorandum stressed that trafficking in human beings is not always related to organised crime.

The Council of Europe supports the development of a binding EU strategy as it appears in the proposal of the European Commission (25 March 2009) for a Council Framework Decision on preventing and combating trafficking in human beings and protecting the victims. These provisions correspond to a large extent to the provisions contained in the Convention.

Furthermore, action against trafficking in human beings is placed under the general heading of “fight against international organised crime” in the Communication by the European Commission on “an area of freedom, security and justice serving the citizens” (the future “Stockholm Programme”).

While acknowledging these positive steps on behalf of the EU, the Convention adopts a broader perspective and considers trafficking to be a major human rights violation, which can be international as well as national, regardless of whether or not it is linked to organised crime. Therefore, the Council of Europe believes that the most effective, rational, and expedient way to proceed would be for the European Community to become a party to the Convention. By now, the Convention has been ratified by 26 Coun-

cil of Europe Member States, of which 16 are European Union Member States. On this occasion, the Secretary General also called for the ratification of the Convention by all European Union Member States which have not yet done so.

The Council of Europe also attaches great importance to the participation of the European Union in the work of the monitoring mechanism of the Council of Europe Convention.

This is why, in accordance with Rule 2.b. of the Rules of Procedure of the Committee of the Parties, the European Commission figures as a participant in the Committee of the Parties. The ratification of the Convention by the European Community would enable it to participate in the work of the Committee of the Parties as a member with the right to vote.

►eucrim ID=0903084

Ratifications and Signatures (Selection)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptance of the provisional application (a)
Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 46)	Spain	16 September 2009 (r)
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117)	Spain	16 September 2009 (r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Spain	24 September 2009 (s)
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194).	Liechtenstein Albania Spain	24 August 2009 (a) 16 September 2009 (a) 22 October 2009 (a)
Convention on Action against Trafficking in Human Beings (CETS No. 197)	Slovenia	3 September 2009 (r)
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Belgium	17 September 2009 (r)
Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Slovakia	9 September 2009 (s)
Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 204).	Georgia FYROM Poland Slovakia Sweden	1 September 2009 (r) 3 September 2009 (s) 1 October 2009 (s) 7 October 2009 (s) 19 October 2009 (s)

►eucrim ID=0903085

Eurojust and Its Role in Joint Investigation Teams

José Luís Lopes da Mota

Joint Investigation Teams (JITs) have come a long way since they were envisioned almost a decade ago and put within theoretical reach by the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union.¹ It is fair to say that they have evolved from an idea, viewed initially with a degree of skepticism by practitioners across the Member States, and are now used more frequently to enable faster and broader investigations. Naturally, there have been challenges along the way, and unfortunately often news of these challenges, rather than news of the many positive experiences, has spread. Fortunately, we have now reached a stage where those involved in JITs on a daily basis are able to speak about their positive experiences and see their role, as does Eurojust, in dispelling the acquired myths, and being on hand with practical advice, guidance, and now also financial support, to encourage and enable the setting up of JITs in a swift, efficient, and effective manner. Still, much work remains to be done.

This article is part of Eurojust's effort to increase awareness and at the same time provide an overview of what Eurojust is doing in the field, to describe the financial support available, and to explain the reasons behind Eurojust's growing role in JITs from a practical side and finally its role as a European centre of expertise.

Eurojust's evolution has been as rapid and significant as that of JITs. Eurojust now deals with more than 1000 cases a year, most of which are related to the facilitation of judicial cooperation, including the implementation of mutual legal assistance requests, and it holds more than 100 coordination meetings a year. Although 100 coordination meetings may not seem like many when compared to 1000 cases, one meeting is held every two days on average. It is during these meetings, most of which are hosted by and take place at Eurojust's premises in The Hague, that key persons with the authority to make decisions come together to discuss strategy, coordinate their investigative measures, share gathered information with each other, and, with greater regularity, agree to set up JITs.² There have been a number of questions asked during these coordination meetings regarding JITs; by police officers contemplating using JITs, by prosecutors or judges agreeing on the setting up of JITs, as well as by national authorities and academics. The most important questions are always: "When should we use a JIT?" and "What is the added value of a JIT in this case?"

It is easy to understand why Eurojust is uniquely placed to provide answers to these questions. The expertise gained through coordination meetings is now used with greater frequency by practitioners when contemplating setting up a JIT. Eurojust gives advice on the types of cases that can benefit from a JIT, it assists the national authorities in the steps to be taken when setting up a JIT, and it also provides advice on what can be done without a JIT. Moreover, Eurojust, in accordance with its powers under Articles 6 and 7 of the Council Decision of 28 February 2002 setting up Eurojust,³ can also recommend that the authorities of a Member State consider the setting up of a JIT in certain cases. Although a JIT creates immense possibilities otherwise unavailable in terms of flexibility, speed, and depth of cross-border investigations, it is certainly not a tool to be used for everything. Eurojust contributes professional and unbiased guidance to the practitioner. Therefore, Eurojust, due to its mandate and experience in promoting and supporting the coordination of investigations, is uniquely placed to dispense advice. In addition, if the legislation of the Member State allows the setting up of a JIT and participation by the Eurojust National Member, then the ability to assist the national authorities directly is most certainly even greater.

The new Council Decision of 16 December 2008 on the Strengthening of Eurojust and amending the Council Decision setting up Eurojust has confirmed the tasks allocated to Eurojust with regard to JITs and has dramatically enhanced its role.⁴ The new Eurojust Decision, which entered into force on 4 June 2009, foresees making Eurojust the central contact in Europe for JITs and establishing an information flow. For example, Member States are asked to notify Eurojust of the setting up of a JIT and the outcome of a JIT. For the first time, we should be able to have information on the number of JITs in existence at any given time as well as their effectiveness. This is extremely significant, as, at present, there are no authoritative or reliable statistics on the number of JITs.

Additionally, there are provisions in the new Eurojust Decision that will (a) allow Eurojust National Members to participate in JITs in their Member State; (b) allow the National Members, their deputies or assistants to be invited to participate in a JIT if Community funding is provided; and (c) last but not least in terms of significance, allow the Secretariat of the JIT Experts Network to be formed from and be part of Eurojust.

Consequently, once the new Decision is implemented in all Member States, Eurojust will be the focal point for JITs. The flow of information will allow Eurojust to know how many JITs are in existence at any one time across the EU, what they are investigating, and their outcomes – and, in particular, it is likely that this knowledge will not come from mere statistics, but actual practical experience. Eurojust's objective is to become a direct point of contact for practitioners all across Europe and to create a medium for discussion of the merits and practicalities of setting up a JIT.

It is clear that these new powers and expectations entail considerable responsibility. The goal of the cumulative efforts is to provide better support to national authorities. Eurojust's purpose is not to accumulate information but rather to disseminate it to the practitioners. Eurojust, when approached with a problem that has never been encountered before, will be able to assist by using its experience to identify possible solutions and to offer guidance. The more Eurojust is called upon, the more precise and specific its responses, and, thus, every request for assistance or query generated from a practitioner will allow others to learn from the same query, avoid similar problems, and also benefit from possible solutions.

Eurojust at present supports JITs in a number of ways. Advice is available (a) on whether a JIT will bring added value compared to other cooperation tools, (b) on dealing with the mechanics of setting up a JIT and (c) on supporting its subsequent operation. Eurojust has provided assistance in:

- Identifying whether a JIT brings added value to a specific investigation;
- Identifying core issues in JIT agreements and providing pre-draft agreements;
- Identifying issues and assisting in JIT extension agreements;
- Providing feedback from other JITs and dealing with issues not considered at the time of drafting the agreement;
- During operations, assisting and facilitating MLA requests to countries not taking part in the JIT agreement, including countries outside the EU; and
- Offering advice on and supporting partnership applications for funding to the European Commission.

In 2005, a Network of National Experts on JITs was established, consisting of at least one expert per Member State.⁵ The Network promotes the use of JITs by helping to facilitate the setting up of the teams, assisting in the sharing of experiences and best practice, and dealing with legal considerations. Eurojust, Europol, and the General Secretariat of the Council have been providing support to the Network. Eurojust will further assist the JIT Experts Network with a permanent, dedi-

cated secretariat set up within the administration of Eurojust, and it will host and organise this year's 5th annual JIT Experts Network Meeting.

Eurojust and Europol have also run joint projects on JITs. They jointly produced a "Guide on EU Member States' Legislation on JITs", which offers an overview of EU Member States' different legal possibilities for setting up JITs pursuant to Article 13 of the 2000 Mutual Assistance Convention. Both organisations are also working on a manual that lists practical issues to be dealt with when setting up JITs and that could be used as a guide for setting up a JIT.⁶ In 2007, Eurojust and Europol launched their web pages promoting JITs (<http://www.eurojust.europa.eu/jits> and www.europol.europa.eu/jits).

Funding for JITs was introduced by the Commission in 2007. However, by listening to practitioners, Eurojust has identified a number of factors that may make the securing of Commission funding - which has proven to be both substantial and extremely helpful in certain cases – more difficult. Examples range from a mismatch of operational needs and application requirements to a lack of awareness of Commission deadlines. Additionally, Eurojust has noticed that experience gained from JITs is not being shared and, therefore, the opportunity to benefit from lessons learned in previous JITs is missed.

To address these points, Eurojust has applied for and received a grant from the Commission under the 'Prevention of and Fight against Crime' programme, which allows for financial and logistical support for JITs until December 2010.⁷ An additional grant, which would run until 2013, has been applied for and is currently under evaluation by the Commission.

Eurojust recognises the need and endorses the idea of financially supporting the setting up and functioning of JITs, in particular travel, accommodation, interpretation and translation costs, as well as IT support to solve potential infrastructure problems (e.g., laptops and mobile phones). However, it should be clear that, according to Commission rules, Eurojust cannot finance the entire cost of a JIT. Any financing is necessarily subject to the limited availability of funds. Eurojust reserves the right to allocate funds and publish new guidelines. The application form, notices, and explanations of the procedures can be found on the Eurojust JIT Funding Project website at www.eurojust.europa.eu/jit_funding.htm as well as the contact details of the JIT Project Manager at Eurojust in case of any questions or need for assistance.

In addition to assisting with funding, Eurojust gathers information for a proper analysis of JIT activity, and it analyses the quantity and duration of JITs as well as the types of crime because of which JITs are formed. The aim is to assist practi-

tioners, the Commission, and the Council in identifying where support is needed and in addressing any shortcomings.

Due to their nature, JITs will keep evolving and adapt to practice, issues encountered, and experiences gained. Increased awareness of JITs in general, new approaches, new provisions, and any other updates are crucial, and new information needs to be made available to national authorities in the Member States. Eurojust has been allocated different tasks and will continue to assist the national authorities in the Member States.

I believe Eurojust can offer a real and potential added value when national authorities are considering or dealing with JITs. Eurojust's main goal is to play an effective and efficient supporting role in cross-border investigations and prosecutions.

Therefore, Eurojust is committed to becoming the key player and centre of expertise with regard to JITs. Moreover, establishing an overall European approach to further strengthen the fight against serious and organised crime is at the heart of Eurojust's mission.



José Luís Lopes da Mota

President of Eurojust

National Member for Portugal

1 OJ C 197, 12.7.2000, p. 1.

2 For more information about cases dealt with at Eurojust, please see the press releases on our website, www.eurojust.europa.eu, and our Annual Reports.

3 OJ L 63, 6.3.2002, p. 1.

4 OJ L 138, 4.6.2009, p. 14.

5 11037/05, 8.7.2005.

6 13598/09, 23.9.2009.

7 O.J. L 58, 24.2.2007, p. 7.

The Collection of Evidence by OLAF and Its Transmission to the National Judicial Authorities

Dr. Joaquín González-Herrero González / Maria Madalina Butincu

I. Introduction

As established by Decision 1999/352 (EC, ECSC, Euratom) of the European Commission in order to strengthen the means of fraud prevention, the European Anti-Fraud Office (OLAF) was given the responsibility of conducting administrative anti-fraud investigations. The purpose of investigations is to collect the evidence needed to identify the facts, so as to verify whether an irregularity, fraud, corruption, or serious misconduct detrimental to the EU's financial interests has occurred. The aim of this essay is to offer an overview of the OLAF mechanism of collecting evidence and forwarding it to the prosecuting and investigative authorities of Member States in the current legal framework.

II. The Collection of Evidence by OLAF and its Probative Value

Members of OLAF undertake a variety of specific activities in order to collect evidence: inspections of premises (internal investigations), forensic examinations of computers, interviews, on-the-spot checks under Regulation 2185/96,¹ controls under sectorial legislation,² fact-finding missions, and written requests for information.

It is necessary for OLAF to always have the proper legal basis in order to open a case. This legal basis empowers the Office to conduct the administrative investigations. What should be kept in mind is that OLAF cannot act as a criminal investiga-

tive service because it is neither a police service nor a public prosecution office. Therefore, the evidence may not be admissible in the national criminal proceeding if it was gathered illegally by the OLAF investigator. It may also deprive the national judicial authorities of the opportunity to gather the evidence in a proper way and, therefore, impair the possibility of establishing the facts. The opposing situation between the original nature of OLAF's investigations and its judicial destination may cause some difficulties. These problems raise three basic questions: (1) what should be reported to judicial authorities; (2) when should the information be reported to them; and (3) how should the information gathered by OLAF investigators be transmitted to the competent national authorities? These matters involve issues of priorities, prescription, and also liaising with national and community services organised under different legal provisions; the secrecy of the criminal investigations; the need to use coercive means reserved for judicial authorities, such as the interception of communications; relations having to do with disciplinary proceedings; the connection with proceedings before the Court of First Instance of the European Union, etc.

The inspection report should be taken into account in the final investigation report drawn up in accordance with Article 9(1), (2) and (3) of Regulation No. 1073/1999.³ Article 9(2) of Regulation 1073/99 deals with the preparation of on-the-spot checks reports. It lays down a general obligation for Commission inspectors to act in accordance with national procedural requirements: "Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned."

The legal nature of the conclusions and recommendations of OLAF investigations should be clarified. In the *Tillack* case, the European Court of First Instance ruled that OLAF's final reports are not definitive acts with legal effects, and, therefore, national authorities are free to decide what action is to be taken upon receipt of OLAF's investigative findings. The duty of the Member States to cooperate in good faith implies that OLAF forwards them the information pursuant to Article 10(2) of Regulation No. 1073/1999. National judicial authorities must examine the information carefully and, on the basis of this examination, take appropriate action, if necessary by initiating legal proceedings. Such a duty does not, however, imply that the forwarded information has a binding effect.⁴

This means that OLAF and the national authorities are relatively independent of one another. The final report, drawn up by OLAF following an investigation and sent to the competent judiciary in the Member States, contains only recommendations. Whether a criminal investigation should be opened re-

mains a decision to be taken by the national authorities. They are the only authorities with the power to adopt decisions affecting the legal position of those persons in relation to the recommendations of the report. Under such circumstances, it remains unclear whether an OLAF final case report, for example, can constitute a criminal charge. This is a matter that should be analysed under the relevant national legal provisions.

OLAF (together with national or international authorities) conducts the external investigations and forwards the information collected to a national authority for prosecution or recovery of sums misappropriated. OLAF also carries out investigations inside the EC institutions, as a result of which information may be transmitted to a disciplinary authority or to national judicial authorities for prosecution. Unlike the Directorate General for Competition, OLAF does not impose sanctions, but its investigations may lead to criminal proceedings in national courts.

Due to the above-mentioned fact, the analysis of OLAF's work depends on a variety of legal and judicial perspectives that originate in the different cultures of the EU countries. This situation – between OLAF and the numerous national judicial authorities – may often lead to different solutions for similar cases. Whether or not this is compatible with such legal principles as the equality of treatment inside the European Union remains uncertain.

In order to remedy this situation, the creation of a European judicial authority competent to deal with OLAF cases and to control OLAF's investigative work has been proposed. In this respect, and on the basis of some precedents, the European Commission drafted the Green Paper on criminal law protection of the financial interests of the Community, which was published in December 2001.⁵ A broad discussion on the establishment of a European Prosecutor was then launched. One purpose of establishing the European Public Prosecutor to protect the Community's financial interests would be to remedy the weakness in the current mechanism that has been stressed several times by the European Parliament and the OLAF Supervisory Committee: the absence of a legal guarantee as regards OLAF's investigation measures. Such a guarantee can only exist if the investigation is carried out under the control of a judicial authority.

As the debates on the feasibility of this ambitious proposal are still ongoing and the envisaged OLAF reform process is still pending, the current rules concerning the collection of evidence and its transmission to the national judicial authority must be strictly observed. It is OLAF's duty to try to remedy, within the existing limits, the weaknesses detected. For this purpose, day-to-day work in liaison with national judicial authorities is essential. In this respect, the organisation of an

informal Network of European Fraud Prosecutors has been a major achievement. As long as the ambitious scenario of the creation of a European Public Prosecutor is still not in place, the role of the Judicial and Legal Advice Unit within OLAF remains extremely useful as regards the judicial outcome of OLAF investigations.

III. The Transmission of Information to National Judicial Authorities

An essential aspect of OLAF's work is that, despite its administrative nature, investigations may concern matters liable to result in criminal proceedings. This original aspect was taken into account when OLAF was created. In order to reflect this intention, Article 2(6) of the Commission Decision establishing OLAF institutes the link between OLAF's investigative function and criminal proceedings in the following terms: "The Office shall be in contact with the police and judiciary authorities."⁶

OLAF transmits information to the competent judicial authority of the Member State when it becomes apparent that a criminal offence may have been committed. Article 10(2) of Regulation 1073/1999 sets out the rules on compulsory forwarding of information obtained during an *internal* investigation to the Member State concerned. It requires that the judicial authorities of the Member States concerned be informed of matters liable to result in criminal proceedings and that, subject to the requirements of the investigation, the Member State concerned shall be simultaneously informed.⁷

Article 10(1) of Regulation 1073/1999 establishes the rules on the discretionary forwarding of information obtained in the course of *external* investigations. It provides that such information may be sent to the Member State authorities concerned.⁸ It should be noted that, whereas OLAF has a duty to forward information to national judicial authorities in case of internal investigations, in case of external investigations, the Office may do so when the conditions justify such a transmission. The Judicial and Legal Advice Unit takes the responsibility within OLAF of advising on whether or not Article 10 of the Regulation 1073/1999 should be applied. Information gathered by OLAF during an investigation may be transmitted to national judicial authorities either during the course of an investigation – when it becomes apparent that a criminal offence has been committed – or when the investigation is completed – if the investigation establishes that a criminal offence may have been committed.

Another peculiarity of OLAF's investigative work is that Article 11(7) of Regulation 1073/1999 requires that the

Director of OLAF inform the OLAF Supervisory Committee of cases requiring information to be forwarded to the judicial authorities of a Member State. Recently, the Court of First Instance, in its ruling of 8 July 2008 – *Franchet and Byk v. Commission* – examined the legality of the way OLAF informed the Supervisory Committee regarding information to be forwarded to judicial authorities of the Member States. The Court held that OLAF violated the provision of Article 11, para. 7 of Regulation 1073/1999 by informing the Supervisory Committee only after it had forwarded the information to the judicial authorities, since the provision requires OLAF to inform the Committee *before* the transmission of information to the judicial authorities of a Member State.⁹

The Court presented the following reasons: first, it cited Article 2 of the former Rules of Procedure of the OLAF Supervisory Committee:¹⁰ "the committee shall ensure that OLAF activities are conducted in full compliance with the human rights and fundamental freedoms and in accordance with the Treaties and secondary legislation, including the Protocol on the Privileges and Immunities of the European Communities and the Staff Regulation of officials." Furthermore, the Court considered that the Supervisory Committee should protect the rights of those who are subject to OLAF investigations and that the rule obliging OLAF to consult the Committee before it transfers information to judicial authorities has the objective of conferring rights to the persons concerned. As a consequence, the Court concluded that OLAF had violated a rule of law which confers rights to individuals.

It should be noted that the former Rules of Procedure of the OLAF Supervisory Committee have been repealed by the new rules of procedure adopted in 2006¹¹ and that no provision similar to Article 2 can be found in the new text. However, in the justification of the Court, Article 2 of the Rules of Procedure of the former OLAF Supervisory Committee is not the legal basis but rather a supportive or illustrative argument. The interpretation by the Court regarding the role of the Supervisory Committee in the protection of individual freedoms derives from the Committee's general monitoring task regarding the investigation function and is to be considered as a corollary to the independent status of OLAF. In this vein, OLAF and its Supervisory Committee are now facing the challenge of introducing modifications to the current procedure applied by OLAF to inform the Committee of cases transferred to the judicial authorities of Member States.

When the transmission concerns internal investigations, the person concerned must normally be given the opportunity to present his views on all the facts that concern him, unless it is necessary to maintain absolute secrecy for the purpose of the investigation. It is necessary first to obtain the agreement of

the Secretary-General of the Community organ concerned. In cases where the person concerned has been interviewed, the Secretary-General of the Community body or agency involved (or, when a Community member is personally involved, the president of the institution) will usually be informed by a note, to be sent at the time of the transmission of information to the judicial authority.

IV. The Transmission of Information Subject to Professional Secrecy in Response to Requests from National Judicial Authorities

In the course of treating a matter concerning Community law, a national court may request that OLAF provide it with operational information or documents, subjected to professional secrecy. In the case *Zwartveld and others*, the European Court of Justice observed that relations between Member States and the Community are governed – in accordance with Article 10 of the EC Treaty – by the principle of *sincere cooperation*, which imposes mutual duties in this regard.¹² The Court specified that “this duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.” It maintained that “it is incumbent upon every Community institution to give its active assistance to national legal proceedings on the infringement of Community rules by producing documents to the national court and authorizing its officials to give evidence in the national proceedings.” The only exception to the obligation to produce documents requested by a national court under such circumstances is the

existence of “imperative reasons relating to the need to avoid any interference with the functioning and independence of the Community justifying its refusal to do so.” In a subsequent decision¹³ on the same matter, the Court further clarified that a refusal to produce documents may be justified on grounds connected with the protection of human rights of third parties. Accordingly, when a national court requests documents or information subject to professional secrecy in the course of national proceedings to enforce Community law, they must be provided, unless there are imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities or to the protection of rights of the third parties.

V. Conclusions

It should be noted that there is an opposing situation between the administrative nature of OLAF’s investigative work and national criminal proceedings. The fact that there is a European investigative body, OLAF, on the one hand and numerous national judicial authorities that are competent to deal with OLAF work, on the other hand, marks another difficulty. It has been repeatedly argued that the execution of these functions in the fight against fraud against the Community budget is extensively fragmented. OLAF should limit the impact of these difficulties. However, the Office cannot remedy all of them. A possible answer to the aforementioned difficulties is the creation of a European Public Prosecutor. As long as this solution is not in place, the role of the Judicial and Legal Advice Unit within OLAF remains extremely useful as regards the judicial outcome of the Office’s investigations.

1 Council Regulation (EURATOM, EC) No. 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities, OJ 1996, L 292, p.2.

2 Cf. Regulation (EC) 515/97, OJ 1997, L 82, p. 1: Art. 18(5) (inspections in the Member State’s offices for the purpose of obtaining information and copies of documents in order to ensure the correct application of the law on customs and agricultural matters); Art. 20 (administrative and investigative cooperation missions in third countries in order to ensure the correct application of the law on customs and agricultural matters). Regulation (EC) 1150/2000, OJ 2000, L 130, p. 1: Article 18(3) (on-the-spot inspections and access to the supporting documents concerning the establishment and making available of own resources). Regulation (EC) 1290/2005, OJ 2005, L 209, p. 1: Articles 36 and 37 (on-the-spot inspections related to the management of expenditure from the EAGF and the EAFRD). Regulation (EC) 1083/2006, OJ 2006, L 210, p. 25: Articles 72 and 73 (on-the-spot checks, including sample checks, on the operations financed by the Structural Funds and on management and control systems, in order to ensure that Member States have smoothly functioning management and control systems so that Community funds are efficiently and correctly used).

3 “1. On completion of an investigation carried out by the Office, the latter shall draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the

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recommendations of the Director of the Office on the action that should be taken.

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

3. Reports drawn up following an external investigation and any useful related documents shall be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations.

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned. The institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him in the findings of his report."

4 Judgment of the Court of First Instance of 4 October 2006 in Case T-193/04, *Tillack v Commission*, [2006] ECR II-3995, paragraph 72.

5 Commission Green Paper on criminal-law protection of the financial interests

of the Community and the establishment of the European Prosecutor, COM (2001), 715, 11 December 2001.

6 OJ 1999, L 136, p. 20.

7 "Without prejudice to Articles 8, 9 and 11 of this Regulation, the Director of the Office shall forward to the judicial authorities of the Member State concerned the information obtained by the Office during internal investigations into matters liable to result in criminal proceedings. Subject to the requirements of the investigation, he shall simultaneously inform the Member State concerned."

8 "Without prejudice to Articles 8, 9 and 11 of this Regulation and to the provisions of regulation (Euratom, EC) No. 2185/96, the Office may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigation."

9 Case T-48/05, paragraph 164. For the judgment, see also *White*, eucrim 3-4/2008, p. 146, and *Wahl/Staats*, eucrim 1-2/2008, p. 11.

10 Former Rules of Procedure of the OLAF Supervisory Committee, OJ 2000 L 41, p. 12.

11 Current Rules of Procedure of the OLAF Supervisory Committee, OJ 2006, C 311, p. 63.

12 Case C-2/88, European Court reports 1990, page I-3365.

13 European Court reports, 1990, page I-04405

The Difficulties of Joint Investigation Teams and the Possible Role of OLAF

Stefan de Moor*

I. Difficulties in Setting Up Joint Investigation Teams

The concept of joint investigation teams, as introduced by Article 13 of the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000¹ ("the Convention"), was not entirely new.² In essence, it allows information gathered by investigators from different EU Member States to be exchanged without making use of a mutual legal assistance request.³ Nevertheless, nine years later, and after the entering into force of this Convention in most Member States, most practitioners lack practical experience and even knowledge of this tool. The lack of joint investigation teams ("JITs") being set up in practice could be explained by the lack of awareness of the instrument's advantages and by the lack of clarity in the rules governing the JITs.⁴ This can make law enforcement officers and judicial authorities reach for traditional cooperation tools such as mutual legal assistance requests ("MLA requests") and mirror investigations rather than setting up a JIT.

Indeed, the Convention leaves much room for the national legislators to implement the instrument of a JIT in their national criminal justice systems. However, this entails differences in national provisions governing international cooperation. In some cases, even the provisions of the Convention have not at all been implemented on a national level, for example the provisions on the criminal liability of the member of a team on the territory of another Member State have not been implemented by France, Latvia, Hungary, the Netherlands, Portugal, etc. Uncertainty about the applicable rules leads to hesitation and, since complex investigations are usually a battle against time, this leads to the use of already established procedures rather than setting up a new investigation structure.

One of the aspects that has been implemented differently when setting up a JIT on a national level is the authority that is competent for taking the initiative. The position of JITs in between law enforcement and judicial cooperation can be interpreted

differently in different criminal justice systems with regard to which authority should be entrusted with the competence of setting up a JIT. Article 13 of the Convention refers to “the competent authorities,” thus leaving it to the national legislator to specify which national authorities are competent. Criminal justice systems endorsing divergent legal traditions will want to grant this competence to divergent authorities; e.g., in the Netherlands, the public prosecutor takes the initiative while, in Sweden, several authorities can do this, including the investigating magistrate, the prosecutor, or the police board. In other countries, such as France, the approval of the Minister of Justice is needed.⁵

In practice, JITs have suffered from slow decision-making when a steering group with a top-down approach was in charge. A better functioning has been experienced in a bottom-up approach where a team of judicial and law enforcement officers saw the evident need for a joint team for the benefit of a joint investigation. This made for a clear motivation to work towards a common goal and a smoother flow of information.⁶

Other aspects remain unclear due to the fact that the Convention did not elaborate on them and national implementation legislation is either lacking provisions or includes provisions that are different from those of other Member States. For example, the question of whether or not the setting up of a JIT needs to be preceded by one or more – mutual – MLA requests between the concerned Member States is not answered by the Convention. It nevertheless states that a JIT should be set up by mutual agreement in accordance with the Convention. Therefore, on a national level, authorities can be expected to rely on a MLA request – based on the same Convention – in order to conclude the required mutual agreement.

The leadership of the team is a matter that has not been dealt with in several Member States’ implementation legislation (Denmark, Germany, Lithuania, Malta, the Netherlands, Portugal, Sweden, and the United Kingdom). Other states have specific provisions only regarding the powers bestowed upon the team leader whereas Spain and Austria have ensured a full implementation.⁷ Thus, the lack of (uniform) legislation can cause hesitation on the part of national authorities with regard to setting up a JIT as supervision of the team and the investigation would have to be transferred to another state when crossing the border.

In order to avoid the necessity of letters rogatory, the Convention enables team members to request investigative measures directly in their home state. This was meant to be one of the main advantages of setting up a JIT over relying on MLA requests and mirror investigations. However, the majority of Member States has not implemented this provision on a na-

tional level or has restricted the investigative measures that can be requested.⁸ If national legislation was clear on this issue, the authorities willing to set up a JIT would have a clear picture of the possibilities and, more importantly, of the advantages of this tool.

Furthermore, as one can expect, the Member States’ JIT experts⁹ are confronted with a number of questions on how to finance JITs. The possibilities of Community financing via EUROJUST have been explored and resulted in a first “JIT Funding Project” under the Commission’s programme “Prevention of and Fight against Crime”¹⁰ in July 2009.¹¹

Ultimately, the role of the agencies (Europol, Eurojust, and OLAF), as mentioned in the explanatory report to the Convention,¹² in the setting up and the functioning of JITs needs clarification. The Convention provides for the participation of persons other than representatives of the competent authorities of the Member States involved. The required legal basis for such participation can be the model agreement provided by the Council.¹³

Still, the national laws of the Member States should also provide for this participation. Evidently, the rights granted to seconded members (members of the JIT who are operating on the territory of a state that is not their national state) do not automatically apply to the representatives of Europol, Eurojust, and OLAF; however, this can be stipulated in the agreement between the JIT and these additional team participants.¹⁴

II. The Role of OLAF in Joint Investigation Teams

Only competent national authorities can be parties to a JIT agreement.¹⁵ Moreover, criminal investigations are subject to this agreement.¹⁶ Therefore, only officials of judicial and police authorities can be members of a JIT. As a Community administrative body, OLAF cannot be party and OLAF officials cannot be formal members of a JIT in the same manner as officials from competent national authorities. However, Article 13.12 of the Convention provides for the possibility of letting other persons take part in the activities of the team and mentions as an example officials of bodies set up pursuant to the treaty, “to the extent that the laws of the Member States concerned or the provisions of any legal instrument applicable between them permit.”

As already mentioned, the explanatory report¹⁷ cites OLAF in this respect, besides Europol and Eurojust.¹⁸ For all three agencies, their role is described as “supportive and advisory.”¹⁹ With regard to Europol, attention should be paid to the new Europol decision that will be applicable at the earliest from January 1st

2010 on and will replace the Europol Convention.²⁰ Article 6 of the Europol decision governs the participation of Europol officials in JITs and includes the specification that their officials may assist in all activities and exchanges of information under the leadership of the team leader, without, however, “taking part in the taking of any coercive measures.”²¹ As regards Eurojust, the amended Eurojust decision – in effect since June 4th 2009 – covers the topic of participation in JITs in the new Article 9f.²²

1. OLAF's participation in JITs

OLAF's mission consists in fighting fraud, corruption, and any other illegal activity affecting the European Communities' financial interests.²³ As both the criminalisation by Member States' penal law and their obligations to assume jurisdiction being imposed by the PIF Convention²⁴ and its 1st Protocol²⁵ concern criminal activities, OLAF's mission also extends to the judicial field. OLAF's activity nowadays covers the following:

- international corruption, both by community officials and national officials, relating to EU funds;
- customs fraud by international trafficking of goods under false import declarations or in violation of anti-dumping measures, trafficking of counterfeit goods; illegal cigarette trafficking;
- VAT fraud;
- organised and large-scale subsidy fraud, both concerning indirect (structural funds and agriculture) and direct expenditure, e.g., development aid;
- procurement fraud, involving a community dimension;
- other offences related to the foregoing, such as money laundering and participation in criminal organisations.

If the JIT concept causes practitioners to hesitate,²⁶ this could also be the case for cooperation with OLAF. The reason is to be found in OLAF's hybrid nature. This hybrid nature results from OLAF's dual functions: conducting (administrative) investigations, on the one hand, and providing assistance to the European Commission, on the other. In its investigative function, OLAF's functional independence is guaranteed by Community Law.²⁷ In its assistance and coordination function, OLAF is a service from the Commission, which it represents vis-à-vis police and judicial authorities. OLAF thus contributes to the gathering of information for administrative purposes and the exchange of information with police and judicial authorities for the purpose of a criminal investigation.²⁸ In spite of OLAF's functional independence, for reasons of purpose limitation – one of the basic principles of data protection – practitioners could be hesitant to cooperate with OLAF officials.

The criminal investigation, for which the competent national authorities create a JIT, might have been initiated as a result of a transmission of information undertaken by OLAF on the basis of Article 10 of Regulation EC No. 1073/1999 (the “OLAF-Regulation”). This is the case when OLAF obtains information liable to judicial procedures during an administrative (internal or external) investigation. In addition, an OLAF investigation might have been opened as a result of a referral under Article 7.3 of the OLAF Regulation based on information or documents, which were obtained through judicial investigations by a Member State. In both scenarios, OLAF is still acting under its operational independence. Community law provides for the necessary legal framework here, since it guarantees the admissibility of the evidence provided; Article 9.2 of the OLAF Regulation states that the reports drawn up by OLAF may constitute admissible evidence in judicial proceedings of the Member State where it shall be treated in the same way and under the same conditions as administrative reports by national administrative inspectors.

Specific attention should be drawn to the situation that arises when administrative and judicial investigations of the same facts are being carried out simultaneously. Indeed, as long as they aim to achieve the purpose they were started for – the existence of serious professional misconduct or financial irregularities in the case of OLAF's administrative investigations as well as the detection, investigation, or prosecution of criminal offences in the case of criminal investigations by police and judicial authorities – nothing prevents both procedures from being carried out simultaneously.²⁹ This implies that gathered information should only be used for the purpose for which it was gathered and not for objectives that are incompatible with the original purpose. The involvement of OLAF investigators in order to support these criminal investigations is an evident matter of efficiency on account of their knowledge of the file transmitted to the judiciary. OLAF investigators, who have often conducted a lengthy, in-depth administrative enquiry, might help to improve the quality of the file that is produced in criminal investigations as well as the efficiency of the investigation itself.

Based on such an approach, the support of the OLAF investigators can take on a more extended dimension and result in continued cooperation, rather than an ad hoc assistance. This is all the more true since judicial and police authorities can, pursuant to Article 7.2 of the OLAF Regulation and under the limits of their national legislation, upon request or on their own initiative, provide information to OLAF relating to its administrative investigations.

OLAF could support a JIT independently from any own investigation, when acting as the Commission's direct contact

and providing assistance to judicial and police authorities of the Member States.³⁰ Due to its aforementioned hybrid nature, OLAF can be of assistance to a JIT in several possible ways:

- Firstly, given its competence for investigating EU fraud and irregularities, the police and judicial authorities involved in joint investigations that cover such acts could be supported with legal advice from OLAF. Should information and documents be needed from the European Commission or its services, OLAF is the best placed service to provide them.

- Secondly, the institutional framework of the EU changes continuously as new agencies are created. In this regard, OLAF, due to its internal missions, can provide quick and precise information regarding Community institutions, bodies, and agencies as well as their staff.

- Thirdly, these days, efficient investigative work is based on data analysis and data processing. For national investigative authorities, access to OLAF databases and, via OLAF, to the databases of the Commission, constitutes a qualitative step forward in the fight against fraud and corruption. In the area of customs fraud, cooperation and assistance are based on mutual administrative assistance between Member States (customs authorities) and the Commission.³¹ This cooperation can result in large-scale control operations monitored by an operational centre in OLAF.

- Fourthly, as already mentioned, investigating Community institutions is not primarily a matter of international judicial cooperation. It requires the waiver of immunities, inviolabilities, and the obligation of confidentiality regarding Community staff, premises, and archives. For this, OLAF functions as the Commission's contact point for police and judicial authorities.

- Finally, based on sectoral and horizontal Community law, OLAF assists in the coordination and exchange of information between Member States in matters of customs and agriculture.

Since the possibilities for OLAF to deliver assistance to JITs are considerable, the idea of evolving towards a dynamic and more continuous cooperation is not too farfetched.

An "old" third pillar instrument – of importance since it recently entered into force (19/05/2009) – tends to sustain this approach: the 2nd Protocol to the PIF Convention^{32,33} deals with cooperation with the Commission of the European Communities in this field (the protocol dates from 1997, before the creation of OLAF).

The PIF Convention clearly puts the principle of cooperation forward as it lays down that the Member States and the Commission shall cooperate with each other in the fight against fraud, active and passive corruption, and money laundering. Furthermore, the legal basis for the Commission's (OLAF) assistance is confirmed. To this end, the Commission shall lend

such technical and operational assistance as the competent national authorities may need to facilitate the coordination of their investigations. Finally, the issue of information exchange is included in the 2nd protocol to the PIF Convention. The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption, and money laundering.

Combining the 2000 Convention on Mutual Assistance in Criminal Matters³⁴ and the 2nd Protocol to the PIF Convention applied to OLAF investigations would enable OLAF to participate in JITs in a more dynamic way.

The explanatory report to the 2nd Protocol³⁵ states that the aim of this assistance is to add value to the investigation "by ensuring that the necessary skills and know how are available". It further clarifies that this assistance can be technical or operational. Technical assistance relates to access to the Commission databases and knowledge of the legal systems of the Member States. Operational assistance includes all organisational aspects related to contacts with authorities involved and access to the results of OLAF's investigations.

In its turn, and based on Community law (Article 7 of the OLAF Regulation), information from the judicial investigations that is relevant for the administrative investigations can be communicated to OLAF taking into account restrictions of national law.

2. Limitations to OLAF's participation

Due to its specific nature, OLAF cannot participate in a JIT unconditionally and without restriction. The following limitations must be taken into account:

- First of all, there are the requirements of investigation secrecy. To this end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

- Furthermore, OLAF protects personal data in line with Regulation EC 45/2001.³⁶ Personal data is communicated only as far as necessary, and OLAF is responsible for informing data subjects as quickly as possible.

- At the same time, any abuse of procedures should be avoided. Judicial and administrative investigations must adhere to their own objectives: their means of investigation can only be used for these distinct objectives. As far as OLAF's investigative activity is concerned, this affects investigations of corruption or illegal activities by community agents or investigations of irregularities committed by economic operators in external

investigations. OLAF investigators will not investigate directly as members of the joint team.

■ Whereas information obtained during external investigations can be forwarded to the competent (judicial or police) authorities at any time, OLAF must respect Community law when transmitting information from its internal investigations. When providing, upon request of the team, information or documents obtained by using its investigative internal powers, OLAF should obtain a waiver of inviolability of the archives of the Commission. Before drawing conclusions referring by name to a Community agent (or Member), OLAF should enable the interested party to express his views on all the facts that concern him, excepting agreement of the institution obtained to defer compliance with this obligation.

■ Community law, as well as staff regulations, privileges, and immunities, also prevent OLAF officials from working under the “direction” of the JIT leader. Instead, OLAF investigators will, with respect to the duty of cooperation derived from Community law, cooperate with the JIT, without carrying out any investigative measure themselves.

The restrictions described above, all of them a consequence of OLAF’s status as Community investigation service, could give rise to uncertainty. Cooperation may indeed seem complex and complicated. The JIT agreement and its appendix provide added value here.³⁷ These instruments will enable parties to and participants in the JIT to clearly define, along the lines as described above, the nature and the boundaries of OLAF’s participation.

III. Conclusion

Some Member States have mentioned OLAF’s possible participation in the activities of a JIT in their implementing legislation on JITs. Others have not. For them, the 2nd Protocol to the PIF Convention constitutes the legal instrument permitting OLAF’s participation.

When a JIT is created in the field of EU fraud and corruption, the agreement between the Member States’ judicial authorities should include a provision on the participation of OLAF. This participation should be defined in detail in an appendix to the JIT agreement, and this appendix should be signed by the OLAF Director. It should describe the tasks of OLAF in the JIT in as much detail as possible. In addition, any possible OLAF administrative investigations related to the matters dealt with by the JIT are to be identified. The procedure of exchanging information between OLAF and the JIT should be described in detail and with due attention to the purpose limitation principle. This solution is not only more efficient and effective – it offers more legal security to all parties involved compared to the situation in which OLAF’s role is limited to assisting each of the Member States’ judicial authorities separately.

In cases of complex and transnational crime, the creation of a JIT can be a valuable alternative to traditional mutual legal assistance. When such cases relate to Community fraud and corruption, the operational and technical assistance of OLAF in such JITs should add value to the investigative activities.



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* The opinions reflected in this article are exclusively the author’s personal opinions.

1 EU Convention of 26 July 1995 on the protection of the financial interests of the European Communities (also known as the ‘PIF’ Convention) (OJ C 316, 27.11.95, p. 48).

2 Art. 24 of the Convention on Mutual Assistance and cooperation between customs administrations (the Naples II Convention), signed on 18.12.1997, OJ C 24, 23.1.1998, introduced joint special investigations teams as a channel to be used for particularly extensive, complex investigations.

3 See to this respect: A. Balcaen, in: Joint Investigation Teams in the European Union, From theory to practice, The Hague 2006, p. 85.

4 Europol and Eurojust’s Joint Investigation Teams Manual, 13598/09, 23.9.2009, Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/16 December 2008, The Hague), 17512/08, 19.12.2008 and the conclusions of the Eurojust Seminar on joint investigation teams, <http://www.ue2008.fr/PFUE/lang/>

[en/accueil/PFUE-07_2008/PFUE-17.07.2008/une_nouvelle_impulsion_en_faveur_des_equipes_communes_d_enquete_.html](http://www.ue2008.fr/PFUE-07_2008/PFUE-17.07.2008/une_nouvelle_impulsion_en_faveur_des_equipes_communes_d_enquete_.html).

5 Report from the Commission on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.

6 Read in this respect: R. Riegel, Gemeinsame Ermittlungsgruppen – der neue Königsweg der internationalen Rechtshilfe?, Die Kriminalpolizei, Nr. 3/2008, 80, and C. Rijken, Joint Investigation Teams: principles, practice, and problems, Utrecht Law Review, Volume 2, Issue 2, 2006.

7 Report from the Commission on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.

8 Report from the Commission on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.

9 Member States appointed specific experts for JITs in accordance with the proposal adopted by the Council Article 36 Committee on 8 July 2005 (11037/05 CRIMORG 67 ENFOPOL 88).

10 O.J. L 58, 24.2.2007, p. 7.

11 See Eurojust Press Release, 15 July 2009, www.eurojust.europa.eu. See also www.eurojust.europa.eu/jit_funding.htm.

12 O.J. C 379, 29.12.2000, p. 19.

13 Recommendation of the Council of 8 May 2003 on a model agreement on the establishment of a JIT, O.J. C 121, 23.5.2003, p. 1.

14 See C. Rijken and G. Vermeulen, in: Joint Investigation Teams in the European Union, From theory to practice, The Hague 2006, pp. 19-20.

15 Art 13 1. O.J. C 197, 12.7.2000, p. 9.

- 16 Art 13 1. O.J. C 197, 12.7.2000, p. 9.
- 17 Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 7.
- 18 Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 19.
- 19 Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 19.
- 20 Council Decision of 6 April 2009 establishing the European Police Office (Europol), O.J. L 121, 15.5.2009, p. 37.
- 21 Council Decision of 6 April 2009 establishing the European Police Office (Europol), O.J. L 121, 15.5.2009, p. 40.
- 22 Council Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. L 138, 4.6.2009, p. 14.
- 23 Art. 1 Regulation (EC) N° 1073/1999.
- 24 Convention on the protection of the European Communities' financial interests, O.J. C 316, 27.11.1995, p. 49.
- 25 Protocol to the Convention on the protection of the European Communities' financial interests, O.J. C 313, 23.10.1996, p. 2.
- 26 See for example: Europol and Eurojust's Joint Investigation Teams Manual, 13598/09, 23.9.2009; Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/16 December 2008, The Hague), 17512/08, 19.12.2008; and the conclusions of the Eurojust Seminar on joint investigation teams, http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-07_2008/PFUE-17.07.2008/une_nouvelle_impulsion_en_faveur_des_equipes_communes_d_enquete_.html.
- 27 Article 12.3 Regulation (EC) 1073/1999, O.J. L 136, 31.05.1999, p. 6.
- 28 Article 10.2 Regulation (EC) 1073/1999, O.J. L 136, 31.05.1999, p. 5.
- 29 The proper objective of OLAF's administrative investigation consists in demonstrating (internal) serious misconduct of (external) financial irregularities; the proper objective of judicial investigations consists in demonstrating the existence of criminal offences.
- 30 Article 1.2 Regulation EC No. 1073/1999, O.J. L 136, 31.05.1999, p. 5; Article 2.6. Commission Decision 1999/352/EC, O.J. L 136, 31.05.1999, p. 20.
- 31 See Art. 18.4 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters O.J. L 082, 22.03.1997, p. 1 (to this respect, OLAF's role in a JIT could be complementary to the coordination task fulfilled by Eurojust).
- 32 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, O.J. C 221 19.7.1997, p. 11.
- 33 See also: explanatory report to the second Protocol, O.J. C 91, 31.03.1999, p. 8.
- 34 Council Act of 29 May 2000 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. L 197, 12.7.2000, p. 1.
- 35 O.J. C 91, 31.03.1999, p. 13.
- 36 O.J. L 8, 12.01.2001, p. 1.
- 37 See Council Recommendation of 8 May 2003 on a model agreement for setting up a joint investigation team (JIT).

Gemeinsame Ermittlungsgruppen

Herausforderungen und Lösungen

Dr. Ralf Riegel

After the establishment of Joint Investigation Teams (JITs) in international treaties and the implementation of the rules on JITs into German law, JITs will become a more and more useful investigative tool for the law enforcement authorities in Germany within the repertoire of their investigative measures. The aim of this article is therefore to bring this new tool home to the practitioners and give them valuable advice on the conditions under which JITs may be established and how practical problems can be solved both as regards the phase when JITs are established (part II) and during their working phase (part III). Part IV is dedicated to the question on how the use of evidence gathered by JITs can be ensured during the criminal proceedings before the court. The article clarifies that JITs can have a decisive advantage for the investigation of crimes, but particular accuracy should already be exercised when developing the agreement establishing a JIT.

Die Idee gemeinsamer Ermittlungsgruppen ist den Kinderschuhen entwachsen. Neun Jahre nach der Unterzeichnung des Übereinkommens über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union aus dem Jahre 2000 (im Folgenden: EU-RhÜbk) und 11 Jahre nach der Unterzeichnung von Neapel II¹ haben viele europäische Ermittlungsrichterinnen und -richter, Staatsanwältinnen und

Staatsanwälte, Polizeibeamtinnen und -beamte² erste Erfahrungen gesammelt und das neue Instrument mit Leben gefüllt.³

Die Erfahrungen waren meist positiv:

- Die gemeinsamen Ermittlungen in den beteiligten Staaten verliefen nicht nur erfolgreich, sondern effizienter, geordneter und schneller als bei parallelen, im Wege der Rechtshilfe koordinierten Verfahren.

- Die Teilnahme entsandter Mitglieder an Maßnahmen im Ausland hat eine weitere Verbesserung der Kommunikation und der Ergebnisse ermöglicht. Insbesondere wird gelobt, dass entsandte Mitglieder das Vorgehen unterstützen konnten, indem sie Zeugen in deren Muttersprache vernehmen und Informationen in dieser Sprache, die gerade bei grenzüberschreitenden Fällen oft anzutreffen sind, schnell dem Inhalt nach übersetzen konnten.
- Dass keine Rechtshilfeersuchen erforderlich waren, sparte administrativen Aufwand und zeitliche Verzögerungen.
- Die Zusammenarbeit führt über den Einzelfall hinaus zu besserem Verständnis für Recht und Praxis im Partnerstaat und ermöglicht persönliche Kontakte, die die künftige Zusammenarbeit auch außerhalb gemeinsamer Ermittlungsgruppen erleichtern werden.

Zu den positiven Ergebnissen trägt bei, dass die Fälle, in denen gemeinsame Ermittlungsgruppen errichtet werden, sorgfältig ausgewählt wurden. Die Bildung einer gemeinsamen Ermittlungsgruppe und die praktische Zusammenarbeit stellt alle Beteiligten vor neue Herausforderungen.⁴ Einige wiederkehrende Fragen und mögliche Lösungen sollen im Folgenden dargestellt werden.

I. Rechtsgrundlagen

Gemeinsame Ermittlungsgruppen sind inzwischen in vielen völkerrechtlichen Vereinbarungen auf der Ebene der Vereinten Nationen,⁵ des Europarates,⁶ der Europäischen Union⁷ und bilateralen Rechtshilfeverträgen, zum Beispiel Art. 12*bis* des Vertrages zwischen Deutschland und den Vereinigten Staaten von Amerika über die Rechtshilfe in Strafsachen, enthalten. Im nationalen deutschen Recht sind Regelungen zu gemeinsamen Ermittlungsgruppen im Bereich der EU in § 93 IRG (früher § 3 k IRG) und für den darüber hinausgehenden vertraglichen Rechtshilfeverkehr in § 61b IRG zu finden. Ergänzend enthält Nr. 142c RiVAST eine Verwaltungsvorschrift. Vergleichbare Basisinformationen über ausländische Rechtsordnungen sind in einer aktuellen Gesetzessammlung von Europol und Eurojust enthalten, die derzeit über das Bundesamt für Justiz bezogen und künftig im Internet abgerufen werden kann.⁸ Der besondere Wert dieser Sammlung liegt darin, dass sich die Beteiligten über den Handlungsspielraum der ausländischen Partner im Klaren sein müssen, wenn eine Errichtungsvereinbarung entworfen wird.

Die Errichtungsvereinbarung stellt die erste administrative, manche Praktiker sagen sogar bürokratische Hürde für eine gemeinsame Ermittlungsgruppe dar. Dem ist zu widersprechen. Die Errichtungsvereinbarung ersetzt sonst erforderliche gegenseitige Rechtshilfeersuchen. Auf ihre Ausarbeitung soll-

te die gleiche Sorgfalt wie für Rechtshilfeersuchen verwandt werden. Sie öffnet und begrenzt zugleich den Handlungsspielraum der Mitglieder der Gruppe, sodass strategische und ermittlungstaktische Überlegungen einfließen müssen. Vielfältige Angebote helfen, diesen Anforderungen gerecht zu werden. In allen Mitgliedstaaten der EU wurden nationale Experten ernannt, die Erfahrungen sammeln und weitergeben sollen.⁹

Eurojust und Europol stehen mit ihrem Sachverstand zur Verfügung. Die beiden Organisationen haben ein Handbuch für gemeinsame Ermittlungsgruppen herausgegeben, das gleichfalls im Internet abzurufen sein wird.¹⁰ Ein wichtiges Hilfsmittel sind Mustervereinbarungen, die allgemein als Empfehlung des Rates zum Rahmenbeschluss über gemeinsame Ermittlungsgruppen¹¹ und spezifisch für die Bedürfnisse im bilateralen Verkehr mit bestimmten Staaten¹² verfügbar sind. Rechtspolitisch sollte künftig versucht werden, diese Praxis hinweise für alle völkervertraglichen Grundlagen möglichst einheitlich zu gestalten, um die Anwendung zu erleichtern.

II. Errichtungsphase

Es gibt keine abstrakten Kriterien, anhand derer zu entscheiden ist, ob ein Ermittlungsverfahren für die Errichtung einer gemeinsamen Ermittlungsgruppe geeignet ist. Notwendig ist jedenfalls, dass wegen eines zusammenhängenden Sachverhalts in verschiedenen Staaten Ermittlungsverfahren geführt werden. Der Strafvorwurf sollte von einigem Gewicht sein. Gemeinsame Ermittlungsgruppen unter deutscher Beteiligung wurden bislang zum einen in Terrorismusverfahren errichtet, in denen die Tätergruppen grenzüberschreitend verbunden sind und koordiniert agieren. Zum anderen handelt es sich um Verfahren, in denen Personen oder Gegenstände durch mehrere Staaten transportiert werden. Das ist vor allem bei Betäubungsmittelkriminalität der Fall, aber auch bei Schleusungskriminalität oder Geldfälschung. Zu prognostizieren ist immer, wie hoch das Maß an Koordination während der Ermittlungen sein wird, wie schnell Informationen aus einem Verfahren in einem anderen benötigt werden und in welchem Umfang Rechtshilfeersuchen zu erwarten sind.

Sind von den Ermittlungen mehr als zwei Staaten betroffen, sind diese Fragen individuell für jeden Staat zu untersuchen. Obwohl multilaterale Vereinbarungen komplizierter sind als bilaterale, können sie erforderlich werden, wenn anders keine gleichermaßen zielführende Unterstützung für alle beteiligten Staaten möglich ist. Insoweit sollten alle Möglichkeiten der Zusammenarbeit kreativ erwogen werden.¹³

Ist ein erster Kontakt mit ausländischen Ermittlern aufgenommen und ein möglicher Mehrwert einer koordinierten Ermitt-

lung, vielleicht sogar einer gemeinsamen Ermittlungsgruppe ausgemacht worden, so sollte möglichst frühzeitig ein Treffen der Leiter der Ermittlungsverfahren vereinbart werden, um den Stand der jeweiligen Ermittlungen darzustellen und das weitere Vorgehen zu planen. Dabei ist es regelmäßig sinnvoll, auf deutscher Seite schon in diesem Stadium Polizei und Staatsanwaltschaft einzubinden.

1. Koordinierungstreffen bei Eurojust und Europol

Europol und Eurojust bieten an, dass in ihren Räumlichkeiten in Den Haag Koordinierungstreffen stattfinden können. Zu diesen Treffen können Dolmetscher gestellt und möglicherweise Reisekosten übernommen werden. Die Teilnahme von Vertretern von Europol oder Eurojust kann eine strukturierte, erfahrungsbasierte Moderation sicherstellen. Besonders bei Errichtung multilateraler Gruppen – bislang in der Europäischen Union noch nicht zu beobachten – ist diese ergebnisoffene Unterstützung von Bedeutung. Denn auch wenn es nicht zur Errichtung einer gemeinsamen Ermittlungsgruppe kommt, gewinnt die weitere Ermittlungsarbeit durch die bessere Koordinierung an Effizienz. Unabhängig von einer möglichen Beteiligung ist bereits zu diesem frühen Zeitpunkt gemäß § 5 EurojustG Eurojust und gemäß Nr. 8 Abs. 2 Zuständigkeitsvereinbarung das Bundesamt für Justiz zu informieren. Diese Berichtspflichten sollen beiden Seiten dienen: Eurojust und das Bundesamt für Justiz sollen in die Lage versetzt werden, die national gesammelten Erfahrungen auszuwerten und anderen zugänglich zu machen. Und sie sollen die Möglichkeit erhalten, schnell Unterstützung anzubieten und damit Mehrarbeit für die anderen Beteiligten zu vermeiden.

2. Zweckbeschreibung

Umstritten ist, wie konkret der Zweck einer gemeinsamen Ermittlungsgruppe in der Errichtungsvereinbarung zu umschreiben ist. Werden der Sachverhalt und die geplante Vorgehensweise abstrakt beschrieben, wird die Formulierung der Errichtungsvereinbarung erleichtert und spätere Änderungen der Vereinbarung werden vermieden. Das stellt einen pragmatischen, zielorientierten Weg dar. Gerade am Anfang der Ermittlungen ist es schwer, den Zweck konkret darzulegen und den weiteren Verlauf zu prognostizieren.

Dennoch ist eine möglichst detaillierte Beschreibung vorzuziehen. Ein normatives Argument dafür findet sich in der rechtshilferechtlichen Basis der Zusammenarbeit. Jedes Rechtshilfeersuchen und damit auch das Ersuchen um Zusammenarbeit in einer gemeinsamen Ermittlungsgruppe ist so genau zu formulieren, dass eine Beweisbedeutung der erbetenen Maßnah-

men erkennbar und eine „*fishing expedition*“ ausgeschlossen wird. Zugleich kann die Einhaltung des Spezialitätsgrundsatzes nur gewährleistet und überprüft werden, wenn deutlich ist, für welche Straftaten Rechtshilfe geleistet wird. Eine vage Zweckbeschreibung reicht nicht aus, da unklar bleibt, ob Hoheitsrechte des Staates, in dem gehandelt wird, verletzt werden. Eine Souveränitätsverletzung aber kann im gerichtlichen Verfahren ein Beweisverwertungsverbot nach sich ziehen.¹⁴

Auch datenschutzrechtliche Gründe erfordern eine genaue Umschreibung: Ein Austausch sensibler und personenbezogener Daten ist nur dann zulässig, wenn bekannt ist, wer für welchen Zweck die Daten erhält. Zudem sind strafprozessuale Vorschriften zu beachten. Insbesondere die Anordnung von Zwangsmaßnahmen setzt voraus, dass der Zweck der Maßnahme in ein Verhältnis zum Eingriff in persönliche Rechte gesetzt wird. Das ist gerade dann, wenn die Ergebnisse der Maßnahmen mit ausländischen Ermittlungsbehörden und Gerichten geteilt werden, nur bei genauer Zweckbeschreibung möglich. Ganz allgemein gilt, dass Erkenntnisse aus den Akten nur dann mit Dritten geteilt werden, wenn dadurch die Ermittlungen nicht gefährdet werden.¹⁵ Diese Gefährdung lässt sich nur dann beurteilen, wenn bekannt ist, wozu die Informationen dienen sollen. Ferner stellt sich die Frage, ob ein Beweisverbot greift, wenn Erkenntnisse auf zu unbestimmter Grundlage erworben wurden. Last but not least ist eine Erfolgskontrolle der gemeinsamen Arbeit am Ende nur dann möglich, wenn das Ziel am Anfang klar definiert wurde.

3. Leitung gemeinsamer Ermittlungsgruppen

Unsicherheiten bestehen über die Frage, ob es einen oder mehrere Leiter einer gemeinsamen Ermittlungsgruppe geben soll und ob die Leitung zwingend die Staatsanwaltschaft innehaben muss.

Art. 13 Absatz 3a EU-RhÜbk 2000 spricht von *einem* Leiter der Ermittlungsgruppe. Damit ist eine klare Organisationsstruktur und Verantwortlichkeit geregelt. Gleichwohl hat es sich in der Praxis als sinnvoll herausgestellt, für jeden teilnehmenden Staat einen Leiter zu bestimmen. Die Leitungsbefugnis bezieht sich dann auf den Einsatz im eigenen Staat.¹⁶ Dieses Modell erfordert einen erhöhten Abstimmungsbedarf bei der Koordination von Maßnahmen und bei der Zusammenarbeit mit Drittstaaten. Der klare Vorteil liegt darin, dass jeder Leiter das Recht am Einsatzort beherrscht und danach vorgehen kann. Zudem ist der Kontakt mit anderen Polizeikräften an einem Einsatzort leichter möglich, wenn diese um Unterstützung gebeten werden sollen. Dieser Doppelkopf hilft auch, am Anfang der Zusammenarbeit die schon aus Gründen der Außendarstellung wichtige Diskussion um die Leitung der

Gruppe zu vermeiden. Besondere Schwierigkeiten in der Zusammenarbeit der Leiter waren bislang nicht auszumachen.

Nach deutschem Recht muss die Staatsanwaltschaft die Leitungsfunktion übernehmen. §§ 160 Abs. 1, 161 StPO bestimmen, dass die Staatsanwaltschaft Herrin des Ermittlungsverfahrens ist und der Polizei möglichst genaue Ersuchen und Aufträge erteilt.¹⁷ Diese normative Struktur der Verantwortlichkeiten muss sich auch in der gemeinsamen Ermittlungsgruppe als neuem, zentralen Ansatz der Ermittlungen widerspiegeln. Davon unabhängig ist die tatsächliche Aufteilung der Aufgaben in der Zusammenarbeit. Die Übung in bestimmten, ausschließlich innerstaatlichen Verfahren, dass die Staatsanwaltschaft Ermittlungsleitlinien vorgibt und die Polizei in diesem Rahmen eigenverantwortlich entscheidet, wie vorgegangen wird, lässt sich auf die gemeinsame Arbeit übertragen.

4. Zahl der Mitglieder

Die Zahl der Mitglieder der gemeinsamen Ermittlungsgruppe ist für die spätere Zusammenarbeit von entscheidender Bedeutung. Denn bei einem Team ist es erforderlich, dass jedes einzelne Mitglied über die rechtlichen und tatsächlichen Grundlagen der Arbeit am Anfang informiert wird und dieser Kenntnisstand im Laufe der Ermittlungen immer wieder aktualisiert wird. Nur dann ist ein zielführendes Miteinander gewährleistet. Das setzt jedoch voraus, dass Zeit und Geld für Treffen und Reisen eingeplant wird. Auch ist festzustellen, dass ein gruppenspezifischer Prozess nach anderen Regeln abläuft, wenn die Gruppe zu groß ist. Es kann sich nicht mehr jeder Teilnehmer einbringen; Gespräche drohen von den besten Rhetorikern und nicht mehr den besten Fachleuten dominiert zu werden. Effektiver ist es daher, eine kleine Kerngruppe von Mitgliedern auszuwählen, die bei Bedarf von anderen Kräften unterstützt wird. Anhaltspunkt sollte die Erfahrung sein, die in anderen Ermittlungen gesammelt wurde: Wenn für die Ermittlungen in einem Verfahren ohne internationale Bezüge zwei oder drei Beamten eingesetzt würden, sollte die Zahl der deutschen Mitglieder etwa gleich groß bemessen werden. Wichtig ist, dass Aufgaben auch auf Nichtmitglieder delegiert werden können. Deren Ergebnisse können in die gemeinsame Arbeit der Gruppe eingebracht werden. Ein Wechsel der Mitglieder setzt eine Änderung der Vereinbarung voraus, die aber erfahrungsgemäß recht einfach zu erzielen ist.

5. Einbeziehung Europol und Eurojust

Neben der koordinierenden und beratenden Funktion können Europol und Eurojust auch Mitglieder einer gemeinsamen Ermittlungsgruppe werden.

Die Beteiligung von Europol setzt voraus, dass die Ermittlungsgruppe im Zuständigkeitsbereich von Europol nach Art. 4 Europol-Beschluss arbeitet. Nähere Voraussetzungen der Mitarbeit von Europol regeln Art. 5 Nr. 1 (d), 6 Europol-Beschluss.¹⁸ Die Vereinbarung mit Europol kann in der Errichtungsvereinbarung oder in einem gesonderten Anhang aufgenommen werden. Ob Europol formelles Mitglied wird, richtet sich danach, ob ein Mehrwert für die Ermittlungen zu erwarten ist. Europol kann insbesondere die Sammlung, Systematisierung und Ordnung von Informationen übernehmen. Dabei ist von besonderem Nutzen, dass Informationen aus Datenbanken von Europol zugestellt werden können und Ergebnisse der gemeinsamen Ermittlungsgruppe unmittelbar in Datenbanken von Europol aufgenommen und mit vorhandenem Material verglichen werden können.

Europol kann technische Unterstützung leisten. Bedeutsam ist zunächst der Aufbau einer sicheren Kommunikationsverbindung über ein Virtuelles Privates Netz (VPN) zum Partnerstaat. Ferner kann technische Ausrüstung zur Verfügung gestellt werden.

Eurojust hat bislang vorrangig in der Errichtungsphase eine koordinierende und beratende Funktion übernommen. Wenn eine gemeinsame Ermittlungsgruppe mehr als zwei Staaten umfasst oder in großem Umfang Rechtshilfe von Drittstaaten innerhalb und außerhalb der Europäischen Union erforderlich wird, ist die Unterstützung auch in der Arbeitsphase wichtig. Dazu ist es aber meist nicht erforderlich, dass Eurojust Mitglied der gemeinsamen Ermittlungsgruppe wird, und die Kerngruppe damit schlank gehalten werden kann. Wichtig ist, mit den deutschen Vertretern bei Eurojust frühzeitig Kontakt aufzunehmen, um zu klären, welche Unterstützung möglich ist und wie diese am Besten geleistet werden kann.

6. Einbeziehung von Drittstaaten, koordinierte Parallelermittlungen

Die Bekämpfung von Straftaten, die international operierende Tätergruppen begangen haben, weist oftmals Bezüge zu mehr als zwei Staaten auf. Die Ziele einer möglichst schnellen, Personalressourcen schonenden und zugleich umfassenden Aufklärung lassen sich dann nicht immer miteinander vereinbaren. Die Entscheidung, welche Form der Zusammenarbeit gewählt wird, muss nicht im Verhältnis zu allen beteiligten Staaten einheitlich sein. Mit Staaten, die wegen des gleichen Tatkomplexes Ermittlungsverfahren führen, sollte eine Koordination oder eine gemeinsame Ermittlungsgruppe angestrebt werden, falls nicht bisher gemachte Erfahrungen dagegen sprechen. Gerade mit Staaten, die nicht der Europäischen Union oder dem Europarat angehören, kann eine Koordinierung zeitaufwändig

sein, so dass das klassische Rechtshilfemodell zu bevorzugen ist. Mit Staaten, die im konkreten Fall kein eigenes Strafverfolgungsinteresse haben oder die lediglich einen abgrenzbaren Tatkomplex verfolgen, bietet sich eine lose Zusammenarbeit durch Rechtshilfeersuchen an. Insoweit ist bei Bildung der Ermittlungsgruppe bereits abzusprechen, wer an diese Staaten Ersuchen richtet, um Doppelarbeit zu vermeiden. Meist wird dabei die Qualität der Beziehungen jedes beteiligten Staaten zu dem betreffenden Drittstaat ausschlaggebend sein.

Diese Ersuchen müssen für die Arbeit der Ermittlungsgruppe gestellt werden, damit die Informationen nicht dem Spezialitätsschutz unterfallen und damit für die gemeinsame Arbeit wertlos sind. Bei der Entscheidung, in welcher Form die stärker betroffenen Staaten zusammenarbeiten, ist neben dem erforderlichen Umfang der Koordinierung und der Zahl möglicher Rechtshilfeersuchen auch zu berücksichtigen, auf welcher völkervertraglichen Grundlage eine gemeinsame Ermittlungsgruppe errichtet werden könnte und wie die nationalen Verfahrensbestimmungen miteinander harmonisieren. Gerade bei derart komplexen Verfahren ist eine Koordinierung mit Hilfe von Eurojust anzustreben.

7. Sprachen

Internationale Zusammenarbeit setzt eine Verständigung über die nationalen Sprachgrenzen hinweg voraus. Damit nicht jede kurze Besprechung gedolmetscht werden muss, sollten die Mitglieder der gemeinsamen Ermittlungsgruppe über grundlegende Kenntnisse einer gemeinsamen Arbeitssprache verfügen. Dies ist insbesondere auch dann erforderlich, wenn gemeinsame Einsätze geplant sind. In diesem Fall muss es möglich sein, dass der Einsatzleiter Anweisungen erteilt, die sofort umgesetzt werden. Verzögerungen können den Erfolg einer Maßnahme oder gar Gesundheit und Leben der Teilnehmer gefährden. Diese Arbeitssprache sollte zur Vermeidung späterer Missverständnisse in der Errichtungsvereinbarung festgelegt werden. Bei komplizierten Themen kann die Hinzuziehung eines Dolmetschers geboten sein.

Davon zu unterscheiden sind die offiziellen Sprachen der gemeinsamen Ermittlungsgruppe. In diese sind die Vereinbarungen und Ermittlungsergebnisse zu übersetzen. Meist handelt es sich dabei um die Gerichtssprachen der beteiligten Staaten. Um Kosten zu sparen, kann vereinbart werden, dass nicht jedes Schriftstück in alle Sprachen übersetzt wird, sondern Zusammenfassungen erstellt und vollständige Dokumente nur bei besonderer Bedeutung übertragen werden. Um nicht durch fehlende Informationsweitergabe den Erfolg der Zusammenarbeit zu gefährden, muss von dieser Möglichkeit behutsam und verantwortungsbewusst Gebrauch gemacht werden.

8. Kosten

Internationale Rechtshilfe in strafrechtlichen Angelegenheiten ist immer mit Kosten verbunden, die in einem innerstaatlichen Ermittlungsverfahren nicht auftreten. Das beginnt mit den Übersetzungskosten für das Ersuchen, den Übersetzungskosten für Erledigungsstücke und endet nicht zuletzt bei dem erhöhten Zeitaufwand für Ermittler und Bewilligungsbehörden. Die Kosten, die im Rahmen einer gemeinsamen Ermittlungsgruppe entstehen, sind nochmals höher, da vermehrt Reisekosten anfallen können und der Übersetzungsaufwand größer wird: Nicht nur steigt die Zahl der zu dolmetschenden Koordinierungstreffen, sondern auch der Umfang der Aktenübersetzung. Hinzu kommt, dass eine bürotechnische Infrastruktur bereitgestellt und kompatible technische Ausrüstung beschafft werden muss.

Verfahren, in denen gemeinsame Ermittlungsgruppen errichtet werden, betreffen regelmäßig Fälle schwerer Kriminalität, bei denen das Kostenargument bei der Abwägung der Opportunität der Strafverfolgung nicht durchgreift. Zudem ist es möglich, die Kosten zu begrenzen und Erstattungen von dritter Seite zu erhalten. Wird die Zahl der Mitglieder der Gruppe begrenzt, werden Reisekosten gesenkt. Video- und Telefonkonferenzen sollten zur Abstimmung im laufenden Geschäft genutzt werden. Der Umfang der zu übersetzenden Unterlagen kann eingeschränkt werden. Bei Einsätzen entsandter Mitglieder außerhalb des eigenen Hoheitsgebietes kann kritisch geprüft werden, in welchem Umfang das sachlich geboten ist.

Auf die Unterstützung von Europol und Eurojust in der Errichtungsphase wurde bereits hingewiesen. Europol kann auch in der Arbeitsphase durch zeitweise Überlassung von technischer Ausrüstung Aufwendungen ersparen. Auch Eurojust prüft, ob künftig Material (Laptops mit sicherer Verbindung, sichere Mobiltelefone) gestellt und Kosten von Kommunikationsverbindungen übernommen werden können.

Ferner kann die EU-Kommission eine allgemeine finanzielle Unterstützung gemeinsamer Ermittlungsgruppen für Reise-Unterkunfts- und Übersetzungskosten gewähren. Nachfragen wegen eines Kostenzuschusses sind an Eurojust zu richten. Ein Formular zur Antragstellung steht im Internet zur Verfügung.¹⁹ Die derzeit vorgesehenen Fördermittel müssen bis Ende des Jahres 2010 verbraucht sein; Anträge müssen vor der Entstehung der Kosten gestellt werden. Mit der Entgegennahme der Förderung verpflichten sich die Antragsteller zur Abfassung eines Schlussberichts und zur Überlassung relevanter Unterlagen. Zwar erleichtert ein solcher Zuschuss die Arbeit der Gruppe, doch besteht die Gefahr, dass Eurojust damit auf Ermittlungsverfahren Einfluss nimmt: Da der finanzielle Rahmen begrenzt ist, wird nicht jede neue Gruppe in gleichem

Umfang unterstützt werden können. Es dürfte aber kaum möglich sein, objektive Förderkriterien zu finden.

III. Arbeitsphase

1. Schulung und Teambuilding

Die Leiter der Ermittlungsgruppe und deren Mitglieder müssen sich vor Beginn der eigentlichen Ermittlungen miteinander vertraut machen. Da sich die Teilnehmer in fachlicher Hinsicht aufeinander verlassen und die Arbeit gegenseitig anerkennen müssen, sollte man diesem Anfang besonderes Augenmerk widmen. Dabei sind die Gruppenleiter gefordert, in möglichst kurzer Zeit eine professionelle Arbeitsatmosphäre zu schaffen.

Wichtig ist auch ein kurzer Überblick über Ermittlungsverfahren und Rechte und Pflichten der Beteiligten im Partnerstaat. Das ist nicht nur für den Einsatz entsandter Mitglieder von Bedeutung, sondern soll auch helfen, die Beweiserhebung so durchzuführen, dass weder im Einsatzstaat noch in den Partnerstaaten später ein Beweisverbot droht. Als hilfreich hat sich erwiesen, vor konkreten Maßnahmen einen kurzen schriftlichen Vermerk über Einsatzmaßregeln zu erstellen und an die Teilnehmer zu verteilen.

2. Beziehung vorhandener Unterlagen

Dem Einsatz einer gemeinsamen Ermittlungsgruppe gehen regelmäßig Ermittlungen in verschiedenen Staaten voraus. Art. 13 Abs. 9 EU-RhÜbk 2000 und § 93 Abs. 3 IRG regeln nur die Verwendung gemeinsamer Ermittlungsergebnisse in allen Partnerstaaten, nicht aber die Einführung vorhandenen Wissens. Daher sollte schon in der Errichtungsvereinbarung konkret angegeben werden, welche Informationen, Unterlagen und Beweismittel in die gemeinsame Ermittlungsgruppe eingebracht werden. Der Ermittlungsstand ist dann beim ersten Treffen der gesamten Gruppe erneut zu erläutern.

3. Akteneinsicht

Die strafprozessualen Verfahrensvorschriften der Partnerstaaten enthalten ein Akteneinsichtsrecht des Beschuldigten, der Verteidigung und dritter Personen. Dieses Akteneinsichtsrecht ist hinsichtlich des Zeitpunktes der Einsichtnahme und deren Umfangs unterschiedlich ausgestaltet. Bedenkt man zudem, dass sich die nationalen Ermittlungsverfahren in unterschiedlichen Stadien befinden können – während ein Verfahren am Anfang steht, kann das andere schon fast anklagereif sein – wird deutlich, dass die Vertraulichkeit des Ermittlungsergebnisses der Gruppe nur sehr eingeschränkt gewahrt wird.

Diese Gefahr kann auf unterschiedliche Weise begrenzt werden. Zunächst ist es wichtig, sich vor Beginn der Zusammenarbeit einen Überblick über die Akteneinsichtsrechte zu verschaffen. Anschließend ist zu klären, in welchem Stadium sich die jeweiligen Ermittlungsverfahren befinden und ab welchem Zeitpunkt die Akten offenzulegen sind. Möglicherweise kann in einem Staat mit der Anklageerhebung gewartet werden, bis auch in dem anderen Staat die Ermittlungen abgeschlossen sind. Ferner sind die Bestimmungen über das Akteneinsichtsrecht daraufhin zu überprüfen, ob bestimmte Aktenteile als vertraulich gekennzeichnet und von der unbeschränkten Einsichtnahme ausgeschlossen werden können. Nach deutschem Recht sind die Akten vollständig vorzulegen.²⁰ Das umfasst auch die Rechtshilfevorgänge. Nur nach § 96 StPO gesperrte Aktenteile bilden eine Ausnahme. Eine solche Sperrung ist jedoch nicht für Zwecke eines ausländischen Ermittlungsverfahrens möglich, sondern nur, wenn dies dem Bund Nachteil bereiten würde. Das ist nur dann der Fall, wenn der Bestand oder die Funktionsweise des deutschen Staates oder seiner wesentlichen Einrichtungen betroffen sind.²¹ Hierunter kann man auch erhebliche Störungen des freundschaftlichen Verhältnisses zu anderen Staaten verstehen. Schlichte Nachteile in einem konkreten Ermittlungsverfahren sind regelmäßig aber nicht geeignet, derartige außenpolitische Folgen zu zeitigen.

Während der Ermittlungen sollte immer wieder geprüft werden, welche Erkenntnisse für die gemeinsame Arbeit benötigt werden. Die Errichtung einer gemeinsamen Ermittlungsgruppe setzt voraus, dass in jedem teilnehmenden Staat ein weiteres Ermittlungsverfahren geführt wird. Diese Ermittlungsverfahren können neben der Tätigkeit der gemeinsamen Ermittlungsgruppe weiterhin individuell gefördert werden. Es wird also bei sensiblen Informationen einer Abwägung bedürfen, ob diese bei Gefahr des frühzeitigen Bekanntwerdens in die gemeinsame Arbeit eingespeist werden oder nur im eigenen Verfahren genutzt werden.

4. Telekommunikationsüberwachung

Die Errichtung einer gemeinsamen Ermittlungsgruppe ist eine Rechtshilfemaßnahme. Damit greifen auch die rechtshilferechtlichen Schutzvorschriften. Das gilt in besonderem Maße bei den modernen Ermittlungsmethoden wie zum Beispiel der Telekommunikationsüberwachung. Nr. 77a RiVAST sieht dazu Verfahrensregeln vor. Wird also schon bei Errichtung einer gemeinsamen Ermittlungsgruppe geplant, Telekommunikationsverkehr zu überwachen, so sollten die Voraussetzungen dazu schon in der Errichtungsvereinbarung festgehalten werden. Soweit Zusicherungen zur Spezialität oder zur Vernichtung von Daten erforderlich sind, sollten diese gleich an dieser Stelle aufgenommen werden.

IV. Beweisverwertung im gerichtlichen Verfahren

Soweit ersichtlich sind bislang keine Entscheidungen veröffentlicht worden, die sich mit der Frage der Verwertbarkeit der Ergebnisse einer gemeinsamen Ermittlungsgruppe auseinandersetzen. Da gemeinsame Ermittlungsgruppen eine Form der Rechtshilfe darstellen, sind die allgemeinen Regelungen anwendbar. Besonderheiten können sich daraus ergeben, dass nur ein Rechtshilfeersuchen zu Beginn der Zusammenarbeit gestellt wurde, und dass Beweiserhebungen durch entsandte Mitglieder vorgenommen wurden.

Die Frage, unter welchen Voraussetzungen im Ausland gewonnene Beweismittel in inländischen Strafverfahren benutzt werden dürfen, ist auf dem 67. Deutschen Juristentag 2008 kontrovers diskutiert worden. Die Verwertung dieser Beweise richtet sich grundsätzlich nach denselben Regeln wie die, denen im Inland erhobene Beweise unterliegen.²² Es sind jedoch drei zusätzliche Problemkreise zu unterscheiden:²³

- (1) Ist die Übertragung der Beweismittel vom ersuchten an den ersuchenden Staat in völkerrechtlich zulässige Weise vollzogen worden?
- (2) Sind die Beweise nach dem Ortsrecht in zulässiger Weise erlangt worden?
- (3) Entspricht das Ortsrecht in seiner konkreten Ausgestaltung den Mindeststandards des Verfahrensrechts des ersuchenden Staates? Ist eine dieser Fragen mit nein zu beantworten, so muss untersucht werden, ob ein Beweisverwertungsverbot vorliegt oder die Verwendung der Beweismittel in anderer Art und Weise beschränkt ist.

1. Ordnungsgemäße Erlangung der Beweismittel im Wege der Rechtshilfe

Die Sammlung von Beweismitteln in einem ausländischen Staat stellt einen Eingriff in dessen Souveränitätsrecht dar.²⁴ Operative Maßnahmen sind nur mit Zustimmung des ausländischen Staates zulässig. Diese Zustimmung muss, um wirksam zu sein, ordnungsgemäß im Wege der Rechtshilfe erlangt werden.²⁵ Fraglich ist, welche Konsequenz aus der Verletzung dieser Regeln gezogen werden müssen. Ein Beweisverwertungsverbot ist jedenfalls dann anzunehmen, wenn der ausländische Staat sich auf die Souveränitätsverletzung beruft.²⁶ Die Verneinung des individualschützenden Charakters der völkerrechtlichen Rechtshilfeeregeln wird in Deutschland dazu führen, dass jede wirksame Errichtungsvereinbarung die Verwendung der von der gemeinsamen Ermittlungsgruppe erlangten Beweismittel zulässt. Die Frage der Wirksamkeit ist aus der Sicht des Staates zu betrachten, in dem die Beweismittel gewonnen wurden, da dessen Souveränitätsinteressen beeinträchtigt werden.

2. Beweiserhebung im Ausland

Zur Verwertbarkeit von Beweisen gibt es in Europa eine Vielzahl unterschiedlicher Regelungsmodelle; eine Harmonisierung ist jedenfalls kurzfristig nicht zu erwarten. Grundzüge legen Art. 6 EMRK und die Rechtsprechung des EGMR zum Recht auf ein faires Verfahren fest. Geregelte Fälle des völkerrechtlichen Individualschutzes sind das Folterverbot in Art. 3 EMRK und die Verletzung der Pflicht zur Belehrung nach Art. 36 Abs. 1 WÜK.²⁷

Da sich die Beweiserhebung nach dem Recht des Handlungsortes richtet, folgt daraus für die praktische Arbeit zunächst, dass sich die Mitglieder der gemeinsamen Ermittlungsgruppe über die Grundzüge des Beweisrechts im Strafverfahren informieren, damit durchschlagende Fehler vermieden werden. Eine solche Einweisung könnte am Beginn der Zusammenarbeit oder spezifisch vor jeder gemeinsamen Zwangsmaßnahme erfolgen.

Schwierigkeiten können daraus resultieren, dass im Gerichtsstaat andere, striktere Regelungen über die Beweisgewinnung bei vergleichbaren Inlandsfällen bestehen, deren Verletzung im Ausland Einfluss auf die Beweisverwertung haben kann.²⁷ Um mit größter Sicherheit ein Verwertungsverbot auszuschließen bieten sich zwei Lösungen an: Entweder man legt zu Beginn der Arbeit fest, vor welchem Gericht später eine Anklage zu erfolgen hat, oder man wendet immer neben dem Recht am Handlungsort das strengste Recht an. Beide Modelle haben Nachteile: Eine frühzeitige Zuständigkeitsregelung kann nicht flexibel auf nachfolgende Änderungen reagieren. Wird zum Beispiel ein Täter nicht im gewählten Gerichtsstaat, sondern in seinem Heimatstaat festgenommen, kann eine Auslieferung auch unter dem Regime des Europäischen Haftbefehls ausbleiben. Zudem lässt sich nicht immer vorhersehen, wo welche Beweismittel und Zeugen gefunden werden. Andererseits führt die Anwendung unterschiedlicher Beweiserhebungsregeln möglicherweise zu einem nicht mehr handhabbaren System, bei dem entweder keine Regel richtig befolgt oder eine Maßnahme überhaupt nicht mehr durchgeführt werden kann. Daher muss von Fall zu Fall versucht werden, einen Weg zu finden.

3. Beweiserhebung im Inland

Der Einsatz entsandter Mitglieder in Deutschland kann dann zu Bedenken hinsichtlich der Verwertbarkeit von Beweisen führen, wenn diese gleiche Rechte wie deutsche Ermittlungspersonen wahrnehmen, ohne den gleichen richterlichen Kontrollen unterworfen zu sein. Geht man von dem Grundsatz aus, dass entsandte Mitglieder im Inland nach dem Recht des Handlungsortes und nicht nach dem möglicherweise weiteren

Recht des Entsendestaates tätig werden, ergeben sich grundsätzlich in der Praxis keine Schwierigkeiten.

Einen Sonderfall stellen verdeckte Ermittlungen dar. Der Bundesgerichtshof hat sich im Jahr 2007 mit der Frage befasst, ob ausländische Polizeibeamte, die im Inland verdeckt eingesetzt werden, als verdeckte Ermittler im Sinn der §§ 110 a ff StPO zu sehen sind.²⁹ Verdeckte Ermittler seien gemäß § 110a Abs. 2 StPO nur Beamte im Sinne der §§ 2, 35 ff. BRRG. Dies verlange nicht nur die besondere Ermittlungstätigkeit und die damit einhergehende Gefährdung, sondern auch die erforderliche straffe Führung sowie die wirksame, auch disziplinarrechtliche Dienstaufsicht über verdeckte Ermittler. Solange es keine gesetzliche Regelung gebe, die Polizeibeamte einer ausländischen Behörde ausdrücklich Beamten im Sinne der §§ 2, 35 ff. BRRG gleichstellt, richte sich deren verdeckter Einsatz nicht nach den Vorschriften der §§ 110a ff. StPO.³⁰ Verdeckt ermittelnde Beamte des ausländischen Polizeidienstes seien deshalb zu behandeln wie von der Polizei eingesetzte Vertrauenspersonen. Wenn nach Deutschland entsandte Mitglieder einer gemeinsamen Ermittlungsgruppe verdeckt tätig werden, kann sich die Rechtslage anders darstellen. Stellt man allein auf die Beamteneigenschaft ab,³¹ ändert sich nichts. §§ 61b, 93 IRG geben den ausländischen Ermittlern jedoch Rechte, die denen eines deutschen Ermittlers nahekommen. Unter Leitung eines

zuständigen deutschen Beamten kann er eigenständig handeln. Ist die Tätigkeit auf Dauer, kann das entsandte Mitglied Rechte erlangen, die über die einer Vertrauensperson hinausgehen. Dann reicht aber die Leitung eines deutschen Beamten allein nicht aus, sondern es ist eine richterliche Entscheidung herbeizuführen. Anderenfalls droht ein Beweisverwertungsverbot.

V. Ausblick

Das Instrument der gemeinsamen Ermittlungsgruppen wird in zunehmenden Umfang zwischen den Mitgliedstaaten der Europäischen Union angewandt. Die Ergebnisse der Zusammenarbeit sind meist erfreulich; die Teilnehmer würden bei vergleichbaren Situationen wieder zu der Maßnahme greifen. Entscheidende Vorteile kann eine Koordination besonders in multilateralen Ermittlungen bieten. Die Bildung einer gemeinsamen Ermittlungsgruppe in diesen Fällen und die praktische Zusammenarbeit mit Drittstaaten muss noch weiter geübt werden. Das Informationsangebot dazu steigt und erleichtert damit den Schritt in das vielen Staatsanwälten und Ermittlern noch unbekanntes Terrain. Entscheidend für die Zukunft dieses Modells der Zusammenarbeit wird aber sein, ob es den Sprung in das jedem Ermittler bekannte Repertoire von Standardmaßnahmen schaffen wird.



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1 Rechtsakt des Rates 98/C 24/01 vom 18. Dezember 1997 über die Ausarbeitung des Übereinkommens aufgrund von Artikel K.3 des Vertrags über die Europäische Union über gegenseitige Amtshilfe und Zusammenarbeit der Zollbehörden Amtsblatt C 24 vom 23.01.1998.

2 Im Folgenden wird zur besseren Lesbarkeit nur noch die männliche Form benutzt.

3 Eine genaue Statistik über die Zahl errichteter gemeinsamer Ermittlungsgruppen in Europa wird nicht geführt.

4 Vgl. grundlegend *Riegel*, *Der Kriminalist* 2008, 80 ff.

5 Art. 19 UNTOC (Bekämpfung der Organisierten Kriminalität), Art. 49 UNCAC (Bekämpfung der Korruption; von Deutschland gezeichnet, aber noch nicht ratifiziert).

6 Art. 20 2. ZP EuRhÜbk (Die Ratifikation in Deutschland wird derzeit vorbereitet.).

7 Art. 13 EU-RhÜbk 2000, Rahmenbeschluss 2002/465/JHA über Gemeinsame Ermittlungsgruppen, ABl. L162 vom 20.06.2002, Art. 24 Neapel II.

8 www.europol.europa.eu, www.eurojust.europa.eu (jeweils Joint Investigation Teams).

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10 www.europol.europa.eu (Joint Investigation Teams).

11 ABl. C 121/1 vom 23.5.2003.

12 Deutsch-Französisches Muster, erhältlich über die Landesjustizverwaltungen und das Bundesamt für Justiz; ein vergleichbares Deutsch-Polnisches Muster wird vorbereitet.

13 Vgl. unten 2 f.

14 Vgl. unten zu 4.

15 Vgl. z.B. §§ 147 Abs. 2, 406e Abs. 2 Satz 2 StPO.

16 So auch Nr. 6 der EU-Mustervereinbarung; vgl. auch Eurojust/Europol, Handbuch zu Gemeinsamen Ermittlungsgruppen, Ratsdokument 13598/09, S. 7.

17 Vgl. auch Nr. 11 Abs. 1 RiStBV.

18 Beschluss des Rates vom 6. April 2009 zur Errichtung des Europäischen Polizeiamts (Europol), ABlEU Reihe L Nr. 121 v. 14.05.2009, S. 37-66 <<http://eurocrim.jura.uni-tuebingen.de/cms/de/doc/1094.pdf>>, vollständig in Kraft ab dem 1.1.2010.

19 www.eurojust.europa.eu (JIT Funding Project).

20 Vgl. im Einzelnen *Meyer-Goßner*, StPO, 51. Aufl. 2008, § 147 Rdnr. 13 ff.

21 Vgl. im Einzelnen *Meyer-Goßner*, a.a.O., § 96 Rdnr. 7.

22 BGH VRS 20, 122, 124; BGH NSTz 1992, 394; *Gleß*, JR 2008, 317, 318 m.w.N.

23 *Gleß*, JR 2008, 317, 318 ff.

24 *Gleß*, JR 2008, 317, 322 m.w.N.

25 BGHSt 34, 334; BGHSt. 51, 202.

26 BGHSt 34, 334, 343; 37, 30, 32 f.; *Gleß*, JR 2008, 317, 323.

27 *Gleß*, JR 2008, 317, 324 f.

28 *Jahn*, 67. DJT (2008) C 118; *Gleß*, JR 2008, 317, 320.

29 BGH HRRS 2007 Nr. 704.

30 So auch *Nack*, in: KK 5. Aufl. § 110a Rdn. 5.

31 So *Schäfer*, in: Löwe/Rosenberg, StPO 25. Aufl. § 110a Rdn. 12; *Meyer-Goßner*, StPO 49. Aufl. § 110a Rdn. 3.

Transnational Gathering of Evidence in Criminal Cases in the EU *de lege lata* and *de lege ferenda*

Dr. Arkadiusz Lach*

I. Introduction

The problem of cooperation in gathering and sharing evidence between the EU Member States is not new and has been discussed widely during the last decade.¹ The discussion touched upon the question of gathering evidence as well as the problem of admissibility of evidence gathered abroad. The aim of this paper is to shortly analyse the first aspect and to make some proposals for improving the cooperation.

II. Present Situation

The system of gathering evidence among EU Member States is still based on the Council of Europe Convention on mutual assistance in criminal matters 1959,² supplemented by its additional protocol from 1978,³ the Benelux Treaty of 1962, the Schengen Implementing Convention of 1990,⁴ and the Convention on mutual assistance between the Member States of EU from 29.05.2000,⁵ with its additional protocol from 2001.⁶ Some bilateral treaties exist as well. The Nordic agreements⁷ should also not be overlooked.

The applied mechanisms are quite old and, despite significant changes introduced by the Schengen Convention and the 2000 EU Convention, they may be regarded as not properly equipped to handle 21st century crime and accommodate the needs of developing a European Area of Freedom, Security and Justice. It still happens that the execution of requests takes several months or even longer or that a request “disappears” without any answer from the requested state for months or even permanently. This is why a new model has been proposed, based on the principle of mutual recognition. Till now, three main instruments have been introduced and implemented:

(1) The most significant one was to be the Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.⁸ Unfortunately this framework decision was implemented with significant delays and has not been promoted sufficiently as it is in the shadow of the EAW. Perhaps this is why freezing orders are quite rarely issued in practice.

(2) The system of obtaining data from criminal records has

also been modified in recent years by introducing the Council framework decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of criminal record information.⁹

(3) In addition, when the crime has a transnational character or there are two or more interconnected investigations in different countries, the possibility exists to create a joint investigation team (JIT).¹⁰

Those instruments were supplemented last year by the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters¹¹ which entered into force on 19.1.2009 and is to be implemented by 19.1.2011.

III. European Evidence Warrant

The European Evidence Warrant will be the most important instrument in the field of evidence gathering based on the principle of mutual recognition in the next years. Work on this instrument was not easy as the proposal was submitted in 2003,¹² the general approach was agreed in 2006¹³ and the framework decision finally adopted in 2008. The EEW is to cover objects, documents, and data specified therein.¹⁴ It is *not* designed to handle the information or procedures listed in Article 4 (2), namely:

(a) to conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts, or any other party;¹⁵

(b) to carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;

(c) to obtain information in real-time, such as through the interception of communications, covert surveillance, or the monitoring of bank accounts;¹⁶

(d) to conduct an analysis of existing objects, documents, or data; and

(e) to obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

Some of these excluded categories are to be regulated later, and the adoption of such an instrument seems to be a far more onerous task than the implementation of the EEW, especially in case of oral evidence, where the differences between the Member States are most visible.

Generally, the EEW may be issued with a view to obtaining objects, documents, or data falling within paragraph 2 where the objects, documents, or data are already in possession of the executing authority prior to the issuing of the warrant (Art. 4 (4)).

It is therefore visible that the scope of the EEW is limited. Moreover, it may happen that the judicial authority would need evidence both within and outside the scope of the EEW. In such a situation, it would be possible to forward one traditional mutual legal assistance request instead of sending both a MLA and a EEW (Art. 21 (3)). Bearing in mind that such complex requests are sent quite often, this could diminish the significance of the EEW. Beside that it will be possible to send a traditional MLA request when the issuing authority considers in the specific case that this would facilitate cooperation with the executing State (Art. 21 (3)). This provision might be attractive for authorities used to the MLA model.

IV. Proposals

The author is not against the concept of the European Evidence Warrant, but other solutions besides the EEW can surely be discussed in order to improve the efficiency and quality of gathering evidence in the EU. The author believes that one of the solutions would be to allow direct gathering of evidence on the territory of another EU country. As an example, we can take the mechanism provided a few years ago for civil proceedings in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation among the courts of the Member States in the taking of evidence in civil or commercial matters.¹⁷

According to Article 17 of the Regulation, a court may request a central body or competent authority to take evidence directly in another Member State. It can be done only on a voluntary basis without using coercive measures. Within 30 days, the requesting court is to be informed of whether the request has been accepted and, if necessary, under what conditions. The requested state may also assign its court to take part in the proceedings and ensure the proper application of the article and set out conditions. Such request may be refused only if it does not fall within the scope of the regulation, if it does not contain all of the necessary information, or if direct taking of the evidence requested is contrary to fundamental principles of law in the requested Member State.

The direct gathering of evidence would be useful, for example, if the number of victims is residing in the requested country and they are willing to give evidence voluntarily, especially in preparatory (pre-trial) proceedings when the principle of immediacy and the need for cross-examination is not an issue. The procedure of direct taking of evidence is used, for example, in intercantonal cooperation in Switzerland¹⁸ and is competitive for JITs or coordinated parallel investigations.

The most serious obstacle to implementing the direct taking of evidence is traditionally the issue of sovereignty but, considering the fact that the cooperation among the EU countries is based on the principle of mutual trust, this issue should be reconsidered as it was done in cooperation in civil matters. The direct taking of evidence abroad would accommodate the best evidence (immediacy) principle and could be regarded as an embodiment of the idea of a European Area of Freedom, Security and Justice.

The next step would be to improve direct communication among the judicial authorities. The author feels that there is some work to be done in this area in certain countries. The delays in executions of rogatory letters are considered the main problem in everyday cooperation, even more pressing than existing legal differences and obstacles.¹⁹ To speed up the proceedings abroad, deadlines should be established, and the promotion of a secure electronic communications system is of great importance.

Concerning oral evidence, some of the difficulties could be overcome via the promotion of hearings per videoconference. This means accommodating the principle of immediacy and is less expensive and more effective than inviting a witness to another Member State. The possibilities of taking oral evidence by videoconference were recently tested in the context of procedural guarantees by the European Court of Human Rights in the cases *Marcello Viola against Italy*²⁰ and *The Conde Nast Publications Ltd and Carter against the United Kingdom*.²¹ In both cases, the ECHR expressed the opinion that such means of submission of evidence are not contrary to the rights guaranteed by the European Convention.

On the contrary, the author is skeptical about teleconferences as, in practice, it is difficult for the court to assess the credibility of witnesses without seeing them. This is why the latter mechanism should only be used for the hearing of expert-witnesses, where the risk of bias and false testimony is minimal. Practice shows that joint investigation teams are seldom used and that they are not going to play a significant role in the EU cooperation in criminal matters. This could be because of insufficiently clear regulations as to the costs of functioning JITs, but it could be also argued that such a complicated mechanism

is rarely necessary. The author is convinced that the need for JITs could, in many cases, be replaced by the possibility for authorities of requesting Member State(s) to participate in procedural acts abroad. Again, we can take as an example Regulation No. 1206/2001: in Article 12 (2), it is stipulated that, if it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the procedure of the taking of evidence by the requested court. The requesting court must indicate that its representatives will be present and, where appropriate, that their participation has been requested (Art. 12 (3)). Then, the requested court determines, in accordance with Art. 10, the conditions under which the requesting Member State's representatives may participate and notifies the requesting court of the date and place of the proceedings and, where appropriate, also the conditions under which the representatives may participate. The analogous regulation in CoE Convention 1959 is "weaker" as it states that officials and interested persons may be present if the requested party consents (Art. 4).

The attempt to enhance such presence was made in the second protocol to the convention which modified Art. 4 and provides that requests for the presence of such officials or interested persons should not be refused where that presence is likely to render the execution of the request for assistance more responsive to the needs of the requesting party and is therefore likely to avoid the need for supplementary requests for assistance. Of course, the requesting judicial authority may also quote Article 4 (1) of the EU 2000 Convention according to which the "requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State." However, this provision is too general to change current practice and the attitude towards the participation of foreign authorities in the execution of requests for assistance. Looking at the above-mentioned provisions, one may notice some progress, but the provisions still provide a mere possibility to be present, not a right to be present and participate. Of course, observation of the practice shows that, in many cases, the presence of the authorities turns into active participation in procedural acts.

The provisions regarding the presence and participation of the parties in the civil cooperation are also of interest. According to Article 11 (1) of Regulation No. 1206/2001, if it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present during the taking of evidence by the requested court. The requesting court shall inform the requested court that the parties (their representatives) will be present and, where ap-

propriate, that their participation has been requested. Then, the requested court may determine the conditions of the participation and inform the parties (representatives) about the date and place of the proceedings and about the eventual conditions of participation. The requested court also has the possibility to ask the parties to be present or participate on its own if such a possibility is provided for in the law of its Member State. Concerning the participation of parties and representatives, especially the defendant and his or her council, the current situation of cooperation in criminal matters is unsatisfactory as the rights of the parties are not accorded adequate attention. This problem will undoubtedly increase with further developments in the *crime control*-oriented cooperation.

V. Conclusion

The improvement of cooperation in evidence gathering is currently becoming one of the most important topics in the third pillar area. This problem encompasses not only legal aspects, but also technical and organisational ones. This is why a wide range of experience is needed to solve these issues. Some resolutions may be found in cooperation in civil matters. According to the author, the experience of federal states and the mechanisms worked out by international criminal tribunals may also be useful. Besides that, improving of effectiveness of the existing instruments could be seen as an alternative to some of the new proposals. The delays in the implementation of framework decisions and the specific differences in implementation among the Member States call for discussion if framework decisions are indeed the best instrument of building European criminal law. Beside that, they are used for very narrow areas of harmonisation which leads to multiplication of legal instruments and unnecessary complication in the system of cross border cooperation. Therefore the reform of the sources of law in the matters regulated in the third pillar seems to be of great importance.

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1 See, for example, *J.F. Nijboer*, Methods of Investigation and Exclusion of Evidence – A Comparative and Interdisciplinary Perspective, in: F. Höpfel/B. Huber (eds.), *Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen*, Freiburg i. Br. 1999, p. 52; *J.R. Spencer*, The Concept of "European Evidence", ERA Forum, No. 2/2003; *S. Gless*, Die „Verkehrsfähigkeit von Beweisen“ im Strafverfahren, ZStW, No. 115/2003, Issue 1; *K. Macdonald*, The Reform of Procedures for Dealing with Foreign Evidence: A Practitioner's Agenda, in: P.J. Cullen (red.) *Dealing with European Evidence in Criminal Proceedings: National Practice and European Union Policy*, ERA Forum, Special Issue 2005, p. 9; *J.A.E. Vervaele* (ed.), *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, Antwerp/Oxford 2005.

2 ETS No. 030.

3 ETS No. 099. Some of the Member States also ratified the second additional protocol from 2001, ETS No. 182.

4 OJ L 239 of 22.9.2000.



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5 OJ C 197 of 12.7.2000. Many provisions of the convention are similar to those included in the second additional protocol of 2001 to the 1959 convention, ETS No. 182.

6 OJ C 326 of 21.11.2001.

7 See *R. Lahti*, Sub-Regional Co-operation in Criminal Matters: The Experience of the Nordic Countries, in: A. Eser, O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law*, Freiburg im Breisgau 1992, pp. 305–310.

8 OJ L 196 of 2.8.2003.

9 Council decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322 of 9.12.2005. The decision was repealed by the Council framework decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States, OJ L 93 of 7.4.2009.

10 See Art. 13 of the 2000 EU Convention and Council framework decision 2002/465/JHA of 13.6.2002 on joint investigation teams, OJ L 162 of 20.6.2002.

11 Council Framework Decision 2008/978/JHA of 18 December 2008 on the

European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008.

12 Commission of the European Communities, Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, 14 November 2003, COM(2003) 688 final.

13 Council of the European Union, Proposal for a Council framework decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters, 10 July 2006, 11235/06, COPEN 74.

14 At first, data from criminal records were also to be included but, in the end, obtaining this type of data was separately regulated in the above-mentioned decision.

15 See, however, the exception provided in Art. 4 (6).

16 Real time interception of communications was regulated in 2000 convention and monitoring of bank accounts in its additional protocol.

17 Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174 of 27.6.2001.

18 See *C. Siebert*, L'évolution du modèle suisse de l'entraide judiciaire et de la coopération intercantonale en matière pénale, in: J.A.E. Vervaele (ed.), *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, Antwerp/Oxford 2005, pp. 187–209.

19 See *P.J.P. Tak*, Bottlenecks in International Police and Judicial Cooperations in the EU, *European Journal of Crime, Criminal Law and Criminal Justice* 2000, vol. 8/4, pp. 352–353, and *J.R. Spencer*, National report of the United Kingdom, in: M. Delmas-Marty/J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States. Penal provisions for the protection of European Finances*, Intersentia 2001, p. 21.

20 Application No. 45106/04 Judgment of 5.10.2006.

21 Application No. 29746/05 Decision of 8.1.2008.

The Global Economic Crisis

Protecting Financial Interests in the European Union

Dr. Wolfgang Hetzer

I. Introduction

On 23 September 2009, the European Commission (Commission) adopted a major package of legislative proposals to considerably tighten up supervision of the financial sector. There were a whole series of good, and bad, reasons for taking this step. The Commission identified the following clear objectives:

- to sustainably reinforce financial stability throughout the EU by enhancing cooperation;
- to ensure that the same basic technical rules are applied and enforced consistently;
- to identify risks in the system at an early stage;
- to be able to act together far more effectively in emergency situations;

- to resolve disagreements among supervisors;
- to create a new European Systemic Risk Board (ESRB);
- to set up a European System of Financial Supervisors (ESFS), composed of national supervisors and three new European Supervisory Authorities for the banking, securities and insurance and occupational pensions sectors.

The aim is to protect European taxpayers from a repeat of the dog days of autumn 2008, when governments had to pour billions of euros into the banks. The Commission President, José Manuel Barroso, envisaged this European initiative possibly serving as an inspiration for a global system. At the time, Commissioner Charlie McCreevy took the view that the package represented rapid and robust action by the Commission

to remedy shortcomings in European financial supervision and help prevent future financial crises. He recommended that Council and Parliament adopt the package swiftly so that the new structures could begin functioning in 2010.

In May 2009, the Commission pointed out that the financial crisis had exposed major weaknesses in financial supervision, both in specific instances and in relation to the financial system as a whole. It is true that the existing supervisory arrangements proved incapable of preventing, managing, or resolving the crisis. Nationally-based supervisory models were no longer able to cope with the integrated and interconnected reality of today's European financial markets, in which many financial firms operate across borders. The crisis also exposed serious failings in the cooperation, coordination, consistency, and trust among national supervisors. As one of the two largest financial markets in the world, the European Union (EU), however, has a clear responsibility to promote global financial stability and security. It can perform this role only if it has a strong supervisory and regulatory framework itself. This framework includes a draft directive on alternative investment funds, a recommendation on executive remuneration, and proposals on capital requirements for banks. In this way, the Commission has laid the foundations for a new European financial supervisory framework.¹ While the scope of this paper does not allow for an examination in detail of the complex system, the underlying aspects of the events need to be borne in mind and analysed.

Let us start off with an example: during the current recession, the Irish economy has suffered more than the economies of most other Western industrialised nations. The Irish Minister for Finance, Brian Lenihan, believes that this is primarily due to the "shameful" behaviour of the financial sector. People are up in arms. The natural reaction, according to at least one commentator, would be to punish the banks for their chancy past dealings.² The Irish Government, however, has done the opposite. It bought up the banks' precarious loans, actually paying more for them than the banks would have received from the market at the time. This enabled the banks to clear their balance sheets and put them in a position to hand out new loans. In the situation created by the current malaise, clearly only the State can take responsibility for the dangers, basically by taking the calculated political measure of forcing taxpayers to foot the bill. This whole sorry state of affairs came about because mortgage customers and investors in the interbank sector had been wooed with a vengeance, although they neither understood nor could themselves cover the risks they were taking.

In this situation, the question of criminal law penalties may seem to be of secondary importance. Perhaps that is a good thing. In particular, the substantive law categories of criminal

law and the procedural conditions for criminal prosecutions have time and again proven inadequate at times of historic upheaval. However, it still seems worth discussing whether the endemic promptness of States to bail out major-league bankrupts should not, in fact, be moderated by slightly more drastic and painful reactions. This would be appropriate if situations attractive to criminals have developed in the economy, with an impact that damages the community on an unprecedented scale.

Such a discussion should commence with an attempt to indicate the objective causes of this catastrophic development. The term "crisis" is completely useless as a working definition. In the debate about the relevance of certain banks and companies to the system as a whole, it has, in fact, never been established whether a system in itself can still be relevant if it produces certain economic, political, and social effects. It is an open question whether the current and persisting situation is only a temporary problem, an unforeseeable deviation from the norm for which nobody can be held responsible, or a systemic development following some sort of laws of nature which cannot be controlled using traditional risk management methods. Ultimately, we can also ask whether global financial markets have transformed themselves into crime scenes, where the most intelligent and ruthless individuals rampage around, using their superior expert knowledge and considerable criminal energy to damage an incalculable number of their fellow human beings and organise the destruction of entire companies.³

The structural peculiarities of the profession, the economic prerequisites and consequences, political ambitions and anthropological givens (e.g., egotism and greed) make it difficult to draw the necessary distinction between playing fast and loose and personal blame. It follows, therefore, that this paper can make little more than a stab in the dark.

II. Risk and Consequence

While international financial markets are at the root of the current global economic crisis,⁴ the key impulses came from the central banks, with the American Federal Reserve playing a prominent role. The Federal Reserve is responsible for a policy of extremely low interest rates. In the face of a faltering economy, the 9/11 attacks in 2001, or the bursting of the dot.com bubble, the Federal Reserve had apparently only one measure available: the slashing of the central bank interest rates. As far as commercial banks were concerned, this opened up the gates to the Garden of Eden. It became child's play to obtain cheap outside capital. When handing out loans, the debtor's creditworthiness was no longer important. At the same time, institutional investors were forced to keep on the lookout for higher yield loans. Governments appear to have seen their role

as one of regulating and steering. However, they quickly found themselves in a dilemma because, as a rule, tighter regulation brings with it competitive disadvantages. This is why political leaders believed that, in relation to the necessary changes in the banking sector, they had to interpret “flexibly” or even to disregard agreements to take account of national interests. One of the key expressions of this policy in the US was the promotion of home ownership. It almost goes without saying that there was a political will to keep interest rates low for reasons of employment policy, especially as this would also have the effect of reducing the cost of the enormous US national debt.

Commercial banks must also shoulder their share of the blame for the current catastrophe. Admittedly, they were in a difficult situation at the outset and still are. They have to keep their customers’ mostly small deposits almost permanently available, while granting loans of relatively long-term duration. This transformation of the terms of loans is at the heart of a typical danger for banks, the liquidity risk, which arises where there is no possibility of short-term refinancing. Credit losses can also heighten the risk of insolvency.

The instruments that can be used to create effective systems for securing risk include:

- voluntary and statutory deposit-guarantee schemes;
- the building up of financial reserves;
- the provision of equity capital.

Risks can be prevented both by ensuring the availability of liquid funds (cash, investment-grade securities) and by providing a high level of equity capital. This, however, creates a further, classic dilemma for commercial banks. To increase returns, they have to keep the amount of cash in hand as small as possible, reduce their equity capital, buy riskier securities, and grant higher-yield and riskier loans. Banks must therefore, as a matter of course, choose between security and profit. Caution and greed can thus, in the final analysis, conflict in a manner that endangers the bank’s existence.

The securitisation and structuring of financial products seemed to offer a miracle solution to this thorny problem. Although a great deal of work was needed on the banking and mathematical aspects, it was not rocket science.⁵ It looks rather like simple sleight of hand, which depends for its success on deception, speed, and precision. A lack of powers creates a favourable environment.

Securitisation is nothing more than the transformation of non-negotiable credit into negotiable securities. Loans are effectively wrapped up in securities. The banks then sell shares in this new portfolio to institutional investors. Some people see this as a “revolutionary” innovation.⁶ Be that as it may: in the

past, banks accepted the liability, keeping loans granted on the balance sheets for the term of the loan. The increasingly common sale of these products had the following consequences:

- injection of new liquid funds;
- extension of the range of options for granting credit;
- generation of attractive charges for the investment banks involved;
- placement of loans with banks not subject to supervisory controls;
- passing on of the credit risk quickly;
- more hassle-free lending.

It was characteristic that every deal involved bundling high-risk loans with securities and correspondingly high interest rates for the buyer by way of compensation. It is debatable whether the “structuring” technique used in this situation made it possible to square the circle from the point of view of financial market theory. What definitely did happen, however, was that this strategy drew investors who should not have become involved in risky securities into the circle of buyers. A hierarchy of taking on risk changed nothing.⁷ Of a portfolio of relatively risky securities, up to 97% were transformed as if by magic into securities categorised as safe or even very safe. This enabled the banks to increase their lending capacity dramatically and changed the function of buyers of the securitised loans into indirect lenders or “conduit banks” that were not subject to any supervision.

This let the genie out of the bottle, unleashing a credit-driven boom, particularly in the USA. Imports grew while exports stagnated. The central banks of the Asian supplier countries served as financiers. The US dollars received in payment for the exports were used to buy domestic currency at fixed rates, which was then invested in American government bonds. As the boom neared its end, American banks grew increasingly generous when granting mortgages, even to very bad debtors. These transactions seemed risk-proof, as the loans were secured against the homes bought. House prices initially rose steadily and securitisation enabled the banks to remove the loans from their balance sheets. The crisis erupted at the moment US house prices collapsed. A gigantic and unique snowball system began to melt.

The limits of the dream world were also soon to be seen in Europe. The mortgage company Hypo Real Estate (HRE) was one of the first to understand what was going on. Its business model was just as simple. It was based on using short-term investments from institutional investors to buy securitised long-term loans. This worked as long as the interest on long-term loans was significantly higher than that on short-term loans. A very high leverage helped to keep returns on capital correspondingly high. In the case of HRE, €50 of outside financing

matched every euro of equity capital. Collapse was inevitable once customers realised the risks they were running and withdrew their own short-term investments.

Other banks put the icing on the risk-taking cake. They ran special purpose vehicles, which bought long-term securitised loans using short-term investments. In this way, they circumvented the law on their own capital requirements and supervision. This was how the systemic risks in the financial sector came about. No longer did anybody have any idea about the involvement of competitors in non-performing loans. Reciprocal willingness to grant credit or trade in securities all but vanished. After the collapse of Lehmann Brothers in 2008, confidence in the seemingly inexhaustible goodness of the State as an omnipresent guarantor of losses evaporated. Finally, the market for central bank reserves among commercial banks collapsed. The credit squeeze was on and the risk of a bank run seemed unavoidable. The shrinking of equity cover and the reduction in lending finally made themselves felt on the real economy, which was forced to defer investments because of financing difficulties. The continuing refusal can be seen as an act of self-preservation by banks that obviously overestimated their capacity to bear risk and thereby caused the financial crisis.

At first glance, higher capitalisation would seem to be the best option. This could create a more effective buffer against risk, but may, however, make it even more difficult for companies to gain access to fresh money. It remains to be seen whether corporate bonds can ease matters sufficiently. Up to September 2009, companies worldwide had already issued bonds worth a billion US dollars. However, German companies are also still far from covering their requirements. This is why thought is turning once again (or still) to securitising credit exposures where the risks can be passed on to investors through asset backed securities (ABS). It is feared, however, that this may breathe fresh life into the central causes of the crisis. It is too early to judge whether the retention of securitised risks on the bank's books, provided for in the EU, can win back the confidence lost in this sector. At any rate, we can now be sure that higher capital requirements are preferable to a once more thriving market in obligations-certificate loans. They would improve both risk-bearing capacity and creditworthiness.⁸ This, of course, does not resolve the question of who is ultimately responsible for this state of affairs. There are a number of possible answers to this question of blame (which is, initially, not a matter for criminal law):⁹

- globally deregulated capital markets;
- misconceptions about existing regulations;
- overly generous supplying of money by central banks;
- involvement of governments in granting loans through nationalised and semi-state-controlled banks;

- failure by owners responsible for supervision and, therefore, dereliction of duty on the part of governments;
- generation of large quantities of sub-prime mortgages as a result of a massive encouragement of home ownership (particularly in the USA);
- failure to adapt state regulations to the possibilities offered by new financial market instruments;
- exploitation of regulatory loopholes by banks acting contrary to the spirit of existing regulations;
- failure of banks' internal risk management systems;
- inappropriate remuneration schemes for bank managers;
- inadequate distribution of risks in connection with securitisation;
- lack of experience of new products resulting in inappropriate assessment of the risks involved;
- arrogance and almost blind faith in the forecasting ability of mathematical methods and highly complex estimation processes;
- underestimation of risk aversion.

To put it in a nutshell: innovations in the financial sector, gaps in regulations, and human error increased risk to the point where it caused the current crisis to explode.

It should be borne in mind, however, that the real danger started with regulated banks in supervised financial centres.¹⁰ What happened was that central banks and supervisory authorities closed their eyes out of a misplaced desire to promote their own financial centres.

While we can speculate whether the excessive risks would not have come about without the banks' unbalanced incentive schemes, the imbalance between the banks and the State, and the unbalanced distribution of incentives among countries, there can be no doubt that shareholders and bank supervisory boards will not develop more sustainable incentives as long as they can be sure that the taxpayer will bail them out when it comes to the crunch. Notwithstanding all the recent announcements, the political competition to relax supervision as much as possible will continue as long as governments put the interests of their own financial centres before those of the global community. The unqualified claim that there is no profit in market economies or financial markets without risk not only brings with it the danger that rationality will fly out the window; it also does not absolve us from the duty to develop more effective rules to manage these apparently inevitable (systemic) risks and ensure that there are suitable preventive and repressive penalties to counter negligent and wilful dereliction of duty. This is an extremely pressing task, since, in addition to their economic impact, developments in the financial markets also have a security policy dimension that has, thus far, not received the attention it deserves.¹¹

III. System and Crime

Any debate on the possible use of criminal law would quickly come to an end if the events described above could only be seen as market failure. However, this would not take account of certain circumstances, such as those relating to the role of the rating agencies. Their supposedly reliable classifications frequently helped steer the way through the complex contracts and transactions behind the securitisations. Confidence in the accuracy of their assessments even led some banks down the road to oblivion. Notwithstanding the manifest failure of the market, they appear not to have understood what risks they were letting themselves in for when concluding certain deals. At the same time, rating agencies claimed that, in connection with the structure of certain loans, they relied on information about individual loans from individual banks. The agencies' seals of approval were therefore nothing more than a rehashing of information from banks whose sole intention was to pass on a credit risk they had taken on through securitisation. The rating they arranged for was necessary for the negotiability of the loans. The market trusted that each classification was the outcome of a reliable procedure. That, however, is highly doubtful. This is why literature on the subject expresses the hope that the US law enforcement agencies will dig deeper.¹²

Even if failure on the part of the buyer to conduct checks can be viewed as negligence, checks still have to be conducted on the data used for the rating in order to establish whether the information has been faked and, if so, by whom. It is a mistake simply to assume market failures and take the view that the whole thing has nothing to do with criminal law. There is a lot to be said for the argument that confidence in ratings was abused. The plummeting of dubious classifications also needs to be explained because the agencies claimed to map risk scenarios. Clearly, large numbers of private investors bought complex financial products with no idea of the risks. However, if the individual no longer knows what he or she is doing, the gateway to all kinds of fraudulent behaviour is thrown wide open.

The prospects for criminal law are still not good. The accounting rules which go hand in hand with the internationalisation of the law on joint stock companies have created "wriggle room," particularly where companies are being bought up, which can give rise to misleading statements of profits. To a certain extent, this pulls the carpet out from underneath criminal law because what is allowed under accounting law cannot be punishable under criminal law. Moreover, the flood of rules and overcomplicated wording of some legal provisions, often to the point of incomprehensibility, provide no guidance to anyone using them in major areas of financial market criminal law. There are hardly any criminal offences which can be derived from them. Instead, legislators have chosen a technique

whereby one is referred to the requirements and prohibitions of the relevant prudential regulation from the criminal offence definition. These provisions refer to other provisions, for example, in the case of legislation on market abuse or insider trading. This has created a jungle of rules that can be seen as unconstitutional. The "excuse" that EU directives have to be transposed does not hold water. The shaping of criminal law is and remains a matter for the EU Member States. This means that, like its counterparts, the German legislature is by no means obliged to allow amendments to capital market law in order to produce a chain of criminal law references.¹³

Overall, this state of affairs gives cause for concern, not least because, of late, the integrity of financial markets has also been threatened by criminal organisations. As recently as 2007, the German Federal Financial Supervisory Authority (BaFin) produced some 750 studies on possible cases of insider trading and market manipulation, opened 103 new investigations, and, in 42 cases, reported 113 people for offences committed.¹⁴

One of the key statements made at the autumn 2008 conference of Germany's Federal Criminal Police Office (BKA), which focused on financial crime in the light of global and overall societal developments, was the suggestion that capital market crime, which stems primarily from the increasing complexity of financial products on markets lacking in transparency, must be tackled using law that is easy to manage. Moreover, instead of creating additional criminal laws, existing legislation should be simplified and references avoided. In this context, the fundamental question was raised as to the necessary and sensible degree of intervention by state law-and-order authorities in free market economy transactions. At the same time, it was seen as the State's duty to regulate suppliers and platforms and to provide information to protect citizens from risky investments in complex investment products on markets where there is no transparency.¹⁵

This is the usual official pie in the sky. It is unlikely to come about in the foreseeable future, since we do not, as yet, even have a binding definition of capital market criminal law. Unlike proprietary criminal law, capital market criminal law is not an established concept. There is no single law to provide it with coherence and ultimate codification. Criminal law provisions are scattered around in numerous laws. Nevertheless, it is considered a good idea to use "capital market criminal law" as a generic term for an area of criminal law. In this respect, it covers all the criminal law provisions directly or indirectly related to the capital market or transactions typical of the capital market.¹⁶ It goes beyond the classic provisions on fraud and embezzlement in general criminal law to include provisions on the provision of false information and misrepresentation contained in the Commercial Code (HGB), the Companies Act

(AktG) and the Limited Liability Companies Act (GmbHG). It also includes numerous other provisions in the Stock Exchange Act (BörsG) and the Securities Trading Act (WpHG) and, altogether, they cover various summary offences, creating a kind of “horizontal law.”

The effectiveness of all these provisions is undermined from the outset by the fact that, from a legal and economic point of view, the capital market is one of the most imprecise terms that is most in need of explanation for specialist and general use.¹⁷ Together with derivatives, money, and currency markets, it is an aspect of financial markets where the supply of and demand for money and negotiable securities meet. Long-term loans and share capital flow into this market, enabling companies to obtain much of the long-term financing they need for their investments. Its range of functions includes the long-term financing of public services and the accumulation of assets. For the purposes of criminal law, it is really just as useless to distinguish between the organised and the non-organised capital market, the primary and secondary market, and the official or regulated market as it is to distinguish between types of capital investment (securities, real estate) etc. or products (equity securities, leveraged securities). Criminal law experts also deem it unsuitable to develop a system based on the two main aims of regulation, i.e., safeguarding the workings of capital markets and protecting investors. These aspects are often covered by criminal law protection. Nevertheless, they differ considerably from the range of individual or collective legal interests that are or have to be protected. Especially in the field of accounting, a radical switch is taking place from the HGB, which is based on protecting creditors, to the capital market oriented system of International Accounting Standards/International Financial Reporting Standards IAS/IFRS accounting rules.

It is currently hard to see how far this change will impact on criminal law. It is, however, already clear that the same fragmentation of capital market law – aspects of which can be found in the Securities Trading Act, the Stock Exchange Act, the Securities Acquisition and Takeover Act, the Prospectus Act, the Sales Prospectus Regulation, the Securities Deposit Act, the Banking Act, the Companies Act, the Limited Liability Companies Act, and even the Commercial Code – can be found in the criminal law and non-criminal law provisions of capital market law. This is not the place to examine the consequences of the numerous EU directives on the harmonised implementation of the freedom of movement of capital, which is anchored in Community law.

However, growing practical importance is now attributed to capital market criminal law. This can be seen from the increasing number of press reports on investigations into unlawful insider trading, illegal price manipulation, balance sheet ma-

nipulation, and other activities which damage investor interests. One reason is said to be the dynamic development of the German capital market over the last 15 years, which has greatly increased the number of investment options. Moreover, the circle of investors interested in riskier investments on the capital market has also widened. The markets in question have therefore gained enormously in importance, both for the economy and for society because the State is increasingly relinquishing the provision of public social services and citizens are increasingly trying to provide for their own security by participating in capital markets. Not least, the complaints and reports from investors who have suffered undue losses show that the lack of transparent information is becoming a matter for criminal law.

Germany’s Fourth Financial Market Promotion Act of 21 June 2002 has taken the greatest steps forward so far in terms of criminal law, tightening up and reformulating provisions on insider trading and ad-hoc criminal law, as well as banning manipulation of the market. Whether Germany is strongly backing criminal law with this approach (and thereby going its own sweet way), which is definitely not required under European legislation, is doubtful. Nevertheless, in the literature on the subject, there is opposition to any extension of German capital market criminal law legitimised on the grounds of the obligation to implement European legislative proposals. By focusing on criminal law, there is said to be a danger that all ideas of seeking regulatory alternatives to criminal law solutions may be overlooked.

While it is still impossible to forecast with any accuracy what sort of changes, if any, the measures taken by the Commission will bring about, it has nevertheless been noticeable for some years now that suspicions of misconduct in connection with making public information about capital markets (scalping, etc.), are increasingly giving rise to intensive criminal investigations. This may also have to do with the work of the central capital market authority set up by BaFin on 1 July 2002, which has proven in practice to be more effective than public prosecutors in many cases and has given a significant boost to the enforcement of capital market law.¹⁸ However, this still does not answer the question of whether criminal law as it now stands, or after implementation of new kinds of prosecution strategies, can act preventively or enforce the law effectively in the face of risks that have emerged in the course of the current financial crisis.

Criminal law categories are based on illegality, guilt, and whether the act can be attributed to an individual. It is the final resort and exists on the basis of derivations from other fields of law. Criminal law fails where it is not concerned with punishing the actions of physical persons but with influenc-

ing social, economic, and political systems for the common good. If it were possible to obtain an overview of the damage caused by institutions and people, there could, however, still be a debate about changing the function of criminal law. The outcome should be a repertoire of sanctions that can meet the challenges posed by “systematised crime.” However, we will have to wait for this development – perhaps forever.

IV. Concluding Remarks

In the course of the financial crisis, the risks that had been evident for some time finally came to the fore. The extent of the damage may have been surprising, but not the fact that it came about. Even in regulated environments, the knowledge and desires of economic and political leaders did not prevent them from flirting with danger. National egotism, human weakness, inadequate laws, a lack of supervision, systemic self-enrichment, a lack of powers, public lethargy, the running down of public spirit and structural mistakes are only some of the many factors that sparked and fomented the greatest destruction of assets in recent economic history.

The main priority must be to create a new global economic system in which the major banks and irresponsible individuals are no longer in a position to bring the global economy to

the brink of collapse with their risky financial products and speculation. Clearly, a globally competitive economic system cannot exist without risk. It will always be necessary to take action in risky situations. However, steps must be taken to ensure that those whose individual or collective excesses of ambition leads them to miscalculate, exploit any lack of transparency, and conspire against the common good are brought to justice. This will not come about by isolating individuals, such as Madoff or Stanford and many others in criminal law proceedings. Such cases have nothing whatsoever to do with the genesis of the financial crisis.

The discussion about risk premium, on the other hand, might be a first tentative, albeit not decisive, step in the right direction. Failure must once again have consequences that make themselves keenly felt. Given the spirit of the age, the only way to accomplish this is through loss of assets. The perverse practice of rewarding failure must be brought to an end. The discussions in Pittsburgh in September 2009 showed clearly where the battle lines are drawn in the world of politics. It has become clear that we still have a long way to go before we reach a global risk society in the positive sense of the term. We must all begin right now. If we do not, there is no need to talk about risk management anymore and even less need to discuss criminal law. If we fail to act here and now, sooner or later, all economic, political and legal distinctions will become blurred.



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1 Cf. Communication from the Commission of 27 May 2009 on European financial supervision COM/2009/0252 final.

2 See Schulz, in: Frankfurter Allgemeine Zeitung No 217 of 18 September 2009, p. 11.

3 Cf. Hetzer, Scene of the Crime: the Financial Markets, 2003, passim. In general, on the failure of the casino economy, see: Flassbeck, Gescheitert: Warum die Politik vor der Wirtschaft kapituliert, 2009, pp. 134 ff.

4 For details of the “technical” causes of the crisis, see Wörl, Die Quittung: Die Finanzkrise und was wir daraus lernen können, 2009, pp. 25 ff.

Although today’s crisis on the financial markets came suddenly and the extent of its impact was unexpected, it did not surprise critical observers. Cf. Beerhorst, Kritische Justiz Heft 2 2009, pp. 148 ff. Further fundamental criticism can also be found in Scherhorn, Geld soll dienen, nicht herrschen. Die aufhaltsame Expansion des Finanzkapitals, 2009, pp. 28 ff.

5 On the failure of mathematisation in the economy, see Heidenreich/Heidenreich, Mehr Geld, 2008, pp. 25 ff.

6 For the following arguments, see the extremely helpful analysis in Beck/Wiener, APuZ 20/2009, 11 May 2009, p. 9.

7 For further details, see Beck/Wiener, op. cit.

8 See Frühauf, Frankfurter Allgemeine Zeitung No. 218 of 19 September 2009, p. 11. See also Schieritz, Die Zeit No. 39 of 17 September 2009, p. 34.

9 Beck/Wiener, op. cit., pp. 11-12.

10 For details on the forms of regulation, see Legnaro, Privatisierung und Korruption: Zur Kriminologie von Globalisierung, Neoliberalismus und Finanzkrise, 2009, pp. 44 ff.

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12 Schröder, Kriminalistik 2009, pp. 12-13.

13 On this subject, see, in general, Schröder, op. cit., pp. 12–15.

14 Büchler/Brisach, Kriminalistik 2009, pp. 4, 9.

15 Büchler/Brisach, op. cit., pp. 10, 11. For more details on the regulatory state in the age of globalisation, see Lütz, Der Staat und die Globalisierung von Finanzmärkten, 2002, pp. 19 ff. On the “State of managers,” see Bruhn, Raubzug der Manager oder die Zerstörung des Sozialstaates, 2005, pp. 135 ff.

16 See Tiedemann, Wirtschaftsstrafrecht, 2nd edit. 2008, pp. 127 ff.

17 On this subject, see Sorgenfrei, Park (eds.), Kapitalmarktstrafrecht Handkommentar, 2nd edition, 2008, Part 1, Introduction, para. 1 ff.

18 The annual reports can be consulted at www.bafin.de.

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