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SUCCESSOR TO AGON

Focus: Impacts of the Stockholm Programme
Dossier particulier: Les effets du Programme de Stockholm
Schwerpunktthema: Die Auswirkungen des Stockholmer Programms

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Editorial

Dear Readers,

Ten years ago, the European Council met in Tampere to adopt the first multiannual programme for the area of freedom, security and justice. On 11 December 2009, the European Council, building on the achievements of the Tampere Programme and its follow-up, the Hague Programme, adopted a new programme for the period 2010–2014 known as the Stockholm Programme. Getting the programme in place was one of the main priorities for the Swedish Presidency, and I am very pleased by the fact that this issue of the eucrim journal will be dedicated to the Stockholm Programme.

Significant progress has already been achieved. Internal border controls have been removed in the Schengen area and external borders of the EU are now managed in a more coherent manner. Through the development of the Global Approach to Migration, the external dimension of the EU's migration policy has begun to focus on dialogue and partnerships with third countries. European agencies such as Europol, Eurojust and Frontex have reached operational maturity. Cooperation in civil law is facilitating the everyday life of citizens, and law enforcement cooperation provides for enhanced security.

The programme enables the Union and its Member States to build on previous achievements and meet future challenges by taking advantage of the opportunities presented by the Lisbon Treaty. The priority for the coming years should be the interests and needs of citizens and other persons for whom the EU has a responsibility. The challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law and international protection rules are coherent and mutually reinforcing. In summary, the following main priorities deserve special mention:

Promoting citizenship and fundamental rights: The rapid accession of the EU to the European Convention on Human Rights is of key importance. The protection of the rights of victims and the rights of suspected and accused persons in criminal proceedings should be strengthened. A comprehensive strategy on data protection is needed.

A Europe of law and justice: Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union, i.e. by eliminating barriers to the recognition of legal decisions in other Member States. Training and cooperation among public professionals should be improved in order to increase mutual trust.

A Europe that protects: An internal security strategy should be developed to further improve security in the EU and to tackle organised crime, terrorism and other threats. The need for coherence and consolidation in information management is stressed. A coherent approach against trafficking in human beings is needed, and cooperation with third countries is crucial.

Beatrice Ask

Access to Europe in a globalised world: Access to Europe for persons recognised as having a legitimate interest in entering EU territory has to be made more effective and efficient. At the same time, the Union must guarantee security for its citizens.

A Europe of responsibility, solidarity and partnership in migration and asylum matters: The development of a forward-looking and comprehensive European migration policy based on solidarity and responsibility, remains a key policy objective for the EU. Well-managed migration can be beneficial to all stakeholders. The European Pact on Immigration and Asylum provides a clear basis for further development in this field. The objective of establishing a common asylum system in 2012 remains in place, and people in need of protection must be ensured access to legally safe and efficient asylum procedures.

The role of Europe in a globalised world: The external dimension is essential to addressing the key challenges and in providing greater opportunities for EU citizens to work and do business with countries across the world.

As a first step, the Spanish Presidency will adopt an Action Plan for the implementation of the Stockholm Programme and I am looking forward to negotiations on concrete measures to fulfil its objectives.

Beatrice Ask
Minister of Justice, Sweden

In Memoriam Franz-Hermann Brüner

Am 9. Januar 2010 ist Franz-Hermann Brüner, der Direktor des Europäischen Amtes für Betrugsbekämpfung (OLAF), in München verstorben. Er war als OLAF-Direktor seit März 2000 Generaldirektor der EU-Kommission und leitete das Amt während der ersten zehn Jahre seines Bestehens. Er war Träger verschiedener Orden, unter anderem der Medaille für besondere Verdienste um Bayern in einem vereinten Europa und des Großen Goldenen Ehrenzeichens mit Stern für Verdienste um die Republik Österreich.

Franz-Hermann Brüner, Director of the European Anti-Fraud Office (OLAF), sadly passed away in Munich on 9 January 2010. As Director of OLAF, he was a Director-General in the European Commission from March 2000 and head of the Office for the first ten years of its existence. He was the recipient of numerous distinctions, including the medal for special services to Bavaria in a united Europe as well as the Grand Decoration of Honour in Gold with Star for Services to the Republic of Austria.

Geboren am 14. September 1945 in Bad Nauheim, absolvierte er nach einer Ausbildung zum Groß- und Außenhandelskaufmann sein Jurastudium und die daran anschließende Vorbereitungszeit in München, ehe er 1976 in den Dienst der bayerischen Justiz trat. Von Hause aus Praktiker, erwarb er sich in den 1980er und 1990er Jahren Berufserfahrung in der Justiz, vornehmlich als Staatsanwalt und Richter in Strafsachen. Die dabei gewonnenen Erkenntnisse konnte er bei seinen Tätigkeiten im Bundesministerium für Justiz in Bonn (1983–1986) und später als Referatsleiter im Justizministerium in Sachsen (1993–1995) einbringen und so bereits in dieser Zeit Theorie und Praxis nutzbringend verbinden.

Franz-Hermann Brüner was born on 14 September 1945 in Bad Nauheim, Germany. After professional training as a management assistant in wholesale and foreign trade, he completed his law degree and preparatory legal training in Munich before joining the Bavarian judiciary in 1976. A practitioner by nature, he gained professional experience in the courts in the 1980s and 1990s, especially as an investigating and trial judge in criminal cases. He was able to apply the knowledge he gained during this time in his work at the Federal Ministry of Justice in Bonn (1983–1986) and later as a department head in the Ministry of Justice in Saxony (1993–1995) – at all times combining theory and practice to good effect.

Nach seiner Ernennung zum Oberstaatsanwalt war er Anfang der 1990er Jahre zunächst beim Kammergericht in Berlin zur Aufarbeitung der SED-Regierungskriminalität mit der Vorbereitung der Anklage gegen Erich Honecker befasst und hatte dabei in vielerlei Hinsicht juristisches Neuland betreten, ehe er (1996–1998) mit dem Aufbau eines der ersten in Deutschland errichteten Spezialdezernate zur Bekämpfung von Korruptionskriminalität bei der Staatsanwaltschaft in München seinen Pioniergeist erneut unter Beweis stellte. Dort betrieb er erfolgreich die Ermittlung und Anklage in mehreren umfangreichen Fällen von Betrug und Bestechung im öffentlichen Auftragswesen bei der Vergabe von Großbauvorhaben.

In the early 1990s, following his appointment as a senior public prosecutor, he was involved – initially at the Court of Appeal in Berlin – in dealing with cases against the former SED (Socialist Unity Party) government, especially the preparation of charges against Erich Honecker, and was in many respects breaking new ground in legal terms. He then went on to once again demonstrate his keen legal skills at the Public Prosecutor's Office in Munich (1996–1998), with the creation of one of the first specialised anti-corruption units in Germany. There, he conducted successful investigations and prosecutions in a number of large-scale cases of fraud and corruption involving major construction projects in the public procurement sector.

Stets bereit, neue Herausforderungen anzunehmen, war er dann von 1998 bis 2000 als Leiter der Betrugsbekämpfungseinheit beim Hohen Repräsentanten in Bosnien-Herzegowina mit der Reform des dortigen Strafgesetzbuchs befasst, bevor er als Leiter von OLAF zur EU-Kommission nach Brüssel ging.

Franz-Hermann Brüner wurde nach Schaffung des Amtes OLAF im Jahr 1999 von der EU-Kommission im Einvernehmen mit dem Europäischen Parlament und dem Rat der Europäischen Union zum ersten Direktor von OLAF ernannt und 2006 für eine zweite Amtszeit bestätigt.

Seine Ernennung folgte der insbesondere vom EP aufgestellten Forderung nach konsequenterer, wenn notwendig auch justizieller Verfolgung von Betrügereien und Korruptionsfällen, die die europäischen Finanzinteressen und das Ansehen der EU-Organe schädigen. Dieser Ansatz erforderte die Zuhilfenahme der Mittel des Strafrechts und der Zusammenarbeit mit der Justiz der Mitgliedstaaten. Heute gefestigt, war dieser Ansatz seinerzeit vollkommen neu und unterstellte die Tätigkeit der Betrugsbekämpfung rechtsstaatlichen Grundsätzen, anstatt sie der Finanzkontrolle oder den Sicherheitsdiensten zu überlassen. Die ihm gestellte Aufgabe, aus dem weitgehend diskreditierten Vorläufer eine schlagkräftige, allseits respektierte Behörde zu schaffen, war nicht leicht, aber er hat sich ihr mit Beharrlichkeit gestellt und es ist ihm im Ergebnis vollauf gelungen.

Dem Auftrag des Gesetzgebers verpflichtet und als überzeugter Europäer handelnd, sah Herr Brüner seine Verantwortung als Hüter des Rechtsrahmens der EU zum Schutz der Finanzinteressen gegen Betrug nicht zuletzt auch in der Wahrung der eigenverantwortlichen und unabhängigen Untersuchungsaufgabe des Amtes in vollständiger Weisungsungebundenheit von Mitgliedstaaten, EU-Kommission, Parlament und Rat. Diese Verantwortung war für ihn zugleich ein Gebot strikter Disziplin und nicht eine Einladung zu Selbstherrlichkeit. Er fühlte sich in der Pflicht zu angemessener Kommunikation nach allen Seiten. Von den besonderen Befugnissen des Amtes wusste er mit Augenmaß und Gespür für die interinstitutionellen Zusammenhänge auf europäischer Ebene Gebrauch zu machen und so Vertrauen für dessen Tätigkeit zu schaffen.

Der Grenzen des Strafrechts bewusst, ging sein Verständnis von der Rolle des Amtes OLAF über die Ermittlungsfunktion weit hinaus. Gezielt stärkte er dessen multidisziplinären Charakter. Die zentrale Bedeutung des „Humankapitals“ für die Wahrnehmung seines Auftrags vor Augen, wusste er dazu ein Personal von knapp 500 Mitarbeitern völlig unterschiedlicher Ausbildung, Herkunft und beruflicher Erfahrung für das gemeinsame Ziel zusammenzubinden und in besonders kollegialer Weise zu führen.

Always willing to take on new challenges, he accepted a position as head of the Anti-Fraud Unit at the Office of the High Representative in Bosnia-Herzegovina, where he helped lead the reform of that country’s penal code from 1998 to 2000.

Following the creation of OLAF in 1999, the European Commission in Brussels, in agreement with the European Parliament and the Council of the European Union, appointed Franz-Hermann Brüner as the first Director of OLAF in 2000. He was confirmed in the post for a second term in 2006.

His appointment followed the demand, from the European Parliament in particular, for more consistent action, if necessary in the courts, against the fraud and corruption damaging the EU’s financial interests and reputation. This required the use of legal instruments of criminal law and cooperation with the Member States’ prosecutors and investigating judges. Although well established today, that approach was completely new at the time in so far as the activity of combating fraud was based on the rule of law, rather than being left to auditing or the internal security services. The task of creating a powerful and universally respected agency from OLAF’s largely discredited predecessor was not easy, but Franz-Hermann Brüner persevered, and the result was utterly successful.

Bound by the legislators’ mandate and as a dedicated European, Mr. Brüner saw it as his responsibility to act as custodian of the EU’s legal framework and to protect its financial interests against fraud, not least by preserving the Office’s autonomous and independent investigative function while remaining untethered by any instructions from Member States, the European Commission, Parliament, and the Council. For him, this responsibility meant a call for stricter discipline, not an invitation to high-handedness. He felt that he was under an obligation to communicate commensurately with all parties. He was able to wield the special powers of the Office at the European level with an awareness of and feeling for interinstitutional relationships and, in this way, to build trust in OLAF’s work.

Conscious as he was of the limitations of criminal law, Mr. Brüner saw the role of the Anti-Fraud Office as extending far beyond its investigative function. He deliberately set out to strengthen its multidisciplinary character. He was keenly aware of the central importance of “human resources” in achieving his mission and was able to unite a staff of almost 500 employees with completely different educational, cultural, and professional backgrounds behind a common goal, thus leading them in a way that promoted a particularly good working atmosphere.

For Mr. Brüner, fraud prevention was just as vital a part of the Office’s activities as cooperation with the budget-management

Betrugspräventive Aufgaben waren für ihn ebenso wichtige Bestandteile der Tätigkeit des Amtes wie die Zusammenarbeit mit den die Mittel verwaltenden Behörden in Kommission und Mitgliedstaaten. Er verstand seine Aufgabe darin, Missstände zu beseitigen, anstatt sie nur anzuprangern. Sein Interesse galt nicht dem skandalträchtigen Einzelfall, sondern dem tiefer liegenden Systemversagen. Die Untersuchungen und Ermittlungen des Amtes waren für ihn kein Selbstzweck, sondern ein Mittel zur Fehlerbeseitigung und Fehlervermeidung. Diesem Ansatz blieb er auch bei der EU-Osterweiterung treu, wo sich OLAF unter seiner Ägide nicht darauf beschränkte, nachträglich Missstände aufzudecken und anzuprangern, vielmehr wirkte er konstruktiv-präventiv, um durch geeignete gesetzgeberische und organisatorische Maßnahmen von vorneherein die korrekte Verwendung der EU-Haushaltsmittel zu gewährleisten. Dieses Bestreben war nicht auf OLAF und Europa beschränkt, er suchte dazu die Zusammenarbeit mit der Weltbank, den Vereinten Nationen (UNODC, UNCAC-Konferenz) oder anderen internationalen Foren (OECD) und Nichtregierungsorganisationen (Transparency International). Dort brachte Herr Brüner seine Erfahrung und sein hohes Ansehen ein, um die Entwicklung neuer Ansätze der internationalen Anti-Betrugs- und Korruptions-Zusammenarbeit voranzutreiben. Dank seiner hervorragenden Fähigkeiten als unermüdlicher Netzwerker wurde er zu einem der Pioniere der internationalen Zusammenarbeit auch auf diesem Gebiet. So übte er den Vorsitz in den verschiedensten internationalen Gremien aus, insbesondere bei der von ihm mitinitiierten internationalen Betrugsermittler-Konferenz. Sein Hauptaugenmerk galt dort der Definition von möglichst einheitlichen Verfahrensstandards für die bei den verschiedenen internationalen Organisationen existierenden Betrugsermittlungseinheiten. Die Lücke, die er gerade dort hinterlässt, wird nicht leicht zu schließen sein.

Als Praktiker war er stets problemgerechten Ansätzen verpflichtet und suchte die Lösungen fallbezogen mit den vorhandenen rechtlichen Möglichkeiten zu erreichen. Das hinderte ihn aber nicht daran, für die Beibehaltung eines die EU-Betrugsbekämpfungs-Gesetzgebung vorbereitenden Auftrags des Amtes als Dienststelle der Kommission einzutreten. Außerdem betätigte er sich über die Jahre hinweg als Herausgeber und Autor einschlägiger Fachpublikationen auf dem Gebiet des Strafrechts, wie etwa der Neuen Zeitschrift für Strafrecht (NStZ), aber auch als Kuratoriumsmitglied des Max-Planck-Instituts für ausländisches und internationales Strafrecht in Freiburg, und trug bei zur Förderung der Forschung für die Weiterentwicklung der Instrumente der internationalen und europäischen Strafrechtszusammenarbeit.

Von liberaler Geisteshaltung geprägt, war der Freiheitsgedanke für Franz-Hermann Brüner von elementarer Bedeutung. Prinzipienfest sah er seine Rolle als Leiter der Betrugsbekämp-

authorities in the Commission and in the Member States. He considered it his task to rectify abuses rather than denounce them. He was not interested in individual cases with the potential for scandal but in the underlying system failures; he did not regard the Office's investigations and enquiries as ends in themselves but as a means of detecting and preventing errors. He continued to stand by this approach when the EU expanded eastwards, when OLAF, under his guidance, did not confine itself to uncovering abuses and denouncing them after the fact but adopted a constructive approach to prevention in order to ensure, from the outset and by means of appropriate legislative and organisational measures, that EU funds were used correctly. His efforts were not limited to OLAF and Europe. He also sought the cooperation of the World Bank, the United Nations (UNODC, UNCAC, etc.), and other international forums (OECD) and non-governmental organisations (Transparency International, for example). Mr. Brüner effectively brought his experience and reputation to the negotiating table in order to develop new initiatives in international cooperation to fight fraud and corruption. Thanks to his outstanding ability as a tireless networker, he became one of the pioneers of international cooperation in this field, too. He was president of a wide variety of international bodies, not least the International Conference of Fraud Investigators, of which he was a co-founder. He focused on developing the best harmonised procedural standards possible for the fraud-investigation units of the various international organisations. The loss of his leadership will be particularly felt in this area.

As someone with a wealth of practical experience, in his problem-solving approach, Mr. Brüner was committed to finding individual, case-related solutions, based on legal means, in order to do justice to a problem. However, this did not prevent him from speaking out in favour of maintaining a role for the Office, as a Commission department, in preparing EU anti-fraud legislation. In addition, he was active over the years as a publisher and author of specialist publications in the field of criminal law, such as the *Neue Zeitschrift für Strafrecht (NStZ)*; he was also a member of the board of trustees of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, and he contributed to the promotion of criminal law research to further the development of legal instruments for international and European cooperation in criminal matters.

Franz-Hermann Brüner was a representative of liberal thought and for him freedom was of fundamental importance. A man of firm principles, in the face of all hostility, he saw his role of heading the anti-fraud agency not only in terms of a duty to safeguard human rights and fundamental freedoms in the investigation process, but also as one of maintaining an approach that pays tribute to the proportionality principle, by remaining

fungsbehörde entgegen allen Anfeindungen durchaus sowohl im Kontext der Verpflichtung zur Wahrung der Menschenrechte und Grundfreiheiten im Untersuchungsverfahren als auch zur Einhaltung eines dem Verhältnismäßigkeitsgedanken Tribut zollenden unbürokratischen und Maß haltenden Ansatzes, der auch die Notwendigkeit eines zügigen Abschlusses der Verfahren berücksichtigt. Die Ausbeutung der Tätigkeit von OLAF für euroskeptischen Skandaljournalismus war ihm zuwider. Er wollte den Wandel der finanzverwalterischen Kultur der EU-Einrichtungen von innen fördern, wobei er wusste, dass dies kein schmerzfreier Prozess sein konnte. Der Rückblick auf seine Amtszeit, in der Wesentliches auf den Weg gebracht worden ist, gibt ihm Recht. Eines seiner letzten wichtigen Verdienste war die Reform der von ihm eingeführten internen operativen Verfahrensregeln, um die Qualitätskontrolle und Effizienz des Amtes zu stärken.

Franz-Hermann Brüner ist viel zu früh von uns gegangen – insbesondere von uns OLAF-Mitarbeitern, denen er so viel gegeben hat. Obwohl er ein gut bestelltes Haus hinterlässt, hat er sein zweites Mandat als Direktor von OLAF nicht mehr ganz zu Ende führen können. Oft genug mit der Erfahrung konfrontiert, dass die funktionale Unabhängigkeit, die ihm sein Amt verlieh, ein hohes Maß allein zu tragender Missliebigkeiten bedeutete, scheute er vor keiner Last zurück und trat jeder Herausforderung entgegen. Nicht Prestige war ihm wichtig, sondern Wirkung und Ergebnis. Manche mochten ihn auf Anhieb unterschätzen, weil er Selbstgewissheit aus einer Bescheidenheit und einem aufrechten Pflichtgefühl schöpfte, die nicht immer der Etikette entsprachen. Es ist uns aufgegeben, sein Erbe fortzusetzen, denn nur so kann das Amt seiner Rolle als Garant für ein korrektes Finanzgebaren auf europäischer Ebene gerecht werden und dazu beitragen, dass die Bürger und Steuerzahler Europas das Einigungswerk auch in der Zukunft unterstützen.

unbureaucratic and striking the right balance, and also takes account of the need to bring the investigation to a swift conclusion. He was strong in his opposition to the exploitation of OLAF's activities by the euro-sceptic sensationalist press. He wanted to bring about a change in the financial-management culture of the EU institutions from within, although he knew that it would not be a painless procedure. A look back on his terms in office, during which the groundwork for reform was laid, shows that he was right. One of his last major contributions was the reform of the internal operating procedures that he himself had introduced, in order to strengthen the Office's quality control and efficiency.

Franz-Hermann Brüner was taken from us far too soon – especially for those of us who worked with him at OLAF and to whom he gave so much. Despite being unable to complete his second term of office as head of OLAF, he left the Office in good order. Although he was confronted often enough with the knowledge that the functional independence his office gave him also brought with it a high degree of unpopularity that he had to bear largely alone, he never shrank from any burden and considered no task to be beneath him. What mattered to him was not prestige, but effectiveness and results. Many people may well have underestimated him at first glance because his self-assurance was born of modesty and a genuine sense of duty that was not always in line with popular expectations. Our task now is to continue his legacy, as this is the only way in which OLAF can fulfil its role as guarantor of proper financial conduct at the European level and play its part in ensuring that the European citizen and taxpayer continues to support the European integration process in the future.

Lothar Kuhl and Harald Spitzer

European Union

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

Foundations

The Stockholm Programme

Adoption of the Stockholm Programme

Reaffirming its determination to continue the development of an area of freedom, security and justice, serving and protecting EU citizens and those living in this area, the European Council adopted its new programme for 2010–2014: the Stockholm Programme. After debates by the Ministers of Home Affairs and the Ministers of Justice on 30 November and 1 December 2009, the European Council officially adopted the Stockholm Programme during its meeting of 10 and 11 December 2009.

The Programme is the successor to the Hague Programme and sets out the priorities for the EU in developing an area of freedom, security and justice for the next five years.

The text was first presented by the Swedish Presidency on 16 October 2009 and has been redrafted several times since then (see also eucrim 3/2009, pp. 62-63), in order to reach a consensus. The Programme's subtitle is "An open and secure Europe serving and protecting the citizen."

The priorities set out in the text are divided into six areas:

- Promotion of citizenship and fundamental rights: this means that the area of freedom, security and justice must above all be an area in which fundamental rights are protected. This includes the core values set out in the Charter of Fundamental Rights and the European Convention on Human Rights. One important aspect in this area for example is the rights of suspected and accused persons in criminal proceedings. A Roadmap on procedural rights is discussed further in this issue of eucrim and with regard to the right to interpretation and translation in criminal proceedings a proposal is being discussed by the Council (see also eucrim 3/2009, p. 72). Concerning the right to privacy of the individual in today's information society, the European Council for example invites the Commission to evaluate the existing data protection instruments and to present initiatives for improvement.
- A Europe of law and justice: in the Hague Programme, mutual trust was the prerequisite for the principle of mutual recognition to be enforced in the EU Member States. In the current Programme, furthering the implementation of the principle of mutual recognition in criminal law and civil law is one of the main objectives. For example the European Protection Order (reported on in this issue) ensures that the special protection measures for victims go beyond the borders of the Member State that issued them. Also, the European Council invites the Commission to propose a comprehensive system that should replace all mutual recognition instruments, including the European Evidence Warrant (see the European Investigation Order, reported on in this issue). The European judicial area should also allow citizens to assert their rights anywhere in the EU and access to justice should be facilitated.
- A Europe that protects: an internal security strategy strengthening cooperation in law enforcement, border management, civil protection, disaster management as well as judicial cooperation in criminal matters should make Europe more secure. Trafficking in human beings has been given particular attention in the Programme. The European Council calls for new legislation on combating trafficking and protecting victims as well as enhanced cooperation with Europol, Eurojust and specific third states.
- Access to Europe in a globalised world – the internal dimension: accessing EU territory should be made more effective and efficient for persons who are recognised as having a legitimate interest in entering the EU. This should go hand in hand with an integrated border management and with visa policies in order to ensure security. The Commission is inter alia invited to make propos-

* If not stated otherwise, the news reported in the following sections cover the period November 2009 – January 2010

als on clarifying the mandate and role of Frontex and to strengthen its efforts to ensure the principle of visa reciprocity.

■ A Europe of responsibility, solidarity, and partnership in migration and asylum matters: the key policy objective for the EU is still to develop a comprehensive migration policy, based on solidarity and responsibility. The European Pact on Immigration and Asylum (see also eucrim 1-2/2008, p. 10) – including the objective to have a common asylum system by 2012 – that was adopted by the European Council of 15-16 October 2008, serves as a solid basis for developing this policy.

■ The role of Europe in a globalised world – the external dimension: an implementation of the objectives of the Stockholm Programme cannot be successful without the external dimension of the EU's policy in the area of freedom, security and justice. This policy should also be integrated into the general policies of the EU and should be coherent with all other aspects of the EU's foreign policy. The European Council recommends that the conclusion of agreements with third states be used more frequently while taking account of multilateral mechanisms.

The European Council has invited the Commission to present an Action Plan for implementing the Stockholm Programme, to be adopted at the latest in June 2010, and to submit a midterm review before June 2012. (EDB)

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Reform of the European Union

Consequences of the Lisbon Treaty on Decision-Making Procedures

On 2 December 2009, the European Commission presented a Communication to the European Parliament (EP) and the Council on the Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures. This Communication has five annexes that include lists of proposals that fall under a new procedure or require a new legal basis. Annex 2 is dedicated to the proposals that were presented by the Commission under Title VI of the Treaty on the European Union (TEU).

For all proposals included in Annex 2, it is not possible to replace the current legal basis with a new one, given the nature and scope of these acts. These are the proposals that were presented by the Commission under Title VI of the TEU and that from now on fall within the scope of the new Title V "Area of freedom, security and justice" of the Treaty on the Functioning of the European Union (TFEU). These proposals will therefore be formally withdrawn and will, for the most part and as soon as possible, be replaced with new proposals that will take account of the new framework of the Treaty of Lisbon.

Annex 2 includes inter alia the proposals on a Framework Decision (FD) on certain procedural rights in criminal proceedings; an FD on the exchange of information under the principle of availability; an FD on combating the sexual abuse and sexual exploitation of children as well as child pornography; and an FD on preventing and combating trafficking in human beings and protecting victims.

For the proposals included in the list of Annex 2, the EP will receive the chance to be genuinely involved in the decision-making process and to rewrite this legislation where necessary. (EDB)

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Institutions

Council

Standing Committee on Internal Security (COSI)

One of the results of the re-structured organisation of police and judicial cooperation under the Lisbon Treaty (Article 71 Treaty on the Functioning of the EU (TFEU)) is the creation of a new Council Standing Committee on Internal Security (COSI).

COSI's main objective will be to facilitate, promote, and strengthen the coordination of operational actions between EU Member States in the field of internal security without, however, being involved in conducting operations.

Its members will be based at and sent from national ministries.

The Committee's coordination role will mainly concern police and customs cooperation, external border protection, and judicial cooperation in criminal matters relevant to operational cooperation in the field of internal security. COSI will also be responsible for evaluating the general direction and efficiency of operational cooperation in order to identify possible shortcomings and adopt recommendations in order to address them. Under Article 222 TFEU (the so-called "solidarity clause"), COSI is furthermore mandated to assist the Council in helping a Member State in case of a terrorist attack or natural or man-made disaster. However, the Committee will neither be involved in preparing legislative acts nor in conducting operations. As to legislative acts, the Permanent Representatives Committee (COREPER) – supported by the different Council working groups – remains solely responsible for their preparation.

Representatives from other relevant bodies, such as Eurojust, Europol, and Frontex, can be invited to the Committee's meetings.

The Committee is asked to regularly report to the Council on its activities (the Council will, in turn, inform the European and national Parliaments). (CR)

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CATS

At its meeting on 15 December 2009, the coordinating Committee in the area of police and judicial cooperation in criminal matters (former "Article 36 Committee", referring to Article 36 TEU), com-

monly known as CATS (Committee of Article Thirty Six), decided to continue using this abbreviation as its name under the Lisbon Treaty.

CATS is a Council working group made up of senior officials. Its role is to coordinate the competent working groups in the field of police and judicial cooperation and to prepare the relevant work of the Permanent Representatives Committee (COREPER). (CR)

➤eucrim ID=0904004

European Parliament

Agreements with Third States Require Consent of European Parliament

With the entry into force of the Lisbon treaty on 1 December 2009, problems arise regarding eight agreements with third states based on Articles 24 and 38 of the Treaty on the EU (TEU) which have been signed but not yet concluded. Some of these agreements are already applied provisionally, such as the agreements on the exchange of passenger name records.

Due to the Lisbon treaty, the rules for conclusion of all eight agreements have changed. They are now governed by Article 218(6) of the TFEU, which provides that "the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement." However, the Council should first obtain the consent of the European Parliament. This new rule implies a number of issues to be solved.

- First of all, it must be determined who the "negotiator" of the existing agreements is (for example the Presidency or the Council).
- Secondly, with regard to the legal basis of the agreements, the legal basis is most likely to refer to the articles related to judicial and/or police cooperation (Articles 82 and 87 TFEU). Additionally, the two agreements on the transfer of passenger name records (PNR Agreements) may have a wider legal foundation as they could also be based on the provisions related to transport (Articles 91(1)(d) and 100(2) TFEU) and Article 37 TEU on the common foreign and security policy. The Presidency is of the opinion that Articles 82 and 87 would be sufficient. With regard to the two PNR Agreements and the Agreement between the EU and the US on the processing and transfer of financial managing data, a reference to Article 16 TFEU on the right to the protection of personal data was deemed to be appropriate by the Presidency.
- Thirdly, before the entry into force of the Lisbon Treaty, Member States could declare that no agreement would be binding upon them until their constitutional proceedings had been completed (by virtue of Article 24(5) TEU that no longer exists due to the Lisbon Treaty). Concerning the eight existing agreements, the question arises as to what should be done regarding the constitutional proceedings. The solution presented by the Presidency for these specific agreements implies that the constitutional proceedings being followed by the Member States should not affect the proceedings of the Council and, in particular, the decision making of the Council that is in accordance with rules laid down in the Treaties. (EDB)

➤eucrim ID=0904005

OLAF

Cooperation with US Bureau of Alcohol, Tobacco, Firearms and Explosives

On 18 January 2010, OLAF signed a Cooperation Arrangement with the US Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a law enforcement agency within the US Department of Justice. The Arrangement sets out the basis for the working relationship between OLAF and the ATF in combating the illicit trade in tobacco products.

OLAF has a special Task Group specifically dedicated to combating trade in contraband and counterfeit cigarettes in the EU, a crime that costs billions of euros of tax and customs revenue yearly. One of the aspects of the ATF's work is also to investigate the illegal diversion of tobacco products. In so far as the illicit trade in tobacco damages the Community's financial interests, both partners agreed to provide each other with mutual support and relevant information in their activities related to this particular offence. Furthermore, they will inform one another of relevant activities and consider organising joint activities to prevent, detect and investigate the illicit trade in tobacco products. (EDB)

➤eucrim ID=0904006

Third Activity Report of OLAF Supervisory Committee

On 22 December 2009, the OLAF Supervisory Committee published its third Activity Report covering the period from June 2008 to May 2009.

The key function of the Committee is to monitor OLAF's investigative function in order to ensure that its independence is not compromised. Thus, the Committee strengthens OLAF's abilities to operate impartially and to defend itself against criticism. The Committee makes recommendations based on its monitoring function. OLAF has implemented recommendations such as the so-called "de minimis" policy. This means that minor wrongdoings can be dealt with satisfactorily by other Commission services rather than by opening an OLAF investigation. The outcome of this policy is the Manual of Operational Procedures, which according to the Committee should contain criteria to select and process "de minimis" cases.

A number of issues are still unresolved according to the Committee such as issues relating to management of the investigations, particularly with regard to the length of investigations and with regard to control systems and supervision.

One of the first conclusions of the Activity Report was that 78% of OLAF investigations have exceeded nine months

duration. Due to a lack of objective and verifiable reasons for delays, the Committee found it was unable to state whether the time taken to complete these cases was justified or not. Thus, it recommends formulating precise and accurate reasons for delays. There was also frequently a lack of reference to the expected time for the completion of investigations, which is an obligation for OLAF.

Additionally, the Committee has observed that heads of unit and directors often countersign case reports which showed misleading reasons for non-completion of cases. Thus, the Committee noted an inadequate level of supervision and control of the day-to-day management of investigations.

The Committee would like to be informed of all cases by OLAF instead of only those cases transmitted to national judicial authorities, in which a complaint of alleged abuse of fundamental rights and procedural guarantees was received.

The Committee suggests OLAF to continue to draft a practical guide in order to increase the legality, efficiency, transparency, and accountability of OLAF's operations. This new "OLAF Manual of Operational Procedures" should also include provisions on using the services of the magistrates in the Judicial and Legal Advice Unit in cases necessitating transmission to the national judicial authorities.

Finally, the Committee calls upon OLAF to make more efficient use of human resources and limit expenses (especially mission and travel expenses). Because the OLAF Director is required to follow the Commission's financial and staff regulations in the spirit of decentralised exercise of functions, he does not have full independence in budgetary and administrative arrangements. Therefore, in order to facilitate cooperation with the Commission administration the Committee recommends agreeing on internal administrative arrangements that would allow OLAF to fully develop and implement its own staff policy. (EDB)

➤eucrim ID=0904007

Europol

Entry into Force of the Council Decision Establishing Europol

On 1 January 2010, 15 years after its establishment, Europol has seen a major change in its legal nature as it is now a formal EU Agency.

Europol was originally established on the basis of a Convention, receiving its budget from the Member States. Since 1 January 2010, it is based on a Council Decision (see eucrim 1-2/2008, p. 13). As Decisions are more easily adaptable to changing circumstances and emerging political priorities than Conventions, Member States hoped to increase the agency's flexibility with this new legal basis. Changes brought by the Europol Decision include:

- An extended competence that is no longer limited to organised crime and now also covers specific forms of serious crime (e.g., murder, organised or armed robbery, swindling, and rape);
- Increased powers to collect information, such as the capability to process – under certain conditions – information and personal data from private parties and persons;
- Full and direct access to all the information available in the Europol Information System by the national units;
- The possibility to add new systems for processing personal data to already existing main systems (the information system and analysis work files);
- Three-year time-limits for storage of analytical work files and all data contained in the information system and files.
- The creation of a Data Protection Officer with independent duties and free access to all the data held by Europol and access to all its premises;
- Financing from the general EU budget;
- As a general rule, the Management Board will take its decisions with a two-thirds majority instead of unanimously;
- Strengthened accountability arrangements with the European Parliament, scrutinising activities and setting the agency's annual budget;
- The application of EU staff regulations to Europol's staff.

As a symbol of its new status, Europol has taken the opportunity to renew its corporate identity by means of, for instance, a new logo and website address and layout. (CR)

➤eucrim ID=0904008

Four Decisions on Europol Adopted

On 30 November 2009, the European Council adopted four Decisions that concern Europol, one day before the Lisbon Treaty entered into force. It was the last day that decisions could be adopted without the full involvement of the EP in the legislative process.

The EP was not pleased to see the scheduled adoption of these instruments on 30 November and asked the Council to withdraw the proposals and table new ones in six months. The Council did not concede and went ahead with its original plans to adopt the following four Decisions. (EDB)

➤eucrim ID=0904009

In addition to the above-mentioned Decision establishing Europol, four complementary Decisions entered into force on 1 January 2010.

The first Decision deals with the implementing rules on the confidentiality of information obtained by, or exchanged with, Europol.

The rules establish the security measures to be applied to all information processed by or through Europol by setting out an overview of Europol classification levels and the equivalent markings currently applied by the Member States.

According to the new regime, public information processed by or through Europol shall be subject to a basic protection level. If strictly necessary and only necessary for a time, information requiring additional security measures will be subject to one of the four Europol classification levels, notably: EU restricted; EU confidential; EU secret; and EU top secret. Each of these classification levels relates to a specific security package applied within Europol, such as differ-

ent security clearances of Europol staff accessing the information. The choice of the appropriate level is left to the Member State supplying information to Europol. Furthermore, Member States are obliged to ensure that, within their territory, Europol information receives a level of protection equivalent to the one set out by these rules.

The rules apply accordingly to information exchange with third parties with which Europol has concluded confidentiality agreements.

To ensure compliance with the rules, a Security Committee, a Security Coordinator, and Security Officers are to advise on, have responsibility for, and assist with issues relating to the security policy, including the application of a Security Manual that will set out Europol's approach to managing security. (CR)
➤eucrim ID=0904010

The second complementary Decision that entered into force on 1 January 2010 contains implementing rules for the Europol Analysis Work Files (AWFs).

The Decision is divided into three chapters:

- The first chapter contains rules on the processing of data contained in AWFs, orders for the opening of AWFs, and categories for personal data in AWFs. These categories concern, for instance, personal details, physical description, occupation, and skills, etc. Furthermore, specific regulations have been found for the storage of data of victims and persons providing information. Finally, the first chapter provides rules as regards time-limits for the examination and storage of such data as well as for association with third parties, States, and organisations to an AWF.
- The second chapter deals with the classification of AWFs that can be either general, or strategic, or operational, depending on their aim. It further contains rules on the assessment of the source and information.
- The third chapter contains rules for the use of AWFs and analysis data, such as the opening of an AWF as well as the retrieval, transmission, use, and storage of data held in an AWF. (CR)
➤eucrim ID=0904011

The third complementary Decision that entered into force on 1 January 2010 deals with the relations of Europol with EU bodies and third parties (states as well as organisations), including the exchange of personal data and classified information. It sets out the procedure for the conclusion of cooperation agreements and working arrangements with EU bodies and for cooperation agreements with third parties. Furthermore, it contains rules on the receipt of information prior to agreements, conditions for the (onward) transmission of information to EU bodies and third parties, and the responsibility for such information. Finally, it contains specific conditions for the transmission of personal data and for the receipt of information by Europol from third parties. (CR)
➤eucrim ID=0904012

Among the instruments that entered into force on 1 January 2010 is also a Council Decision that determines the list of third states and organisations with which Europol shall conclude agreements (see eucrim 3/2009, pp. 66-67).

The inclusion of a country or organisation in the list does not automatically lead to an operational agreement with Europol. The list merely contains those countries and organisations with which Europol – according to its Management Board and the Council – shall conclude agreements preferably prior to the conclusion of agreements with other third states or organisations. (CR)
➤eucrim ID=0904013

Enhanced Cooperation with Interpol

Europol and Interpol have agreed to further enhance their cooperation. In a meeting between the Director of Europol, Rob Wainwright, and Interpol's Secretary General, Ronald K. Noble, an agreement on a new joint Interpol-Europol global police initiative to combat the new threats of piracy in the Gulf of Aden could be reached. Additionally, both agencies agreed to encourage their Member States to use Interpol as a central database for collecting information on suspected pirates.

Furthermore, the heads of the two agencies agreed to elaborate a joint communication strategy and to continue the successful exchange programme of experts. (CR)
➤eucrim ID=0904014

Eurojust

President Resigns

In December 2009, the President of the College of Eurojust and National Member for Portugal, Mr. José Luís Lopes da Mota, handed in his resignation. According to the Eurojust Decision and its Rules of Procedure of the College, the Vice-Presidents, in the order of longest serving National Member, substitute the President in the event of absence or vacancy. Therefore, Ms. Michèle Coninsx, Vice-President and National Member for Belgium, acts as interim President until a new President is elected and approved.

On 16 February, during a special plenary meeting, the College of Eurojust elected Mr. Aled Williams, National Member of the UK, as its new President. The election must be approved by the Council of the EU by qualified majority. Until that time, Ms. Michèle Coninsx will provisionally remain Acting President. (CR)
➤eucrim ID=0904015

Italian National Member

Mr. Francesco Lo Voi has been appointed Italian National Member at Eurojust. Mr. Lo Voi took office on 4 January 2010. He replaces the former National Member, Mr. Cesare Martellino, who went into retirement in June 2008. The position Mr. Lo Voi held last before being appointed to Eurojust was Deputy General Prosecutor before the Italian Supreme Court (Corte di Cassazione). (CR)
➤eucrim ID=0904016

Memorandum of Understanding with CEPOL

On 1 January 2010, a Memorandum of Understanding between Eurojust and CEPOL (European Police College) entered into force. The purpose of the Memorandum is to define the cooperation between the parties in the field of training. For this purpose, each party consented to establish internal contact points. Both organisations agreed to cooperate in the development of training courses, to send and invite Eurojust experts to these activities, to inform each other about their relevant projects and training activities, and to cooperate in the development of course materials and common curricula for training activities in the fields relevant to both. Furthermore, Eurojust officials have received access to the open-source information stored in the CEPOL e-library database. (CR)

➤eucrim ID=0904017

Eurojust Assists in Football Bankruptcy Investigation

The former President of Salernitana Sport s.p.a. and eighteen other people are under investigation for causing the bankruptcy of the Italian football club. Rogatory letters issued for the purpose of obtaining bank records led to the discovery of money transfers for a total of 13 million euro.

Eurojust delivered crucial assistance to the Italian and Luxembourg authorities in arranging and facilitating the necessary requests for judicial assistance. (EDB)

➤eucrim ID=0904018

European Judicial Network (EJN)

33rd Plenary Meeting

On 23-24 November 2009, the EJN held its 33rd Plenary Meeting in Stockholm. The meeting was intended for the EJN's contact persons in order to give them an opportunity to meet and discuss legal and practical issues concerning international cooperation in criminal matters. The meeting was composed of presentations showing the work of the EJN contact points and the EJN's activities in the Member States. It also included workshops on the practical use of mutual legal assistance requests, the cooperation and coordination of large-scale investigations, and the European Arrest Warrant. (CR)

➤eucrim ID=0904019

Frontex

Frontex to Specialise

Following up the request expressed by the Council in its Conclusions of June 2008, Frontex presented the main results and internal assessment of a feasibility study to its Management Board in November 2009. The study looked at the possibility of establishing specialised branches in order to improve coordination efforts for the management of the external borders.

The study (carried out by Deloitte) gives the following results:

Both Frontex' risk analysis and operational functions could benefit from an enhanced local presence as this would lead to an improved understanding of local conditions, enhanced effectiveness in the use of risk information, and increased communication between Member States and Frontex.

In its own assessment of the study results, Frontex headquarters sees the following concrete operational and practical opportunities in specialised branches:

- A strengthened role in coordinating joint operations;
- Enhanced situational awareness, risk analysis, and intelligence services;
- The possibility to reinforce Frontex' contribution to increase and harmonise border management standards across the EU Member States.

In its discussion, the Management Board underlined that the decision-making powers should remain in Frontex headquarters. Furthermore, organisational clarity, operational and geographical coverage, and the unity of the agency are primary issues to consider when discussing branches of specialisation.

On 5 February 2010, the Frontex Management Board decided that the first of such regional-based offices will be set up in Piraeus, Greece. The board chose this eastern Mediterranean region for a pilot project. If the project proves successful, the concept may also be implemented in other regions, such as the Western Mediterranean, the Western Balkan and the Black Sea, and the Eastern land borders including the Baltic Sea. (CR)

➤eucrim ID=0904020

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

MEP Jailed for Fraud after OLAF Investigation

On 11 November 2009, a former MEP was sentenced to two years of imprisonment by the Southwark Crown Court in London. After pleading guilty to charges of false accounting for a total amount of 45,000 euro, the former British MEP was additionally charged with paying 33,000 euro in prosecution costs.

While exercising his mandate, he claimed 3000 pounds per month to pay an assistant, who only received a monthly salary of 500 pounds. The balance was used for his personal benefit.

An OLAF investigation in 2006–2007 had resulted in a referral to the Bedfordshire police authorities and is a prime example of successful cooperation between OLAF and the national authorities. The Director-General of OLAF at the time, Brüner, stated that this case has

highlighted the benefit of close cooperation between OLAF and the national authorities. (EDB)
➤eucrim ID=0904021

VAT / Tax Fraud

Agreement on Strengthened Mutual Assistance in the Recovery of Taxes

On 19 January 2010, the Council of Economy and Finances reached agreement on a general approach to a draft Directive aimed at strengthening mutual assistance between Member States in the recovery of taxes.

The Directive will be adopted at a forthcoming Council meeting once the Parliament's opinion is available. The draft instrument is aimed at better fulfilling the Member States' needs with regard to the recovery of taxes as well as replacing the 1976 Directive on mutual assistance for the recovery of claims relating to certain levies, duties, taxes, and other measures.

The draft Directive encompasses an improved assistance system, with rules that are easier to apply, including rules regarding information held by banks and other financial institutions. In addition, the instrument provides for more flexible conditions by which to request assistance, requiring the spontaneous exchange of information. (EDB)
➤eucrim ID=0904022

Reversal of VAT Liability for CO_2 Emission Allowances

On 2 December 2009, the Council agreed on a general approach regarding a Directive that would allow Member States to implement a reversal of liability for the payment of VAT on greenhouse gas emission allowances.

The aim of the instrument is to prevent, in particular, tax fraud by carousel schemes, where goods are traded several times by several suppliers without paying VAT. The reversal mechanism means that the liability for the payment of VAT is shifted from the supplier to the customer (see also eucrim 3/2009, p. 70). The proposed Directive would allow Member States to implement this reversed liability mechanism for the payment of VAT on greenhouse gas emission allowances on an optional and temporary basis. (EDB)
➤eucrim ID=0904023

Priority of Presidencies Given to VAT System Modernisation and Combating Tax Fraud

On 27 November, the Spanish Presidency and the future Belgian and Hungarian Presidencies presented their draft 18-month programme. In the field of indirect taxation, priority will be given to the modernisation of the common system of VAT and on combating tax fraud.

Regarding the VAT system, the Presidencies agreed that they should work on the VAT treatment of insurance and financial services, on the invoicing rules, and on the treatment of postal services.

With regard to combating tax fraud, the discussion concerning the reversed liability mechanism on VAT on greenhouse gas emission allowances has in the meantime resulted in a general approach as reported above. Additionally, work on administrative cooperation in the field of VAT shall be enhanced and the revision of the Directive on energy taxation realised.

In the field of direct taxation, the proposal to improve the functioning of the savings taxation mechanism within the EU and with third countries (COM(2008) 727 final) will be further developed. Concluding more agreements with third states on cooperation and information exchange in direct tax matters is one of the objectives in addition to the improvement of the coordination of national tax systems.

In the programme, the three presidencies emphasised their aim to ensure the implementation of the Stockholm Programme and to adopt the Action Plan in the first half of 2010. (EDB)
➤eucrim ID=0904024

Partial Agreement on Cooperation in the Field of Direct Taxation

At the outset of the Spanish Presidency, hopes were high to reach agreement on a set of laws to increase Member State cooperation against tax evasion. During the Council of Economy and Finances on 19 January 2010, agreement was reached on a package of measures to enable the Member States' tax authorities to cooperate more effectively against tax offenders. The result is a Directive on administrative cooperation in the field of taxation encompassing mutual legal assistance between the Member States. This enhanced cooperation aims to remove specific obstacles – such as language barriers and the use of differing forms – that have prevented the cross-border pursuit of tax evaders in the past.

On 2 February 2009, the Commission adopted the proposal for this Directive, which will replace the 30-year old legislation that has become inadequate at addressing the current state of tax evasion in the EU. The proposal includes provisions on simultaneous controls, the presence of authorised foreign officials in administrative offices, and participation in administrative enquiries of another Member State.

It is indicated that resistance regarding this instrument came mostly from Austria and Luxembourg, who are known for having a solid tradition of bank secrecy. The Spanish Presidency had also made an effort to conclude an anti-fraud agreement between the European Commission and Liechtenstein as well as to receive mandates for negotiating such agreements with Andorra, Monaco, San Marino, and Switzerland. This sparked resistance from Austria and Luxembourg (see eucrim 3/2009, p. 69), states that still enjoy a partial exemption from Directive 2003/48/EC on the taxation of savings interest. The exemption allows both states to pay a withholding tax, rather than share information. However, when the new agreements are concluded, these exemptions will expire. (EDB)
➤eucrim ID=0904025

Data Protection in Taxation Directive

With regard to the proposed Directive on administrative cooperation in the field of taxation, the European Data Protection Supervisor (EDPS) was not consulted. Nonetheless, the EDPS issued his opinion on 6 January 2010.

The EDPS is particularly concerned that the proposal does not contain references to the instruments regulating the processing of personal data by EC institutions. Furthermore, the EDPS calls upon the Council to adopt a provision regarding the transparency of information exchange. (EDB)

➤eucrim ID=0904026

Preliminary Ruling on the Scope of Exemption from VAT

On 24 July 2009, the German Bundesgerichtshof (Federal Court of Justice) lodged a reference for a preliminary ruling with the Court of Justice, which was published in November 2009 (Case C-285/09). The case revolves around the interpretation of Article 28, c, A, (a) of the Sixth Council Directive 77/388/EEC.

The defendant in the case before the Bundesgerichtshof is a Portuguese national who sold cars from Germany to commercial car dealers in Portugal. The buyers were enabled to evade income tax in Portugal and the defendant was able to evade VAT in Germany inter alia by concealing the status of the buyers, manipulating his bookkeeping, and using fake buyers. In his defence, he argues that the sales fall within the scope of tax-exempt intra-Community transactions.

The Landgericht of Mannheim ruled that this was not the case rather that this was an intentional abuse of Community rules.

Thus, the Bundesgerichtshof referred a question to the Court of Justice regarding the interpretation of Article 28, c, A, (a) of the Sixth Council Directive 77/388/EEC. The question concerns whether this provision should be interpreted as meaning that a supply of goods is to be refused exemption from VAT if the supply has actually been effected, but was established on the basis of objective factors that the vendor, a taxable person, evaded VAT by one of the following actions: He either knew that, by his supply, he was participating in a transaction aimed at evading VAT, or he took actions aimed at concealing the true identity of the person to whom the goods were supplied in order to enable the latter person or a third person to evade VAT. (EDB)

➤eucrim ID=0904027

Common VAT System – New Developments

On 22 December 2009, the Council adopted a directive amending various provisions of Directive 2006/112/EC on the common system of value added tax (see eucrim 3/2008, p. 96).

Regarding the place where VAT is levied on services, the provisions of Directive 2006/112/EC, taken literally, excluded important distribution systems for gas and electricity. More specifically, it meant that the special scheme that was set up under the 2003 Directive (as regards the rules on the place of supply of gas and electricity) applies only to the provision of access to the natural gas and electricity distribution systems. Even though it was the purpose of the 2003 Directive to apply this scheme to these particular supplies, they were excluded in the 2006 Directive. Therefore, the new amendments specify that the special scheme applies to all services relating to the provision of access to all natural gas and electricity systems or networks and to heating and cooling networks.

The Member States need to complete the national legislation necessary to implement this Directive by 1 January 2011at the latest. (EDB)

➤eucrim ID=0904028

VAT Deduction Derogation for Austria

Austria requested and received authorisation from the Council to continue to apply a measure derogating from the provisions of Directive 2006/112/EC governing the right of deduction of VAT. This right to deduct VAT had previously been granted to Austria by a Council Decision of 13 December 2004. Reaffirming this decision, the Council decided on 22 December 2009 to allow Austria – by way of derogation from Article 168 of Directive 2006/112/EC – to exclude VAT on goods and services from the right to deduct when the goods and services in question are used in excess of 90% for the private purposes of a taxable person or of his/her employees, or, more generally, for non-business purposes. (EDB)

➤eucrim ID=0904029

Europol Reveals Actual Costs of Emission Fraud

In a press release issued on 9 December 2009, Europol revealed the results of investigations of fraudulent trading activities with regard to EU emissions. These investigations started in 2008. Europol officials declared that the EU's Emissions Trading Scheme (ETS) is an open door for crime. The crime in question is what Europol calls the "missing trader" scam, a variation on VAT carousel fraud. This means that traders establish themselves in one Member State and open a trading account with the national carbon credit registry. After buying VAT-free carbon credits in another country, they sell the credits to buyers in their own country after having added VAT. Eventually, the trader disappears with the money. This form of delinquency cost governments over 5 billion euro in the past 18 months.

As reported in this issue of eucrim, the European Commission has already agreed upon a general approach to dealing with the faults in the system of CO_2 emission allowances. (EDB)

➤eucrim ID=0904030

Council Decision on the Use of Information Technology for Customs Purposes

On 16 November 2009, the Council adopted a Decision on the use of information technology for customs purposes. This instrument will replace the 1995

Convention on the use of information technology for customs purposes that introduced the Customs Information System (CIS).

Experience gained since the 1995 Convention entered into force has shown that using CIS for the purposes of sighting, reporting, discreet surveillance, or specific checks does not achieve the system's full objective, which is to assist in preventing, investigating, and prosecuting serious contraventions of national laws.

This Decision adds a customs Files Identifications Database (FIDE) to CIS. The aim of FIDE is to increase cooperation between customs administrations of the Member States by making information available. When national customs authorities open a file on (or are investigating) one or more persons or businesses, using FIDE, they will now be able to identify competent authorities of other Member States that are investigating or have investigated those persons or businesses. Additionally, Europol and Eurojust will be given access to CIS and will be able to make use of FIDE.

The establishment of FIDE was already included in Regulation 766/2008. The Decision of 16 November 2009 brings CIS in line with this Regulation. (EDB)

➤eucrim ID=0904031

Corruption

EU Wants Tougher Measures Against Corruption

From 9 to 13 November 2009, the EU Member States that have signed the UN Convention against Corruption met in Doha, Qatar for the Third Session of the Conference of the States Parties to the UN Convention against Corruption.

The establishment of a review mechanism that allows states to gain insight into another state's laws and methods of combating corruption is a controversial matter in the discussion. The EU is striving for a system where two states review another state and the final review reports are public and accessible, whereas other states are opposed to granting access to their information to other states at all.

In spite of the difficult negotiations, agreement was reached on the review mechanism. This means that the UN Convention against Corruption, which has been in force since 2005, will now be equipped with a mechanism that ensures supervision of as well as support for the effective application of the instrument by the Member States.

The review mechanism will be applicable to all States Parties and will gradually cover the implementation of the entire Convention. Up to 15 governmental experts will be appointed by each State Party for the purpose of the review process.

The experts visiting the State Party that is under review can meet representatives of government and the business sector, NGOs, and other stakeholders in order to identify problems in the application of the Convention, any challenges, and the need for technical assistance.

Country review reports can be kept confidential but the State Party under review is encouraged to publish it fully or partially.

The Conference of State Parties will be responsible for establishing policies and priorities related to the review process. (EDB)

➤eucrim ID=0904032

Fight Against Corruption a Priority for CoR and CLRA in 2010

The president of the Committee of the Regions (CoR), Mr. Luc Van den Brande and the president of the Congress of Local and Regional Authorities (CLRA) of the Council of Europe, Mr. Ian Micallef, met on 13 November 2009. The meeting resulted in the signing of a revised Cooperation Agreement extending the current areas of cooperation between both bodies.

The presidents decided to make the fight against corruption a priority on their common agenda for 2010. Therefore, a joint conference focusing on the local and regional aspects of combating corruption will be organised in the spring of 2010. During this conference, information will be exchanged between both bodies on how the introduction of specific structures in public administrations as well as codes of conduct and measures involving citizens, civil society, and the media can be valuable in dealing with corruption.

The renewed agreement is a step forward in the implementation of the commitment that both the EU and the CoE agreed to in § 29 of the 2007 Memorandum of Understanding (see also eucrim 1-2/2008, pp. 46-47, eucrim 1-2/2007, pp. 41-42, and eucrim 3-4/2006, pp. 81-82). Under the heading of democracy and good governance, both institutions committed to working more closely in the field of regional and transborder cooperation. (EDB)

➤eucrim ID=0904033

Money Laundering

Belgium Fails to Completely Transpose Directive on Cross-Border Mergers

After deciding that Belgium failed to fulfil its obligations regarding Directive 2006/70/EC (see eucrim 3/2009, p. 71), the ECJ declared on 1 October 2009 that the Member State again did not adopt the necessary laws.

Directive 2005/56/EC on cross-border mergers of limited liability companies should have been transposed into national law by 15 December 2007. Even though Belgium adopted two new laws transposing the first 15 articles of the Directive, it failed to complete the transposition before the deadline. (EDB)

➤eucrim ID=0904034

Spain Fails to Fully Transpose Two Money Laundering Directives

The Court of Justice (ECJ) declared on 24 September and on 1 October 2009 that Spain failed to fulfil its obligations

regarding the transposition of Directive 2006/70/EC and Directive 2005/60/EC, respectively.

With regard to Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, Spain did not adopt, within the prescribed period, all the necessary laws, regulations, and administrative provisions. Additionally, Spain failed to communicate to the Commission the provisions of national law intended to contribute to ensuring such compliance.

In relation to this, Spain also failed to fulfil its obligations under Directive 2006/70/EC laying down implementing measures for Directive 2005/60/EC as regards the definition of "politically exposed person" as well as the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis. In this case, Spain only partially transposed the Directive. (EDB)

➤eucrim ID=0904035

Counterfeiting & Piracy

Growing Concern over Counterfeit Medicines in the EU

On 7 December 2009, EU industry commissioner Gunter Verheugen expressed concern over the alarming amount of counterfeit medicines disseminated in the EU. The concerns were caused by the confiscation of 34 million fake tablets in the EU in just two months, which, according to Verheugen, exceeded the Commission's worst fears.

Counterfeit medicines – ranging from Viagra to cancer medication and antibiotics – do not contain any active ingredient or they contain too much or too little of it. In some cases, they even contain toxic substances. Verheugen points out that "even when a medicine only contains an ineffective substance, this can lead to people dying because they think they are fighting their illness with a real drug."

On 10 December 2008, the Commission had already adopted a proposal for a Directive of the European Parliament and of the Council amending Directive 2001/83/EC as regards the prevention of entry into the legal supply chain of medicinal products that have been falsified in relation to their identity, history, or source.

The proposed instrument was part of the so-called "medicine package," a collection of five legislative proposals presented by the Commission: one on counterfeit medicines, two on the supervision of medicines, and two related to information to the general public on medicinal products. The proposal concerning counterfeit medicines is currently still the subject of discussions in the Council after having been criticised by the European Parliament for not including sales over Internet. (EDB)

➤eucrim ID=0904036

Organised Crime

Policy Reactions to Thwarted Airline Attack

After an airline passenger detonated explosives on a US flight on 25 December 2009, the EU's interior ministers have been planning to increase data sharing with the US. During an informal meeting in Toledo on 20-22 January 2010, the ministers agreed to set out a series of measures in a plan by the end of April 2010.

The aim is to exchange passenger name records (PNR) among EU Member States in a similar manner as they are exchanged with the US in accordance with the 2007 Agreement (see also eucrim 1-2/2008, pp. 29-31; eucrim, 3-4/2007, p. 101; eucrim 1-2/2007, pp. 9-10 and eucrim 1-2/2006, pp. 3-4).

Privacy safeguards, however, still need to be discussed. Under the rules laid down in the Lisbon Treaty, sharing PNR within the EU would require the approval of a majority of Member States and of the EP.

Other initiatives that were discussed following the alleged terrorist attack include introducing the controversial body scanners at airports and the presence of security officers in plain clothes or "sky marshals" on European flights.

Furthermore, the Spanish Presidency stated that, following the events of 25 December 2009, the focal points of the Presidency's agenda include strengthening transatlantic relations as well as increasing police coordination and cooperation in security matters. (EDB)

➤eucrim ID=0904037

EU-US Joint Declaration on Aviation Security

During an Informal Meeting of the Ministers of Justice and Home Affairs from 20 to 22 January 2010, the Vice President of the European Commission and the Secretary of the US Department of Homeland Security joined the Ministers to discuss terrorist threats.

The participants at this meeting agreed that the objectives should be to identify individuals who pose a risk to security, to identify the illicit materials that these individuals might be carrying, to cooperate with partners worldwide in order to improve aviation security schemes, and to improve international travel security.

Plans were made to discuss the following topics at the High Level Meeting, in April 2010, on Justice and Home Affairs between the EU and the US:

- Aviation security: this includes inter alia continuing existing EU-US cooperation, exchanging best practices on search techniques and research results (as regards, e.g., explosives), and supporting the provision of "predeparture" information to aid in screening, etc.;
- Information sharing: an examination of the functioning of existing information sharing and further possibilities of improving its exchange is proposed. Ad-

ditionally, the results of the joint review of the 2007 EU-US Passenger Name Records (PNR) Agreement and future reviews should be evaluated;

- Research activities: national and co-operative research and development in related subjects, such as physical and behavioural explosives detection and mitigation, should be prioritised;
- International activity: this includes working with and in affected third countries and regions in the field of capacity building and development in order to support counter-terrorism work, cooperation in setting up international standards in aviation security, and the coordination of efforts to ensure the most efficient use of aviation securityresources. (EDB)

➤eucrim ID=0904038

New Implementation Report on EU Action Plan on Combating Terrorism

During the European Council of 30 November to 1 December 2009, the EU Counter-Terrorism Coordinator Gilles de Kerchove presented two documents: his latest implementation report on the EU Action Plan on combating terrorism and a discussion paper on EU Counter-Terrorism Strategy.

Since the EU Action Plan on combating terrorism was adopted in June 2004, the Counter-Terrorism Coordinator has been requested to submit reports every six months on its implementation. The report is divided into two parts: part I reviews the latest results and progress made, and part II focuses on measures to be taken and ongoing activities.

Firstly, the report highlights the new possibilities that the entry into force of the Lisbon Treaty opens. Particularly with regard to external relations, the new structure (including the abolishment of the pillars and the new post of High Representative) will ensure a better coherence between traditional external policy instruments and internal instruments, which is necessary in the field of terrorism.

Secondly, the Stockholm Programme takes up an important place in the report. In part I, the Programme's proposals in the sphere of countering the financing of terrorism are applauded. However, due to its focus on the future, more specifically the coming five years, the Programme's priorities concerning border control and assistance to victims have been incorporated into part II.

The Counter-Terrorism Coordinator dedicates a significant part of his report to the importance of international cooperation.

In his discussion paper, he presents ten key challenges to focus on in the EU's counter-terrorism strategy and concludes by pointing out the importance of having a network of senior national officials, each of whom has an overall view at the policy level of their country's work on counter-terrorism. (EDB)

➤eucrim ID=0904039

Action-Oriented Paper and Thematic Debate on Trafficking in Human Beings

In the fight against trafficking in human beings, three significant instruments have been adopted in the past ten years: the 2002 Framework Decision on combating trafficking in human beings, the 2004 Directive on temporary residence permits for third-country nationals who are victims of trafficking, and the 2005 Action Plan.

In 2009, the external dimension of action against this crime was added to the plan. Trafficking in human beings is a crime that repeatedly illustrates the connections between EU Member States and third states as well as between EU Member States themselves. Thus, an elaborate Action-Oriented Paper was dedicated to the external dimension of action against trafficking in human beings. This paper was presented by the Presidency to COREPER on 19 November 2009 and includes an analysis of the issue and the EU's objectives, a summary of current action being carried out, and an identification of what needs to be done at the political, technical, and operational levels in order to meet the EU objectives.

Since March 2009, a new Commission proposal for a Council Framework Decision on preventing and combating trafficking in human beings and protecting victims has also been discussed in the Council. The instrument is aimed to further approximate national legislation and to improve international law enforcement and judicial cooperation.

However, now that the Lisbon Treaty has entered into force, a new legislative proposal has become necessary – as well as a new legislative procedure with the full involvement of the European Parliament – that can be based on the discussions held.

During the European Council from 30 November to 1 December 2009, this instrument was one of the major topics of debate. Agreement has already been reached on the majority of the provisions. They include inter alia a definition of the crime, aggravating circumstances and higher punishment; extraterritorial jurisdiction and the use of investigative tools such as wiretapping and access to financial data; special treatment of the victims in criminal proceedings; a higher standard of protection and assistance for victims, especially children, and, finally, preventive measures aimed at the demand side of trafficking in human beings.

When a new legislative proposal is adopted, it will replace the provisions of the 2002 Framework Decision on combating trafficking in human beings. (EDB)

➤eucrim ID=0904040

EMCDDA Publishes New Report on Drug Problems in Europe

On 5 November 2009, the European Monitoring Centre on Drugs and Drug Addictions (EMCDDA) published its Annual Report for 2009. The report shows that the European drug market is gradually becoming more sophisticated.

Eastern and Northern Europe show an increase in the circulation of methamphetamines, whereas the use of cannabis is generally decreasing.

Following the presentation of the re-

port, Jacques Barrot, vice-president of the European Commission called upon the Member States to tackle the problem in a united and coordinated manner and to rely on the existing structures and experience that Eurojust and Europol offer. (EDB)
➤eucrim ID=0904041

Cybercrime

High Tech Crime Experts Meeting 2009

The annual High Tech Crime Expert Meeting was held at the Europol headquarters in The Hague during the first week of December 2009. Experts from several EU Member States, third states, the European Network of Forensic Science Institutes, the European Commission, Eurojust, and Interpol participated.

This three-day conference on cybercrime-related topics was divided into three sections. The first included discussions on strategic issues, such as the establishment of the European Cyber Crime Platform. This platform joins several other initiatives in creating a consistent and effective approach to tackling Internet crime on an EU level. The second part focused on operational issues, including EU law enforcement action against the use of the Internet for criminal purposes by criminal organisations. In the third and final part, new developments in high-tech crime were presented and discussed. Best practices and experiences were exchanged as well as new software developed to prevent illegal file sharing via the Internet. (EDB)
➤eucrim ID=0904042

Environmental Crime

New System to Control Fisheries Enters into Force

On 1 January 2010, a new system entered into force tackling illegal fishing. With two new Regulations, the EU has taken the next step in creating an environment of responsible and sustainable fishing inside and outside the EU (see also eucrim 1-2/2008, p. 26).

The new system is founded on three pillars. The first pillar ensures that all marine fishery products traded with the EU be certified and their origin traceable, regardless of origin. The second pillar introduces a more effective and harmonised control system applicable in the EU and to EU vessels outside the EU. The third pillar is the Regulation on fishing authorisations for the EU fleet operating outside EU waters.

The EU, being the largest importer and one of the biggest producers and exporters of fishery products, is an appealing territory for illegal fishing. For this reason, an efficient common fisheries policy became indispensable. (EDB)
➤eucrim ID=0904043

Racism and Xenophobia

FRA Report Describes Level of Racism in the EU as "Shocking"

On 8 December 2009, the EU's Fundamental Rights Agency (FRA) published the results of a survey on racism covering more than 23,000 individuals. The FRA investigated discrimination in nine different areas of everyday life: when looking for work or at work, when looking for a house or apartment to rent or buy, when dealing with healthcare and social services, at schools, a café, restaurant, bar or nightclub and at shops, as well as discrimination when trying to open a bank account or obtain a loan.

Inter alia, the report states that 22% of sub-Saharan Africans have been discriminated against at least once in the last year while looking for work. Other results include Roma (17%) and North Africans (11%) who registered as having had similar experiences. The FRA concludes that especially the Roma in the Czech Republic, Africans (both from the Maghreb and south of the Sahara), and Muslims are the groups facing the greatest discrimination.

Victims of discrimination testify, however, that they rarely report these incidents due to a lack of trust in police authorities. This leads to the conclusion that the figures resulting from this survey do not show the full picture. (EDB)
➤eucrim ID=0904044

Sexual Violence

Draft Framework Decision on Sexual Exploitation of Children

During the European Council of 30 November to 1 December 2009, significant progress was made on a draft Framework Decision aimed at improving the fight against sexual abuse, sexual exploitation of children, and child pornography.

After a proposal on this topic was presented to the Council by the Commission on 30 March 2009, the European Council assessed the progress on the content of the instrument. This instrument is meant to eventually replace the 2004 Framework Decision on combating the sexual exploitation of children and child pornography.

Due to the entry into force of the Lisbon Treaty, a new legislative proposal should go through the ordinary legislative procedure with the full involvement of the EP. The discussions held will serve as the basis for the new proposal. The main issues that still need to be discussed are the definitions and scope of the offences, the penalties system and the level of penalties as well as the question of jurisdiction.

Once a follow-up proposal has been adopted, the goal is to further approximate national legislation and to improve international law enforcement and judicial cooperation. The draft Framework Decision also includes new criminal offences in the IT environment, such as knowingly obtaining access to child por-

nography or „grooming“ (following the COE Convention). (EDB)
➤eucrim ID=0904045

Clear Legal Basis Needed for Elimination of Sexual Violence

On 26 November 2009, the EP adopted a Resolution on the elimination of violence against women. In the text, the EP urges Member States to recognise sexual violence and rape, including incidents within marriage and intimate informal relationships and/or those committed by male relatives, as a crime and to ensure that such offences result in automatic prosecution. Additionally, the Member States are called upon to take appropriate legal measures against female genital mutilation. Furthermore, the Council and the Commission are requested to establish a clear legal basis for combating all types of violence against women, including human trafficking.

The Resolution was tabled by the Committee on Women's Rights and Gender Equality and fits in the priorities for the period 2006–2010 that have been set out in the EU Roadmap for Equality between women and men. (EDB)
➤eucrim ID=0904046

Council Promotes Financial Coalition against Child Pornography on the Internet

The Council of Ministers of Justice and Ministers of Home Affairs published its conclusions of a meeting on child pornography on 23 October 2009. The Council calls upon all Member States to become members of the European Financial Coalition. This Coalition aims to bring together all stakeholders involved in the fight against the sale and distribution of child pornographic images in order to facilitate properly coordinated law enforcement and other complementary disruption activities with cross-sector solutions.

Additionally, the Council wants the Member States to establish national financial coalitions against child pornography on the Internet or equivalent measures to that effect. Member States should develop policies and ensure a multi-stakeholder approach to tackling this offence.

The activities of the Member States' national financial coalitions should be developed in connection with the European Financial Coalition. Furthermore, best practices and experiences should be exchanged, also involving Europol and Eurojust. (EDB)
➤eucrim ID=0904047

Procedural Criminal Law

Procedural Safeguards

Roadmap for Strengthening Procedural Rights in Criminal Proceedings

On 30 November 2009, the Council adopted a Resolution on a "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings."

The discussion on this instrument was set in motion by the Swedish Presidency on 1 July 2009. The idea behind the roadmap is to support the implementation of the principle of mutual recognition. Mutual recognition presupposes that the competent authorities of the Member States trust the other Member States' criminal justice systems. It is crucial for the enhancement of mutual trust within the EU that common standards for the protection of procedural rights are laid down.

The Resolution states that the Council endorses the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" as the basis for future action. Future action can comprise legislation as well as other non-legislative measures.

The set of procedural rights encompassed in the roadmap is set out in the Annex attached to the Resolution. It includes measures on translation and interpretation (see also eucrim 3/2009, p. 72); information on the involved person's rights and information about the charges; legal advice and legal aid; communication with relatives, employers, and consular authorities; special safeguards for vulnerable suspected or accused persons and pre-trial detention. The Commission is invited to submit proposals regarding these measures and to present a green paper on pre-trial detention.

The European Council has welcomed the adoption of this Resolution and incorporated the roadmap into the Stockholm Programme. (EDB)
➤eucrim ID=0904048

Debate in the EP on Procedural Rights in Criminal Proceedings

The first steps towards strengthening procedural rights in criminal proceedings have been suspended in view of the new institutional framework introduced by the Treaty of Lisbon (see above). Still, the Swedish Presidency was committed to making progress on this subject. Therefore, during the plenary session of 20 January 2010, the EP's Civil Liberties Committee asked the Council whether it agreed that work should continue on this subject as a priority matter and what initiatives it would pursue or encourage on procedural rights, with what scope, and according to what timetable.

The author of these questions, Baroness Sarah Ludford, recalled that the European Arrest Warrant (EAW) was agreed upon with the understanding that it would soon be followed by measures guaranteeing inter alia fair trial rights.

The Council had failed to accept the comprehensive FD on procedural rights in 2004. This resulted in settling for a roadmap on a step-by-step basis.

Because the proposed FD on the right to interpretation and translation in criminal proceedings – which the Council reached a general approach on – is less ambitious than the original Commission text, Baroness Ludford, on behalf of the Civil Liberties Committee, has asked for reassurance from the Council and Com-

mission that measures in the roadmap will be developed quickly.

Vice-President Barrot, on behalf of the Commission, concluded that, even though the EAW was an efficient and useful tool, further work was needed to develop an area of justice. He announced that the Commission was working on a proposal regarding information on defendants' rights and intended to put forward other proposals as soon as possible. The indication of one proposal per year was only a rough estimate; if discussions permitted, this could be speeded up. (EDB)

➤eucrim ID=0904049

Meeting of the Justice Forum

The Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings was also the topic of discussion during the last meeting of the Justice Forum on 9 November 2009 in Brussels.

Debates during the Forum focused on the measures laid down in the roadmap. Particularly Measure A on translation and interpretation took the spotlight as these rights were the subject of a general agreement reached by the Council on 23 October 2009 (see also eucrim 3/2009, p. 72). The Forum showed large support in taking Measure B concerning information on rights and about the charges as the next measure to be developed into a legislative proposal.

Furthermore, the recently published "Study on Procedural Rights: Existing Level of Safeguards in Member States 2008 – Update" was discussed during the Forum. This study, which is the update of the 2005 study "Procedural Rights in criminal proceedings: Existing Level of Safeguards in the European Union," was funded by the European Commission. It focuses on the actual level of provision in all EU Member States (except Malta) of the right to information, the right to legal assistance, the right to legal, aid and the right to interpretation and translation. (EDB)

➤eucrim ID=0904050

Stop and Search Powers Illegal Under British Terrorism Act

On 12 January 2010, the European Court of Human Rights decided upon complaints filed by two British citizens who had been briefly stopped and searched near the Defence Systems and Equipment International Exhibition in London. While demonstrations and protests were going on in the direct area of the fair, the two had been detained by police officers, but nothing incriminating was found.

Section 44 of the British Terrorism Act of 2000 allows police officers – authorised by the Home Secretary – to make random searches under certain circumstances.

The Court decided that a violation of the right to a private life (Article 8 ECHR) had occurred based on the insufficient definition of stop and search powers and the lack of adequate legal safeguards for abuse. The Court stated that, in its view, there is a clear risk of arbitrariness in granting such broad discretion to a police officer.

The applicants also claimed that their rights to freedom of expression under Article 10 and freedom of assembly under Article 11 had been violated. The Court did not consider it necessary to examine these complaints in the light of the aforementioned conclusion. (EDB)

➤eucrim ID=0904051

High Court Ruling against Use of Secret Evidence

On 1 December 2009, two judges of the High Court in London ruled that suspects cannot be denied bail solely on the basis of secret evidence.

Two men who were suspected of terrorist-related activities won a court battle against the government for the use of secret evidence they could not challenge. As a violation of the right to a fair trial laid down in Article 6 of the ECHR, the use of secret evidence was already prohibited by the High Court in June 2009. However, this ruling only applied to control orders.

In the most recent ruling, Lord Justice Laws and Justice Owen said that it cannot be concluded that bail cases call for a less stringent procedural standard than control order cases. (EDB)

➤eucrim ID=0904052

Data Protection

Parliament Votes against EU-US SWIFT Agreement

On 11 February 2010, the European Parliament (EP) voted against a new Agreement between the EU and the US on the processing and transfer of financial messaging data from the EU to the US, known as the new SWIFT Agreement (referring to the company that transfers financial data between banks internationally). The Agreement required the consent of the EP in order to enter into force due to the new rules of the Lisbon Treaty. However, the EP was not satisfied with the information it had received from the Swedish and Spanish Presidencies on the EU-US Agreement.

The background of this new instrument is the exchange of financial messaging data between the US Department of the Treasury and the EU-based Society for Worldwide Interbank Financial Telecommunication (SWIFT). On 27 November 2009, the Council signed the Agreement to ensure financial data transfers for the purposes of the US Terrorist Finance Tracking Program (TFTP). The Presidency had received authorisation to enter into negotiations regarding this Agreement on 27 July 2009.

At the end of 2009, SWIFT opened a new operating centre in Switzerland. It will still use its existing EU and US-servers. However, a significant volume of the data which are currently received by the Treasury Department under the TFTP will no longer be stored in the US.

The new Agreement aimed to allow the US Department of the Treasury to receive European financial payment messaging and related data for counter-

terrorism investigations, while ensuring an adequate level of data protection. This should be done while not derogating from or amending the legislation of the EU and within the framework of existing national laws.

Important aspects in the Agreement are that US requests for data should be based on an ongoing investigation and have to be verified by the competent authority of the requested Member State. This authority shall confirm whether the request is in accordance with the requirements of the Agreement. Part of these requirements is that the request substantiates the need for the data and is tailored as narrowly as possible.

US requests to obtain data from designated providers should be based on Article 8 of the 2003 Agreement on Mutual Legal Assistance between the European Union and the United States of America, which will entered into force on 1 February 2010 (see also eucrim 3/2009, p. 75).

The Agreement was meant to be temporary and meant to be provisionally applied until 30 October 2010 at the latest. A joint review procedure, redress possibilities, and a suspension clause are equally provided by the Agreement. Because the Agreement, which is based on Articles 24 and 38 TEU, had been signed but not concluded, the EP's consent to the formal conclusion of the instrument was required. From 1 December 2009 on, the rules for conclusion of such agreements are governed by Article 218(6) TFEU, which provides that "the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement." The Council can adopt such a decision upon conclusion only after having obtained the consent of the EP.

A plenary debate on the matter in the EP resulted in demanding more time for the Parliament's Committee on Civil Liberties, Justice and Home Affairs to examine the text of the Agreement. The EP did not receive the text before 25 January 2010 due to the time required to translate the text.

Members of the EP criticised the timing used in the procedure surrounding this Agreement – especially since the Commission had announced on 27 January 2010 that a new (confidential) evaluation report on SWIFT would be brought forward on 4 February 2010. The new report is the second report written by Judge Jean-Louis Bruguière who was appointed by the Commission in March 2008 to review the procedures governing the handling, use, and dissemination of personal financial data from the EU through SWIFT.

After examination of the Agreement, rapporteur Jeanine Hennis-Plasschaert of the Committee on Civil Liberties, Justice and Home Affairs listed the arguments against giving the Agreement the green light. The Agreement violates the basic principles of data protection, more specifically the principles of necessity and proportionality. Additionally, mechanisms of supervision and control to rectify such violations are lacking.

The Civil Liberties Committee's vote on 4 February 2010 thus resulted in a recommendation that the EP withhold its consent. The Parliament voted against the Agreement on 11 February 2010 (378 votes against 196 and 31 abstentions).

A possible long-term agreement on the exchange of financial data should be fully negotiated and concluded under the rules of the Treaty of Lisbon with full involvement of the EP in all stages of the negotiation. (EDB)

➤eucrim ID=0904053

Revised ePrivacy Directive Adopted

The EP and the Council have adopted the revisions to the so-called ePrivacy Directive or Directive 2002/58/EC of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector. The review of this Directive is part of a broader process of reviewing several Directives, which is often referred to as the "review of the telecom package."

The ePrivacy Directive also ensures the free movement of such data and electronic communications equipment and services in the Community. The improvements made to the instrument are aimed at strengthening the protection of privacy and personal data of all EU citizens active online.

The revised Directive introduces a framework for mandatory notification of personal data breaches for communications providers or Internet service providers as well as the possibility to take legal action against spammers. Additionally, the instrument enhances protection against the interception of communications via spyware and cookies. With respect to national data protection authorities, the revised Directive substantially strengthens their enforcement powers. For example, they are able to order an immediate stop to breaches of the law, and they will have improved means of cross-border cooperation.

The revised ePrivacy Directive entered into force on 19 December 2009 and should be implemented by the Member States by 25 May 2011. (EDB)

➤eucrim ID=0904054

Romanian Law on Data Retention Unconstitutional

Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks has indirectly been the subject of another court decision (see also eucrim 1-2/2009, pp. 2-3; eucrim 1-2/2008, p. 2, and eucrim 1-2/2006, p. 4). This controversial instrument obliges communications providers to retain personal data on users for possible future use in criminal investigations.

On 8 October 2009, the Romanian Constitutional Court ruled the national implementation legislation of the Directive to be unconstitutional. The grounds on which the law was ruled unconstitutional revolved around the derogations that are allowed to the right to a private

life, the right to secrecy of correspondence as well as the freedom of movement and of expression.

The Romanian Constitution and the ECHR lay down the conditions under which these rights and freedoms may be derogated from. This is permitted when the derogations are necessary and proportionate, fulfil a legitimate purpose, and are not applied in a discriminatory way or adversely affect the existence of such rights or freedoms. Additionally, the European Court of Human Rights' jurisprudence has ruled that these derogations should be precisely formulated and therefore foreseeable.

Data retention for traffic and localisation of the data of users of electronic communications as well as related data was ruled to be imprecise due to the lack of a definition of "related data." Furthermore, the law introduces a continuous obligation for communications providers to retain data that is deemed to be disproportionate, since the use of the data is independent of the occurrence of a criminal offence. The Court ruled that this transforms the derogation from the right to a private life and freedom of expression into an absolute rule.

Even though only Articles 1 and 15 of the Romanian law on data retention were deemed to be unconstitutional by the complainant, the Civil Society Commissariat, the Court ruled that it had enough grounds to declare the entire law unconstitutional. (EDB)

➤eucrim ID=0904055

German Federal Constitutional Court Considers Data Retention Law Unconstitutional

A class-action law suit of 35,000 citizens regarding the German Data Retention Law was brought before the German Federal Constitutional Court (Bundesverfassungsgericht) on 9 November 2007. On 15 December 2009, the oral hearing took place and on 2 March 2010, the Court delivered its judgment.

The constitutional complaint was directed against the German implementation law of Directive 2006/24/EC (see also eucrim 1-2/2009, pp. 2-3; eucrim 1-2/2008, p. 2, and eucrim 1-2/2006, p. 4). The arguments brought by the applicants in this case were focused on violations of communication secrecy and the right to self-determination.

The retention of personal data without a direct connection to a criminal offence is disproportionate according to the applicants (private citizens) who raised concerns regarding profiling. This is particularly alarming for the applicants who are lawyers, doctors, or journalists. They feel that their professional freedom is being infringed upon as their confidential contacts and clients could be revealed as a result of this legislation. For example, for businesses that offer anonymous surfing on the Internet, this decision, in practice, amounts to banning them from carrying out their professional activities.

The Constitutional Court ruled in favour of the applicants and found the German law on data retention to be unconstitutional. The Court ruled that the law does not offer enough protection against unlawful access to data. Additionally, the rules on the transmission and use of personal data do not comply with Germany's constitutional data protection requirements.

Therefore, the Court has ordered that all data already stored in accordance with this law be deleted and that no further data can be stored until a new law has been enacted. (EDB)

➤eucrim ID=0904056

ECJ Decides on Lack of Independence of German Data Protection Authorities

On 9 March 2010, the ECJ ruled on a case between the European Commission and Germany on the independence of Germany's data protection authorities.

On 22 November 2007, the European Commission brought an action before the ECJ concerning the independence of German data protection authorities (Case C-518/07). The Commission claimed that the ECJ should declare that Germany did not fulfill its obligations under Directive 95/46/EC because it incorrectly transposed the requirement of "complete independence" of the data protection supervisory authorities. The supervisory authorities of the German federal states are subject to state supervision while they are responsible for the monitoring of data processing within the private sector, a condition which compromises their independence.

Advocate General Ján Mazák issued his opinion on 22 October 2009, pointing out that the concept of "independence" is often linked to the judiciary, whereas data protection authorities are administrative authorities. Directive 95/46 does not require the establishment of authorities that are separate from the administrative system.

According to the Advocate General, state supervision could also be a way of monitoring an authority. He states that the mere fact that supervisory authorities, such as those in this case, are under state supervision cannot give rise to the conclusion that these authorities are not acting with complete independence in exercising their functions pursuant to Article 28(1) of Directive 95/46.

Therefore, the Advocate General concluded that the Commission had not proven the failure of a system of monitoring that would hinder data protection supervisory authorities in the exercise of their function with complete independence.

However, the ECJ confirmed the Commission's position in this case. In its judgment, the Court considers "independence" to mean that the data protection authority should have a decision-making power that is independent from any direct or indirect external influence. This also includes any influence from the government, as the government itself may have an interest in the data protection cases that are dealt with. The Court considers the existence of state scrutiny – even if this is meant to guarantee the legality of the acts of the data protection authorities – to mean that there is still

a possibility that the authorities are not able to act objectively. (EDB)
➤eucrim ID=0904057

Ne bis in idem

Framework Decision on Conflicts of Jurisdiction Adopted

The Council adopted a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings. Even though the European Parliament called upon the Council not to adopt this instrument before the entry into force of the Lisbon Treaty – in order to ensure inter alia full involvement of the EP – (see also eucrim 3/2009, p. 73 and eucrim 1-2/2009, p. 11-13) the instrument was adopted on 30 November 2009.

The Framework Decision aims at preventing violations of the ne bis in idem principle. The measures contained in the instrument are developed to prevent situations where the same person is subject to parallel criminal proceedings in different EU Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States. The measures laid down in the Framework Decision include:

- A procedure for establishing contact between competent authorities of Member States, with a view to confirming the existence of parallel criminal proceedings in respect of the same facts involving the same person(s);
- Rules on the exchange of information between these competent authorities conducting parallel criminal proceedings(s), with a view to reaching a consensus on any effective solution aimed at avoiding the adverse consequences arising from parallel criminal proceedings.

The Framework Decision entered into force on 15 December 2009. Member States need to take the necessary measures to comply with its provisions by 15 June 2012. (EDB)
➤eucrim ID=0904058

Victim Protection

Initiative for Directive on European Protection Order

On 5 January 2010, the Council presented an initiative for a Directive on a European Protection Order. This initiative aims to improve the protection of victims of crime by introducing a European protection order which has to be recognised by every Member State.

The intention is to activate appropriate mechanisms to prevent a repeat offence by the same offender against the same victim. Repeat offences against the same victim can occur with regard to any type of crime but are specifically frequent in the case of gender-based violence.

The Member States of the EU all have national measures in place to prevent repeat offences against the same victim. However, these are only applicable on the territory of that particular Member State. A common approach is needed on the territory of the entire EU in order to keep protecting victims who travel or move to another Member State. The current initiative will thus ensure the freedom of movement for victims without being compelled to forgo the protection provided by their Member State.

The initiative complements the instruments that are already in place in this field, such as the FD on mutual recognition of judgments and probation decisions and the FD on mutual recognition of decisions on supervision measures as an alternative to provisional detention (see eucrim 3/2009, p. 81).

The proposed instrument obliges the Member States to recognise any European protection order. After verifying that the protection measure meets all the requirements laid down in the proposed Directive, a judicial authority of the issuing Member State or another competent authority should issue a European protection order. This can only be done at the request of the protected person and on the basis of a protection measure adopted in the issuing Member State. All subsequent decisions relating to the protection measure underlying a European protection order, such as its renewal or withdrawal should be taken by the issuing Member State.

The initiative has been taken after the entry into force of the Lisbon Treaty and therefore the ordinary legislative procedure applies with both the Council and the EP as legislators. (EDB)
➤eucrim ID=0904059

Freezing of Assets

Cases *Ayadi* and *Hassan* Follow in Footsteps of Kadi Judgment

Following the line of the Kadi judgment, a Libyan and Tunisian national – respectively residing in the United Kingdom and Ireland – have been taken off the list of persons suspected of being associated with terrorism after a long battle before the Court of First Instance (CFI) and the ECJ. The cases – that were joined before the CFI – show strong similarities with the joined cases of Mr. Yusuf and Mr. Kadi. Similar to Mr. Ayadi and Mr. Hassan, Mr. Yusuf and Mr. Kadi were suspected of being associated with Usama bin Laden, Al-Qaeda or the Taliban. Therefore, their funds and financial assets should be frozen based on the 2002 Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

Mr. Ayadi and Mr. Hassan attempted to obtain the annulment of this Regulation (see also eucrim 3-4/2006, pp. 66-67) before the CFI but the complaint was dismissed. They launched an appeal before the ECJ in September 2006.

In the meantime, in September 2008, the ECJ set aside the judgment in the *Yusuf* and *Kadi* cases (see also eucrim 3-4/2006, p. 66; eucrim 3-4/2007, pp. 106-107 and eucrim 1-2/2008, p. 33 and pp. 81-88). This decision was based on the lack of jurisdiction to review the

measures adopted by the EC to give effect to resolutions of the UN Security Council. Based on a breach of the rights of defence and the right to a legal remedy, the ECJ also annulled the Regulation which was the legal basis for freezing the funds.

On 13 October 2009, this Regulation was replaced by a new Regulation which retroactively confirmed the inclusion of Mr. Ayadi and Mr. Hassan in the list of persons whose funds should be frozen. This new instrument has not been challenged by the applicants. However, the Court considered that the adoption of this new Regulation (No. 954/2009) cannot be seen as equivalent to the annulment of the contested Regulation. The Court found that the appeals have not become devoid of purpose and should adjudicate on them. Thus, the ECJ ruled that the judgments under appeal should be set aside inasmuch as their grounds in law are the same as those relied on in the *Yusuf* and *Kadi* cases at first instance.

Additionally, the Court saw identical violations of the rights of defence in the Kadi case as in the *Ayadi* and *Hassan* cases. Therefore, the Court annulled the Regulation in the version before the Regulation of 2009 was adopted in so far as it freezes Mr. Ayadi and Mr. Hassan's funds. (EDB)

➤eucrim ID=0904060

MEP's Question Legal Basis for Antiterrorist Measures

On 15 December 2009 representatives of the Committee on Civil Liberties, Justice and Home Affairs drafted a resolution regarding the legal basis of restrictive measures, including the freezing of assets, against individuals linked to Al-Qaeda, and against people threatening the rule of law in Zimbabwe and Somalia. The EP voted on 16 December 2009.

The legal basis chosen for these specific proposals (COM(2009) 0395, COM(2009) 0393, COM(2009) 0187 and Council Document 12883/2009) was Article 215 TFEU. This means that the EP is not involved in the decision-making process. After the entry into force of the Lisbon Treaty, the procedure for proposed measures affecting the rights of individuals is the procedure described in Article 215 TFEU or the procedure described in Article 75 TFEU. The latter however involves the EP in co-decision.

Since the EP considers Article 215 to be more of an exception, the question was asked how to deal with this exception and whether a double legal basis would be an option.

For restrictive measures used against people and entities linked to Usama bin Laden, Al-Qaeda or the Taliban, the EP is in favour of using the ordinary legislative procedure involving the EP. Concerning the proposed measures against Zimbabwe and Somalia, which is part of the EU's external action policy, the EP wants to be consulted. The EP also expresses its concern whether these proposals will pass a possible assessment by the ECJ.

With regard to the transfer of personal data to third states, the EP calls for a general legal framework on data protection. (EDB)

➤eucrim ID=0904061

Increased Procedural Guarantees for UN Antiterrorist Measures

The Swedish Presidency published a Declaration on the Adoption of UN Security Council Resolution 1904 (2009) welcoming more procedural guarantees for the notorious 'terrorist lists'. The lists are part of the antiterrorist measures listing persons suspected of links to terrorist groups and freezing their financial funds (see the news items above).

Security Council Resolution 1904 (2009) introduces several new elements relating to the procedures for the listing and delisting of individuals and entities. The most eye-catching novelty is the introduction of an independent and impartial ombudsperson to look into requests for delisting of such individuals and entities.

According to the Presidency, this should be seen as a significant step forward in the continued efforts of the Security Council to ensure that fair and clear procedures exist for placing individuals and entities on the list created pursuant to resolution 1267 and for removing them. (EDB)

➤eucrim ID=0904062

Cooperation

Police Cooperation

Erasmus Programme for Police Training

Beginning of January 2010, the Spanish Presidency submitted a note to the Police Cooperation Working Party containing draft Council conclusions to step up the creation of an Erasmus Programme for police training.

Similar to the various initiatives that have already been taken in the last years for judicial cooperation in criminal matters (e.g. the exchange programme for judicial authorities conducted by the EJTN), this initiative now translates the requirement of the Stockholm Programme to set out police training initiatives into practice in order to foster a European Police Culture and mutual trust. (CR)

➤eucrim ID=0904063

Resolution on the Exchange of DNA Analysis Results

The Council adopted a Resolution on the exchange of DNA analysis results at its meeting on 30 November to 1 December 2009. This Resolution is linked to the Decision implementing the so-called Prüm Decision (Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime). The Prüm Decision obliged Member States to use existing standards for DNA data exchange, such as the European Standard Set (ESS) or the Interpol Standard Set of Loci

(ISSOL). Since the ESS has been expanded in 2009 from using seven DNA markers to twelve, the Member States are encouraged to implement the new ESS no later than 24 months after the adoption of the Resolution.

From a data protection perspective, it is important to note that the Resolution lays down that no DNA containing specific hereditary characteristics shall be exchanged. (EDB)

➤eucrim ID=0904064

Judicial Cooperation

Progress Made on FD on Transfer of Proceedings in Criminal Matters

During the meetings of 30 November – 1 December 2009, the Council held an orientation debate on the proposal for a Framework Decision on the transfer of proceedings in criminal matters (see also eucrim 3/2009, p. 75 and eucrim 1-2/2009, pp. 15-16).

The above mentioned Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings addresses the adverse consequences of several Member States having criminal jurisdiction to conduct criminal proceedings in respect of the same facts relating to the same person. Common rules between the Member States regarding the transfer of proceedings are essential in order to address crossborder crimes.

The progress that has been made so far on the FD on Transfer of Proceedings in Criminal Matters will form the basis for a new legislative proposal based on the Lisbon Treaty under participation of the EP.

The main question that still remains on the table is one of the most significant questions for the proposed instrument, namely the matter of jurisdiction. While some Member States prefer the principle of territoriality, others suggest the principle of active/passive personality.

Other open questions concern the conditions for transfer, the effects for transferring and receiving Member States, and costs. (EDB)

➤eucrim ID=0904065

Model Provisions for Criminal Law

Anticipating the increased possibilities to discuss criminal law provisions under the Lisbon Treaty, in October 2009, the Swedish Presidency together with the German Delegation presented a proposal for draft Council Conclusions on guidelines for future criminal law in EU legislation. The Swedish Presidency and German Delegation argue that such model provisions for criminal law would facilitate future negotiations as they could focus on the substance of the specific provision; the transposition into national law as the EU provisions would be more coherent; and the legal interpretation.

The text has been discussed and amended by the CATS (Article 36 Committee) and COREPER, which reached agreement at the end of November 2009.

In detail, the draft conclusions deal with the assessment of the need for criminal provisions stating that they should only be introduced if essential and as a last resort as well as in accordance with the principles of the Lisbon Treaty and the principles of proportionality and subsidiary. Furthermore, criminal law provisions should address a clearly defined and delimited conduct, and only if the conduct cannot be effectively addressed by less severe measures. When adopting new provisions, the following factors shall be considered: their added value and effectiveness, the seriousness and frequency of the harmful conduct, and the impact on existing provisions. Criminal provisions must be profoundly structured, the criminal conduct precisely worded and focused on conduct implying actual harm or threat. Additionally, EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally, while negligent conduct should only be criminalised on a case-by-case assessment and strict liability should not be prescribed in EU legislation at all. According to the guidelines, inciting, aiding and abetting of intentional offences in future criminal law provisions should follow the criminalisation of the main offence. On a case-by-case basis, the level of penalties for natural persons may either be determined by the Member States or be subject to approximation rules.

In annex, the Conclusions also entail several model provisions, notably on infringements; criminal offences; inciting, aiding, abetting and attempt; criminal penalties; liability of and penalties against legal persons. These model provisions shall guide the future work of the Council on legislative initiatives.

The Conclusions need now to be discussed and possibly adopted by the JHA Council. (CR)

➤eucrim ID=0904066

European Crime Prevention Network

The Council Decision setting up a European Crime Prevention Network of 2001 has been repealed by a new Council Decision of November 2009 (for the background, see eucrim 3/2009, p. 76).

The new Decision intends to strengthen the network by amending its provisions dealing with contact points, the Secretariat, the structure of the Board and its tasks, including the appointment of the Chair. The original focus of the network on crime prevention in the fields of juvenile, urban and drug-related crime has been removed. Furthermore, the network will now be financed from the Member States instead of from the general budget of the EU. Also the Secretariat is no longer provided by the European Commission. (CR)

➤eucrim ID=0904067

EU-Japan MLA Agreement Signed

The EU and Japan have signed an Agreement on Mutual Legal Assistance in Criminal Matters (see also eucrim 3/2009, p. 76).

The Agreement enters into force three

Cooperation between European Courts

Conference of European Presidents of Higher Regional Courts on Issues of European Criminal Justice

A. The "jurop" Project

The unity of Europe was the dream of a few. It became the hope of many. Today it has become a necessity for all of us. (Konrad Adenauer)

The dream of European unity has since become a living reality for the citizens of the European Union. One example of this unity is the agreement to share a legal framework as well as its practical implementation. The dispensation of justice by the Higher Regional Courts of the individual Member States is of considerable importance in this respect. The states are guarantors of the common European legal framework within which the various national judicial authorities operate.

"Unity" cannot be imposed from above. It has to develop, grow, and needs constant care. In addition, unity always presupposes that there is a will to develop closer links with each other and identify what we have in common. Unity needs these areas of commonality in order to flourish. At the judicial level, a continuous exchange of information and opinions is indispensable, particularly insofar as the practices of the Higher Regional Courts are concerned. This is essential if the citizens of the European Union are to be able to operate within a safe and predictable legal framework in their daily lives, beyond the boundaries of their own Member States. The overall objective of the "jurop" project, which receives support from the European Commission within its criminal justice programme, is to provide a sustainable foundation for just such an exchange of information and opinions between judges of Higher Regional Courts:

- The *first pillar* is a regular cycle of conferences of European Presidents of Higher Regional Courts on selected issues of European criminal justice. The three-day conference,[1] held from 23/9 to 25/9/2009 in Quedlinburg, was the first of its kind and the launch pad for an ongoing exchange between court practitioners. Learning about judicial processes in other Member States, exchanging information about tried and tested practices relating to judicial procedures, and conducting a joint examination and evaluation of EU criminal justice instruments are intended to increase the confidence of judges in one another's legal systems. Such conferences also clarify the way in which the European Court of Justice and the European Court of Human Rights dispense justice, thus increasing accessibility.
- The *second pillar* is to be a shared internet platform for Higher Regional Courts in Europe. This platform should not only serve exclusively as a notice board for the various issues[2] discussed at the conferences. It should also provide information about the criminal proceedings, structures, and practicalities of each Member State as well as provide judges with a direct opportunity to discuss practical issues and opinions on aspects of European criminal justice in an unbureaucratic setting. The conference website www.jurop.info has been organised so as to incorporate an electronic forum in the medium term.
- The *third pillar* is to be a system whereby one can observe the practices of others at the "decision-making level" without being hampered by bureaucracy Judges at Higher Regional Courts in Europe will be provided with an opportunity to experience everyday life in the justice system of another Member State firsthand for a specific period, thus improving their understanding of its internal workings through personal observation.

The "jurop" project is intended to launch a sustainable network of European Higher Regional Courts. This goes hand in hand with a more authoritative application of European law and a deeper understanding of the national laws of individual countries. Both aspects will help create a unified European jurisprudence.

B. The Conference of European Presidents of the Higher Regional Courts on Issues of European Criminal Justice from 23 to 25 September 2009 in Quedlinburg, Germany

The first conference of European Presidents of the Higher Regional Courts, which was held from 23 to 25 September 2009 in Quedlinburg, examined issues of European criminal justice.

It brought legal practitioners from 19 countries together so that they could relate their various experiences and develop means of supporting the implementation of European law.

On the *first day of the conference* (23/9/09), after the official opening and once the delegates had been welcomed, the programme included a visit to nearby Falkenstein Castle, where, in the 13th century, the legal scholar Eike von Repgow is reputed to have compiled the most famous medieval law book in the German language, the "Mirror of the Saxons," which had an enormous impact on the development of law throughout Europe, far beyond the personal sphere of influence of von Repgow in central Germany. Guest speaker Prof. Dr. Anne Weyembergh of the Liberal University of Brussels, who is also a coordinator of the ECLAN network, a European federation of criminal law academics, discussed the "status quo" and the outlook for criminal justice in Europe. She described the current framework within which action can be taken, quoting good and "bad" examples and those where improvements can be made. With reference to the Lisbon Treaty, she explained that the European dimension of criminal law would be gaining even greater significance.

The *second day of the conference* (24/9/09) was devoted to exchanges of specialist information. In the morning, Prof. Dr. Christian Schröder of Martin Luther University, Halle-Wittenberg, addressed the "Europeanisation of national criminal law." He represented the view that the results achieved by means of EU law could create more legal certainty than national law and supported his thesis by claiming that products could only be marketed across Europe if there was a harmonious shared legal landscape. He put his European "vision" in perspective with a critique of the present state of European legislation. The delegates were then divided into working groups that simultaneously tackled "The effect of

the European Convention on Human Rights on national criminal procedure," "The practical repercussions of EC directives on national criminal law," and "The importance of the judicature of the European Court of Justice for national adjudication." After the results of the working groups had been presented in a plenary session, it was followed by an in-depth discussion of such issues as the excessive length of court proceedings.
In his opening paper on "The structure of justice and law in the member states" early in the afternoon, Prof. Dr. Richard K. Vogler of the University of Sussex, United Kingdom, compared legal systems in the fields of "adversarialism," "sentencing," and "the involvement of non-legal practitioners in criminal proceedings." He closed by recognising the existence of a shared European jurisprudential heritage, which has continued to evolve and is of increasing importance.
This was followed by working groups that examined, in tandem, "Practical experiences gained in the mutual recognition of decisions of other member states of the European Union (taking as an example the European Arrest Warrant)," "Rights of defence from the perspective of judicial decisions," and "The independence of judges and structure of the administration of justice." The results of the working groups were then presented in a plenary session and discussed from a number of different angles.
At the working dinner in the Schlossmühle Hotel, hosted by Prof. Dr. Wolfgang Böhmer, Minister President of the State of Saxony-Anhalt, Prof. Dr. Heiner Lück of Martin Luther University, Halle-Wittenberg delivered a lecture entitled "800 years after Eike von Repgow – The importance and dissemination of his 'Mirror of the Saxons' in Europe." His academic contribution brought to a fitting conclusion the fact-finding tour of Falkenstein Castle, enjoyed by the delegates the previous day, as well as the second day of the conference, which had been organised as a challenging opportunity to exchange thoughts and opinions.
On the *third and final day of the conference* (25/9/09), its host – "jurop" project leader *Winfried Schubert*, President of Naumburg Higher Regional Court, Germany – together with "jurop" project partners Dr. Alois Jung, President of Linz Higher Regional Court, Austria, Dominique Gaschard, President of Dijon Higher Regional Court, France, and Cezar Hîncu, President of Suceava Higher Regional Court, Romania, asked delegates to evaluate the "jurop" project and air their thoughts on its future. They were quick to agree that the conference as well as the other pillars of the "jurop" project that have yet to be put in place (the electronic forum and the opportunity to shadow one another at work) were successful approaches in terms of the work which has yet to be accomplished in Europe. As the conference drew to a close, the delegates adopted a declaration in which they set the course for future collaboration, based on the valuable experiences they had gained from their initial meeting in Quedlinburg:

- The delegates welcome this inaugural conference as a positive first step towards integrating the Higher Regional Courts into the process of developing a shared legal area.
- They are united in their belief that this approach should continue to be pursued through a regular series of conferences in the future. The next conference is scheduled for 2011 in Dijon, France.
- In addition, the delegates agree that the electronic forum developed by Naumburg Higher Regional Court should evolve into a rapid, easy-to-use information exchange and, in the medium term, be accessible by all European Higher Regional Courts. The website provides a record of the issues discussed at the conference. It is also to provide information about the criminal proceedings, structures, and practicalities of each Member State as well as information on judges serving on Higher Regional Courts, including an opportunity to discuss practical issues and opinions on aspects of European criminal justice directly in an unbureaucratic setting. After the Quedlinburg conference, Naumburg Higher Regional Court drew up a list of topics for the electronic forum, some of which follow up on issues discussed at the conference, while others address themes in connection with the Stockholm programme.
- It is agreed that judges should be provided with an opportunity to make a series of regular visits to observe the practices of their peers, thus helping to extend the building up of mutual trust and reciprocal practical assistance in the long term through personal contact. Concrete plans for the first of these visits were made by delegates before they even left the conference. Their ability to observe other European Higher Regional Courts in action should enable "decision-makers" to experience how justice is dispensed on a day-to-day basis in another Member State without being hampered by red tape. Through their own personal observations, they would then have a deeper understanding of the internal workings of justice systems in the other Member States.

C. The Future

We have now taken the first steps towards launching a network of European Higher Regional Courts. This is an important contribution to the next phase of action at the European level. The European Commission's proposals for the new five-year programme in the area of justice recommend additional measures aimed at improving the continuing training of judges, and, in particular, increased dialogue between judges in the different Member States. This was discussed by heads of state and government at their December summit as part of the 2010 to 2014 Stockholm programme. The European Parliament also supports the trust-building activities of the judiciary in Europe. The "jurop" project will enable judicial practitioners to contribute to the creation of the necessary European common legal area.
"United in diversity" is the basic tenor of "jurop," and, indeed, the Quedlinburg Cathedral organist impressively improvised on this theme. However, "improvisation" has no part to play in the objectives of the "jurop" project in the prosaic world of the law.

Winfried Schubert,
President of Naumburg Higher Regional Court

1 For a report on the proceedings and subjects under discussion, cf. Section B.
2 Documentation on the conference in Quedlinburg with speeches and abstracts can be found at www.jurop.info

months after the parties have notified each other of the completion of the relevant internal procedures.

As the conclusion of the Agreement is governed by the Lisbon Treaty, it requires prior approval by the European Parliament. (CR)

➤eucrim ID=0904068

EU-US Agreements on Extradition and on Mutual Legal Assistance in Force

On 1 February 2010, the Agreement on extradition and the Agreement on mutual legal assistance between the EU and the USA (see eucrim 3/2009, p. 75) entered into force.

Following the request of the Netherlands, the Council additionally approved the extension of the territorial scope of the EU-US Agreement on extradition to the Netherlands Antilles and Aruba. (CR)

➤eucrim ID=0904069

European Arrest Warrant

EAW – Final Report on the Fourth Round of Mutual Evaluations: Follow-up

On 7 December 2009 the Swedish and Spanish Presidencies have presented a follow-up to the final report on the fourth round of mutual evaluations on the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States (see eucrim 3/2009, pp. 77-78 and eucrim 1-2/2009, p. 18).

The aim of this follow-up report is to initiate discussions between the EU Member States on particular recommendations made in the report. Therefore, the Presidencies invite the Working Party on Cooperation in Criminal Matters to consider which type of action would be preferable and how these recommendations should concretely be taken forward. The recommendations include those on time limits for the provision of language-compliant EAWs; proportionality checks; accessory surrender; specialty rule; Article 111 of the Schengen Convention; "provisional arrest" under the EAW; information deficits; and seizure and handover of property. (CR)

➤eucrim ID=0904070

European Evidence Warrant

European Evidence Warrant Possibly Replaced by European Investigation Order

The three next EU Presidencies (the Spanish, Belgian and Hungarian Presidencies), presented their combined programme for the period of January 2010 – June 2011 on 27 November 2009.

In the area of judicial cooperation in criminal matters, the further implementation of the mutual recognition principle is intended to lead to the development of a general instrument replacing the European Evidence Warrant (EEW), possibly called the 'European Investigation Order'. (EDB)

➤eucrim ID=0904071

European Supervision Order / Transfer of Sentenced Persons

Entry into Force of the European Supervision Order

The so-called 'European Supervision Order' has been published in the Official Journal of the EU on 11 November 2009 and entered into force 20 days later on 1 December 2009.

The Framework Decision lays down rules according to which one EU Member State recognises a decision on supervision measures issued in another EU Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures (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; eucrim 3/2009, p. 81). Member States are now asked to implement the Framework Decision by 1 December 2012. (CR)

➤eucrim ID=0904072

E-Justice

Launch of the European E-Justice Portal Postponed

In the highly anticipated E-Justice Action Plan (see eucrim 1-2/2009, p. 21), the launch of an E-Justice Portal was planned for the end of 2009. The portal aimed to promote the use of information and communication technologies in the field of justice by providing access to relevant information and services.

On 30 November – 1 December 2009, the Council took note of the fact that the first release of the portal had to be postponed to the first half of 2010.

The development of the portal takes place gradually. In the long-term, three aspects will be covered:

- Firstly, access to law and legal information at EU and at national level (N-Lex, EUR-Lex, caselaw) will be provided, including pan-European databases (for example to find a lawyer or notary in another Member State);
- Secondly, electronic communication between a judicial authority and the citizen will be set up (for example to submit applications to court, exchange documents in court proceedings, such as the European order for payment procedure etc.); and
- Thirdly, secure communication between judicial authorities in the cross-border context will be set up (for example to exchange information about videoconferencing, its availability and possibilities, secure exchange of legal assistance requests etc.).

The Commission is now requested to take all possible measures to ensure the delivery of the first release of the portal as soon as possible. (EDB)

➤eucrim ID=0904073

Law Enforcement Cooperation

Fifth Expert Meeting on Joint Investigation Teams

On 30 November and 1 December 2009, the fifth meeting of National Experts on Joint Investigation Teams (JITs) was hosted by Eurojust, co-organised with Europol. The meeting was attended by experts and practitioners from 25 EU Member States, including representatives of Eurojust, Europol, OLAF, the Council Secretariat, the European Parliament and the European Commission.

This year's meeting focused primarily on two subjects: first, the future of the JIT Experts Network in view of the integration of the JIT Secretariat within the administration of Eurojust; and second, the review and possible amendments of the Model Agreement on JITs.

Discussions on the first question concluded that an integration of the Secretariat within Eurojust was important to strengthen and expand the original function of the network. Proposals for the Secretariat's future role and function included the creation of a platform for exchange of non personal related information to allow the Secretariat to become a centre of information.

The second workshop provided concrete guidance on a possible update of the Model Agreement on JITs, notably to

- Include best practice examples on gathering and admissibility of evidence in the JIT Manual,
- Formalise the status and tasks of EU bodies such as Europol, Eurojust and OLAF in a JIT in a separate annex to the model agreement as they are only participants and not members to a JIT,
- Consider the concept of an Operational Action Plan,
- Anonymise the members and participants of a JIT,
- Formally amend the JIT agreement in case of major adjustment to the JIT.

Since 2005 JIT Expert Meetings take place annually hosted by Eurojust and Europol on a rotating basis. (CR)

➤eucrim ID=0904074

Focused Approach to the Implementation of the Prüm Decision

In a note to the Delegations, the Austrian Delegation has asked the forthcoming Trio Presidency to put the issue of implementation of the Prüm Decision high on their agendas. The note proposes that Delegations check and monitor the respective national implementation and provide the necessary leadership and guidance in order to enhance and pool the national efforts; and that the operational Prüm Member States consider offering stronger support to the non-operational ones.

The Austrian Delegation has taken this initiative out of its growing concern that the deadline for the implementation of the necessary measures to exchange DNA profiles, dactyloscopic and vehicle registration data of 28 August 2011 may not be met by all Member States; and that some Member States may underrate the complexity of the implementation requiring the cooperation of legal, forensic and technical experts, human and financial resources and time. (CR)

➤eucrim ID=0904075

Conclusion of Agreement Extending Prüm Decision to Iceland and Norway

On 26 November 2009, the EU and Norway agreed on the application of certain provisions of Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and the Decision on its implementation (see also eucrim 3/2009, p. 74). On 30 November 2009, Iceland followed in signing the Agreement.

This Agreement will enhance law enforcement cooperation between Norway and Iceland and the EU Member States and will imply access to inter alia their DNA, fingerprint and vehicle registers for law enforcement authorities of the Member States.

The Agreement will enter into force after Iceland and Norway have completed the formal procedures regarding their consent with the Agreement. (EDB)

➤eucrim ID=0904076

Information Management Strategy for EU Internal Security

The current system of information systems and instruments is more and more criticised as being an uncoordinated and incoherent patchwork. Following the invitation made in the Stockholm Programme, the JHA Council decided during its meeting in November 2009 to adopt and implement an Information Management Strategy. Such a strategy is believed to ensure the EU internal security by supporting, streamlining and facilitating the management of information necessary to the competent authorities. According to the Council, the strategy will be based on several principles such as the obligation to strictly tie the use of information management to political, policy and operational priorities, its functional definition, and appropriate use. The strategy in itself does not create links between different databases or provide for specific types of data exchange but rather aims at ensuring that, when the operational requirements and legal basis exist, the simplest, easily traceable and cost-effective solution is found. The strategy consists of eight focus areas, namely the needs and requirements, interoperability and cost efficiency, decision-making and development processes, and multidisciplinary approach for information management.

The authorities addressed are essentially law enforcement authorities, authorities responsible for border management and judicial authorities dealing with criminal matters. (CR)

➤eucrim ID=0904077

EDPS Opinion on New Agency for Large-Scale IT Systems

On 7 December 2009, the European Data Protection Supervisor published his opinion on the new Agency for large-scale IT-systems. The EDPS generally welcomes the idea of the European Commission to establish an Agency for the operational management of large-scale information technology IT systems that would be responsible for the op-

erational management of the Schengen Information System (SIS II), Visa Information System (VIS), Eurodac and possible other large-scale IT systems (see eucrim 1-2/2009, p. 4).

The EDPS sees an advantage in such an Agency as it could clarify issues of liability and applicable law as long as the scope of its activities and responsibilities is clearly defined. According to the EDPS, this has not been accomplished by the current proposal.

He therefore recommends to clarify the scope of the Agency's activities, either comprising policies on border checks, asylum and immigration or all large-scale IT systems developed in the area of freedom, security and justice, as well as to define the concept of large-scale IT systems within this framework. (CR)

➤eucrim ID=0904078

Accreditation of Forensic Service Providers

On 20 December 2009, a Framework Decision establishing common standards for forensic service providers entered into force.

The Framework Decision introduces accreditation of all forensic service providers carrying out laboratory activities resulting in DNA-profile and dactyloscopic data. This means that the results of their activities can be mutually recognised by the Member States' authorities responsible for the prevention, detection, and investigation of criminal offences as being equally reliable as the results of their domestic forensic service providers carrying out laboratory activities accredited to the 'General requirements for the competence of testing and calibration laboratories', referred to as EN ISO/IEC 17025.

To achieve this aim, Member States are required to ensure that their respective forensic service providers are accredited by a national accreditation body as complying with relevant international standards such as EN ISO/IEC 17025.

The need for such common standards has become of particular relevance in the framework of the Prüm provisions granting Member States access rights to their automated DNA, dactyloscopic and vehicle registration data.

In relation to DNA-profiles, Member States are asked to take the necessary steps to comply with these provisions by 30 November 2013.

In relation to dactyloscopic data, Member States have time until 30 November 2015. (CR)

➤eucrim ID=0904079

European System for Forensic Drug Profiling

At its meeting in November 2009, the JHA Council adopted Conclusions on establishing a European system for forensic drug profiling that had been proposed by the Swedish Presidency in September 2009. Such a law enforcement driven system is seen as an additional tool to combat organised crime and drug production and/or trafficking. The objective of the system should be to carry out and compare forensic profiling analysis according to reliable and well-defined standards.

In its Conclusions, the Council invites Member States to inter alia:

- Encourage their law enforcement personnel and judicial authorities dealing with drug related offences to use the results of law enforcement intelligence/information and related forensic drug profiling in their work;
- Designate National Contact Points in law enforcement organisations as part of a network for information exchange,
- Ensure enhanced collaboration and exchange of information between law enforcement agencies (including Europol) and forensic institutes.

Furthermore, Europol is invited to host a European Union Drug Profiling Database (EUDPD) from 2012 onward.

Finally, the Commission is asked consider its possibilities for financial support. (CR)

➤eucrim ID=0904080

Council of Europe

*Reported by Dr. András Csúri**

Foundations

European Court of Human Rights

Guidelines for a Systematic Prevention of Human Rights Violations at National Level

On 7 December 2009 – in order to contribute to a successful outcome of the High-Level Conference in Interlaken (18-19 February 2010) on the future of the European Court of Human Rights (hereafter: the Court or ECtHR) – Thomas Hammarberg, the Commissioner for Human Rights (hereafter: the Commissioner) addressed a Memorandum to the 47 Member States of the Council of

* If not stated otherwise, the news reported in the following sections cover the period November 2009 – January 2010

Europe (CoE). In his Memorandum, the Commissioner underlined that the Court is regarded by all citizens in Europe as the ultimum remedium, which has also led to a permanently increasing caseload, with the number of pending cases in October 2009 amounting to approximately 115,000. The Court's annual judgments also increased from 695 to 1543 between 2000 and 2008. The Commissioner stressed his concerns over the fact that, in over 81% of the judgments delivered since 1959, the Court had found at least one violation of the European Convention on Human Rights (hereafter: the Convention) by the respondent state. In addition, approximately 50% of the admissible cases are "repetitive applications," which normally should already have been resolved by the respondent Member State. Moreover, the reality that only 10% of the new applications before the Court are clearly admissible appears to indicate serious deficiencies in the provision of information on the Convention and the Court's procedures.

On 8 April 2004, the Steering Committee for Human Rights (CDDH) adopted a Report on "Guaranteeing the long-term effectiveness of the European Court of Human Rights." In this report, CDDH stressed the importance of evaluating the implementation of the relevant Committee of Ministers Recommendations (CM) in a regular and transparent manner on the national level. The Commissioner considers giving effect to and systematically supervising the implementation of these five CM Recommendations to be of utmost importance. He further notes that, since adoption of the CDDH Report, they were in fact complemented by the CM Recommendation (2008)2 on efficient domestic capacity for rapid execution of the Court's judgments (see also eucrim 1-2/2009, p. 29).

For the purpose of understanding important Convention principles followed by the domestic courts when they apply the law, the Commissioner considers the translation of all leading judgments of the Court by Member States into their national language to be imperative. This practice could make the verification of the compatibility of draft and existing domestic laws, as well as administrative practice as regards the Court's case-law and standards, more effective. In order to bridge the implementation gap, a systematic and comprehensive governmental strategy should be worked out that ensures the full realisation of the European human rights treaties, incipient with the Convention and the Court's case-law.

The Commissioner underlined that the effective implementation of other major European human rights treaties is also necessary as they are, in effect, complementary to the Convention and part of the European human rights protection system.

The systematic implementation of Convention standards by Member States should be comprehensive, which implies the systematic domestication of the standards contained in other CoE human rights treaties. The work of the independent monitoring bodies of the CoE should also be seriously considered. The idea of systematic human rights work is not new. The World Conference on Human Rights (Vienna, 1993) already expressed concerns about the gap between the agreed norms and the reality in a number of countries – it recommended that governments produce a national plan for the implementation of their human rights obligations. Since 1993, only handful of countries has produced national plans. No universal formula exists on how to systematise effective implementation of human rights standards.

Therefore, the Commissioner laid down some practical guidelines for the Member States. They are as follows:

Systematic human rights work requires, as a first step, the preparation of a national baseline study giving a precise picture of the current human rights situation under existing policies and practices as well as the recognition of problematic areas in a particular country. A part of the description must also be dedicated to the status of the domestic implementation of core international and European human rights treaties. The Commissioner highlights that the Court's leading judgments (regardless of the country in respect of which they have been rendered) should be part of the national baseline studies.

The next step is to develop a national human rights action plan to address the human rights challenges identified in the baseline study.

Since the key terms of the process, according to the Commissioner, are participation, inclusiveness, and transparency, all stakeholders, including National Human Rights Structures (NHRSs), civil society, and representatives of disadvantaged groups of people, should be involved. Their participation contributes to the legitimacy of the plan and will make its implementation more effective. In the process, all communication with NHRSs and civil society representatives must be conducted with full respect for their integrity and independence.

The implementation of these action plans should be reviewed regularly with an independent evaluation of results upon their completion. The assessment of the process is as important as the evaluation of its end results.

High-level and long-term support for the action plans should be ensured through the active involvement of politicians and the leadership of the authorities responsible for the plan's implementation. In addition, the planning of human rights work needs to be coordinated with the budgetary process in order to ensure proper funding and accountability.

Furthermore, the Commissioner underlines the necessity of setting up adequate systems for data collection and analysis, including data on disadvantaged groups of people, complemented by relevant information from NHRSs and NGOs.

In addition, local authorities should develop comprehensive local baseline studies and action plans, ensuring regular reviews of the local situation and coordinated efforts to address human rights challenges. Adequate systems should be

established to monitor the provision of health care, education, or social services, whether provided by private or public actors.

Establishing such institutions at the regional or local levels could facilitate easy access for those whose rights may have been violated. NHRSs, if adequately resourced, may also facilitate the establishment of national systems of information on the Convention and the Court's procedures and make this information easily accessible for any interested individual.

➤eucrim ID=0904081

The Interlaken Declaration on the Future of the ECHR

On 19 February 2010, a landmark conference took place in Switzerland to reaffirm the Member States' commitment to the protection of human rights in Europe and to draw up a roadmap for the future development of the Court. Beyond the necessary steps at the national level (see previous news on the Commissioner's Guidelines), the Declaration also addressed proposals to the Committee of Ministers and the Court itself.

The conference recognised the extraordinary contribution of the Court towards the protection of human rights in Europe and welcomed the entry into force of Protocol No. 14 to the Convention (1 June 2010). It also noted that the entry into force of the Lisbon Treaty paves the way for accession of the EU to the Convention. The meeting stressed that the number of applications brought before the Court damages the effectiveness and credibility of the Convention and its supervisory mechanism. Furthermore, the amount of work represents a threat to the quality and consistency of the case-law and the authority of the Court.

For these reasons, the conference reiterated the obligation of the State Parties to fully secure the rights and freedoms set forth in the Convention at the national level and called for a strengthening of the principle of subsidiarity. Furthermore, the conference stressed a reduction in the number of clearly inadmissible applications as well as effective filtering of such applications in addition to finding solutions to deal with repetitive applications.

The conference also adopted an Action Plan to provide political guidance for the process geared towards long-term effectiveness of the Convention system. The plan acknowledges individual petitions as a cornerstone of the Convention system. However, with regard to the high number of inadmissible applications, the Committee of Ministers is invited to consider measures that would enable the Court to concentrate on its essential role as a guarantor of human rights. The Conference also recalled that it is the prime responsibility of the Member States to guarantee the application and implementation of the Convention. Therefore, it called upon the Member States to increase the awareness of national authorities regarding Convention standards and to ensure their application. The Conference also encouraged the Member States to fully execute the Court's judgments in order to prevent further similar violations. With regard to filtering mechanisms, the Member States were called upon to provide comprehensive and objective information to potential applicants on the Convention and the Court's case-law, in particular on application procedures and admissibility criteria. In this regard, the Declaration also recommends to the Court to put in place a mechanism within the existing bench that is likely to ensure effective filtering. It also recommends that the Committee of Ministers examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure. With respect to repetitive applications, the Conference called upon the Member States to adopt general measures to effectively remedy the structural problems at the origin of repetitive cases. The Declaration also underlined the need for the Court to develop clear and predictable standards for the pilot judgment procedure as regards the selection of applications, the procedure to be followed, and the treatment of adjourned cases. Ultimately, the Committee of Ministers were called upon to present possible options for a State Party required to remedy a structural problem revealed by a judgment.

The conference also reaffirmed the need for the independence of the judges and the impartiality and quality of the Court. Therefore, by acknowledging the responsibility shared between the State Parties and the Court, the Conference invited the Court to avoid reconsidering questions of fact or national law that have been considered and decided by national authorities. It was also asked to give full effect to the principle de minimis non curat praetor (avoiding the resolution of trivial matters not worthy of judicial scrutiny). The Declaration also suggested that the Court make use of the possibility to request the Committee of Ministers to reduce the number of judges of the Chambers to five members, as provided by Protocol No. 14.

Regarding the supervision of execution of judgments the Conference stressed the Committee of Ministers to develop the means which will render its supervision of the execution of the Court's judgments more effective and transparent.

Finally the Conference called upon the State Parties to inform the Committee of Ministers, before the end of 2011, of the measures taken to implement the relevant parts of the Declaration.

➤eucrim ID=0904082

Russia Approves Protocol No. 14 for Ratification

As reported in earlier issues (e.g., eucrim 1-2/2009, p. 28), due to the persistent refusal of Russia to ratify Protocol No. 14 to the European Convention on Human Rights (Convention), the ECtHR and the CoE Member States concluded Protocol No. 14*bis* to increase the ECtHR's short-term capacity to process applications, since it contains procedural provisions that enable the Court to work more efficiently. Protocol No. 14*bis* was opened

for signature on 27 May 2009 and entered into force after ratification by three Member States. On 15 January 2010, the Committee of Ministers and the Court welcomed the news that the Russian State Duma had approved Protocol No. 14 of the Convention for ratification. This vote finally cleared the way for the Protocol that had already been ratified by the other 46 States Parties to enter into force. In particular, the new procedural measures (the single-judge procedure and the new powers of the three-judge committees) will help the Court (see eucrim 1-2/2009, pp. 27-28).
➤eucrim ID=0904083

Major Step Forward Towards a European Fundamental Rights Area

In a press release Jean-Paul Costa, President of the Court, welcomed the entry into force of the Lisbon Treaty (1 December 2009). He underlined that this has paved the way for the EU to join the European Convention on Human Rights and that it is a major step towards creating a European fundamental rights area.
➤eucrim ID=0904084

Human Rights and Legal Affairs

Human Rights Commissioner on the Use of Secret Intelligence

In his Viewpoint of 2 November 2009, the Commissioner pointed out the urgent need to improve the democratic oversight of intelligence and security agencies and to regulate cross-border cooperation between them. The Viewpoint emphasised the breakdown of human rights as a consequence of the US-led "war on terror." According to the Viewpoint, the violations include emerging systematic torture, secret detentions, and other serious human rights abuses. Political authorities, however, appear reluctant to face facts.

The Commissioner states that terrorism is a reality and is seeking effective ways to combat it. However, many counter-terrorism measures used today are illegal or even counter-productive. This was also concluded by an international panel of eminent judges and lawyers in an authoritative report in 2009 ("Assessing Damage, Urging Action," February 2009. International Commission of Jurists. www.icj.org).

Standards have been defined, for instance, in relation to the collection and processing of personal data. The CoE's Guidelines on Human Rights and the Fight against Terrorism (2002) have specified the conditions for such activities.

Most European countries have oversight bodies, such as parliamentary committees on a permanent basis or for particular special investigations or groups of experts with relevant backgrounds, to hold intelligence and security services accountable and to ensure that laws are respected and abuses avoided. The effectiveness of these bodies depends though on their statutory powers on the level of governmental cooperation (and from the agencies).

Nevertheless, the Commissioner stressed that several Member States need to improve the democratic control of their agencies. For this purpose, the Commissioner considers, e.g., the Norwegian Parliamentary Oversight Committee to be a good model, because it reviews all records and archives and appears to actively control inter-agency communications. In contrast, there are countries where the oversight bodies seem to have little access to sensitive information or even strategy discussions.

In his Viewpoint, the Commissioner refers to individual cases where particularly embarrassing lapses are conspicuous. The main argument of the authorities – not only in these cases – was fear of a negative reaction by the US government.

The Commissioner stressed that, while cross-border cooperations are essential, it is not acceptable that investigations into possible human rights violations are prevented by such "arrangements."

Some facts have already emerged about human rights violations that took place during secret collaborations between intelligence agencies. They, in turn, led to a discussion on how to make the struggle against terrorism more effective by preventing human rights violations. For this reason, legislation on exemptions of freedom that are based on national security considerations should be strictly limited. However, it must be recognised that there are facts that should legitimately be kept confidential and that indicate the main role of oversight bodies: to control the agencies in a manner that makes them worthy of trust. Therefore, they also have to be able to deal with the flow of information between the different national agencies. Additionally, such collaborations should only be allowed according to principles established in law and when authorised or supervised by parliamentary or expert control bodies.

Both the supply and receipt of data should be regulated through explicit agreements, be required by law, include human rights safeguards, and be submitted to the relevant oversight body. Supplied data should only be used and further distributed in accordance with clear restrictions and regulations. The Viewpoint stipulates as a guiding rule that the condition for disclosing information must be the same supervision as exercised by the requested agency – including guaranteeing respect for human rights safeguards. Similarly, requesting agencies should make imported data subject to full scrutiny by their respective national oversight mechanisms.

The Commissioner states that it would be easier for individual European Member States to conclude bilateral agreements with other states if they agreed among themselves on principles to apply in inter-agency cooperation. Furthermore, he referred to the recent 2009 Communication of the European Commission on the development of the area of freedom, security and justice in the EU for which a common "information model" has been suggested.

International cooperation as it exists between the intelligence and security services is not to be seen at the level of national oversight bodies. The modest network needs to be further developed on the basis of the existing models of national mechanisms.

➤eucrim ID=0904085

Specific Areas of Crime

Corruption

GRECO: Liechtenstein Joins the Group of States Against Corruption

On 17 November 2009, Liechtenstein signed the Criminal Law Convention on Corruption (Convention). Although it had not yet ratified the Convention, on 1 January 2010, Liechtenstein became the 47th member of the Group of States against Corruption (GRECO). In this way, Liechtenstein has actively committed itself to fighting corruption.

An on-site visit will be soon carried out to study the capability of institutions to deal with corruption cases in Liechtenstein as well as to examine the preventive measures taken within the public administration and mechanisms to target the proceeds of corruption.

Next year, GRECO will produce a report summing up the findings and containing possible recommendations for improvement.

➤eucrim ID=0904086

GRECO: Third Round Evaluation Report on Ireland

On 25 January 2010, GRECO published its Third Round Evaluation Report on Ireland focusing on the two distinct themes of criminalisation, namely corruption (Theme I) and transparency of party funding (Theme II). As a whole, the report addressed ten recommendations to Ireland. GRECO will assess the implementation of these recommendations in the second half of 2011.

Regarding the criminalisation of corruption, the report states that, overall, Ireland's criminal law complies with the relevant provisions of the CoE Criminal Law Convention on Corruption and its Additional Protocol. Nonetheless, GRECO encourages the authorities to criminalise trading in influence as a separate offence as well as the extension of the jurisdiction of Irish authorities to prosecute nationals who commit bribery offences abroad (if they do not have the status of public official).

Concerning the transparency of party funding, GRECO commends the thorough regulatory system as well as the role played by the Standards in Public Office Commission in monitoring compliance. However, GRECO recommends some additional measures for the ongoing reform process in order to increase transparency and control over political finances. The report stresses introducing a legal requirement for political parties to keep proper books and accounts and to have them independently audited. Of particular importance is the easy, timely, and full access by the public to party accounts, including financial information on local branches and so-called third parties. Moreover, monitoring of political funding at the local level should be reinforced.

The report also suggests further regulation of the existing sanctioning system, most notably by ensuring that all legal requirements are matched with effective sanctions in case of non-compliance. Finally, GRECO advises Ireland to consolidate the currently dispersed rules on party funding into a comprehensive, clear, and up-to-date legislative instrument.

➤eucrim ID=0904087

GRECO: Third Round Evaluation Report on Croatia

On 9 December 2009, GRECO published its Third Round Evaluation Report on Croatia. The report addressed five recommendations on the criminalisation of corruption (Theme I) and a further six on the transparency of party funding (Theme II). Their implementation will be assessed by GRECO in mid-2011.

In the field of criminalisation of corruption, the report stated that – following permanent legal reforms – the criminal law of Croatia complies, to a large extent, with the relevant provisions of the CoE Criminal Law Convention on Corruption (ETS 173). Nevertheless, inconsistencies and deficiencies still exist in the current legislation, such as the lack of an explicit reference to bribes intended for a third person; the low sanctions prescribed for active bribery offences (both in the public and private sectors); and the potential for misuse of the defence of "effective regret." The latter can be invoked when an offender reports a crime after its commission and is granted mandatory, total, and automatic exemption from punishment.

Concerning the transparency of party funding, GRECO acknowledged that the Act on the financing of political parties, independent lists, and candidates (in force since January 2007) is, in many respects, in line with the standards established by Recommendation (2003)4 of the Committee of Ministers on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns.

Nevertheless, it appears that the system of political financing suffers from a lack of substantial and proactive monitoring that would go beyond the formal examination of submitted information. Moreover, the harmonisation of the provisions on election campaign funding contained in the various election laws is indispensable. These provisions also have to be aligned with the standards set by the above-mentioned Act as regards transparency, supervision, and sanctions. Furthermore, the level of disclosure obligations should be increased and the control of political financing of individual party candidates and entities related to a political party or under its control extended.

In the field of sanctioning, GRECO suggests more flexible criminal sanctions with regard to the infringement of rules concerning the funding of political parties, independent lists, and candidates, including administrative sanctions and effective, proportionate, and dissuasive sanctions for infringements of existing and yet to be established regulations concerning election campaign funding under the various election laws.

Ultimately, GRECO stated that its report should be seen as a timely contribution to the current and ongoing reform of the criminal code, given that its revision is underway and that an interdepartmental working group with the mandate to analyse existing legislation on political financing and to suggest further amendments has recently been established.

➤eucrim ID=0904088

GRECO: Third Round Evaluation Report on Germany

On 9 December 2009, GRECO published its Third Round Evaluation Report on Germany, following authorisation by the German authorities. The report addressed a total of 20 recommendations to Germany (10 on incriminations and another 10 on the transparency of party funding). Their implementation will be assessed by GRECO in the second half of 2011.

The report states that, despite Germany's economic power and practitioners in charge of investigating and prosecuting corruption efforts to make the best use of current legal tools at their disposal to investigate and prosecute corruption, there are certain limitations when it comes to dealing with cross-border forms of corruption.

The report emphasises that, during the last period of legislature, the federal parliament did not manage to adopt the draft Act on revision of the anti-corruption provisions, which was presented in 2007 and which would have enabled Germany to ratify the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) as well as the United Nations Convention against Corruption. Therefore, GRECO advises swift ratification of the aforementioned documents.

GRECO is particularly concerned about the fact that certain categories of persons are subject to limited anti-corruption provisions. Therefore, the report urges Germany to substantially broaden the criminalisation of active and passive bribery of parliamentarians, foreign public officials, and persons employed at the international level (officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts). It also calls on the German authorities to extend the criminalisation of bribery in the private sector, criminalise trading in influence, and harmonise and broaden the rules on Germany's jurisdiction for corruption offences. In the latter case, the report suggests including, to the largest extent possible, all relevant rules concerning jurisdiction in the Criminal Code in order to facilitate the understanding by practitioners and the public at large.

Regarding the transparency of party funding, Germany's Political Parties Act follows a liberal model of political financing. Even if the Act implements to a great extent the Recommendation (2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, German legislation still needs to be adjusted in order to better deal with associations of voters.

The report recommends the examination of the rising sponsoring-practices. Particularly to lower the 50,000 euro threshold for the immediate reporting and disclosure, under the Political Parties Act, of donations made to political parties as well as to consider reducing significantly the threshold for the disclosure of donations and donors. GRECO suggests to put a ban on anonymous donations and to prohibit donations to parliamentarians and candidates who are members of political parties or, alternatively, to subject them to requirements for record keeping and disclosure similar to those applicable to political parties. On a more general level the report recommends to develop a more global approach of party financing in Germany by presenting in an official document the various forms of state support effectively granted or available and to initiate consultations about the additional measures needed to better ensure the strict separation, under the law, of the financing of political parties on the one hand, and foundations and parliamentary groups on the other hand.

The report strongly recommends introducing a system for the publication of election campaign accounts at federal level, which would make information on political parties' financial activities available shortly after election campaigns. It is also of great importance to harmonise the sanctions for non-compliance with the requirements of the Political Parties Act and to address, in this context, the absence of sanctions for donations over 1000 euro made in cash. It is also necessary to clarify possible infringements to the Code of Conduct appended to the Rules of Procedure of the Parliament (Bundestag) as regards the regime of donations to parliamentarians. It should be ensured that these infringements are subject to effective, proportionate, and dissuasive sanctions.

Furthermore, GRECO is highly concerned about the supervision exerted by the Federal Parliament. It clarifies that the body that supervises party financing should enjoy a sufficient degree of independence and have proper means of control, adequate staffing, and appropriate expertise. Therefore, GRECO urges Germany to review the situation of Members of Parliament regarding the financing of their political activities and to subject them to stricter rules concerning the receipt of support from private sources. This is an especially important issue given the aforementioned gaps in the criminalisation of corruption involving Members of Parliament.

➤eucrim ID=0904089

GRECO: Third Round Evaluation Report on Malta

On 10 November 2009, GRECO published its Third Round Evaluation Report on Malta. The two distinct themes were the criminalisation of corruption (Theme I) and the transparency of party funding (Theme II). The report addresses altogether nine recommendations to Malta, and their implementation will be assessed by GRECO in the first half of 2011.

Regarding the criminalisation of corruption, GRECO finds that Malta has generally established a solid legal framework, which would only require a few amendments in order to be in full compliance with the Criminal Law Convention on Corruption (ETS 173), ratified by Malta and incorporated into the Criminal Code. Additionally, the report has no more than 3 Recommendations to the Member State. However, the report noted that the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) has not yet been ratified, and some of the offences contained therein (i.e., bribery of arbitrators and foreign jurors) have not been criminalised under Maltese law. Therefore, GRECO suggests including the offences of bribery of domestic and foreign arbitrators as well as foreign jurors in the Criminal Code. The group encourages Malta to proceed swiftly with the ratification of the Additional Protocol. The report also recommends increasing the maximum penalty for trading in influence in order to render it "effective, proportionate and dissuasive". The report states that, in practice, there appears to be a generally low level of investigated/adjudicated corruption cases in Malta.

Concerning the transparency of political funding (Theme II), GRECO notes that political parties and election candidates are heavily dependent on private sources, as there is almost no direct general public funding available. Political parties are under no transparency requirement or supervision in respect of their income and expenditure as opposed to election candidates who are obliged to declare their income and expenses following elections. Therefore, the existing rules appear ineffective. Malta has progressively become a two-party system, and politics in this Member State are increasingly party-orientated. Thus, GRECO has called for further regulations to provide for reasonable transparency and monitoring in respect of political financing, in order to be in line with the principles of Recommendation (2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns. It is therefore necessary to introduce a general requirement for both political parties and election candidates to disclose all individual donations (including those of a non-monetary nature) that they receive above a certain value, together with the identity of the donor. In connection with this,a general ban should be introduced on donations from donors whose identity is not known to the party or candidate. GRECO suggests that political parties should keep proper books and accounts (especially in connection with election campaigns) and that income, expenditure, assets, and debts are accounted for in a comprehensive and coherent manner and reported on at appropriate intervals. Accounts and reports on political financing should be published in a manner such that the public can obtain access to these documents. Ultimately, GRECO urges independent monitoring of the funding of political parties and electoral campaigns as well as the establishment of appropriate sanctions in this field.

➤eucrim ID=0904090

GRECO: 45th Plenary Meeting

GRECO held its 45th Plenary Meeting on 4 December 2009 in Strasbourg, where it adopted an Addendum to the Second Round Compliance Report on Romania, Third Round Evaluation Reports on Croatia, Germany, and Ireland as well as the Third Round Compliance Report on Finland. With regard to the low number of fully implemented recommendations, the Bureau was asked to discuss the possible need to revise GRECO's Rules of Procedure, in particular as regards the use of the non-compliance procedure.

After examination of the thematic proposals for its Fourth Evaluation Round, GRECO also expressed support for the topic "Human rights and corruption prevention in parliaments, public administration and the private sector," and the Bureau was mandated to revise and refine its proposals in light of the discussions.

The Meeting participants also adopted GRECO's Programme of Activities for 2010 which, inter alia, foresees evaluation visits to 12 states. Regarding its Tenth General Activity Report (2009), a substantive section on "Experience with the criminal offence of trading in influence" or, alternatively, on "Human rights and corruption" will be included.

With regard to cooperation with the EU, GRECO took note of the Stockholm Programme and the invitation addressed by the European Council to the Commission to submit a report, in 2010, on the modalities for the Union to accede to GRECO. Overall willingness to contribute to the development of a comprehensive anti-corruption policy of the EU was expressed.

➤eucrim ID=0904091

Money Laundering

MONEYVAL: 8th Typologies Meeting

MONEYVAL regularly undertakes typology research projects (studying methods and trends regarding certain criminal offences) in order to better understand the money laundering and terrorist financing environment in Europe. Its findings aim to assist decision makers and operational experts in targeting policies and strategies to combat the aforementioned threats.

MONEYVAL's 8th experts' meeting on such typologies was held from 10 to

12 November 2009 in Limassol. Over 80 experts from 24 countries and two international organisations as well as private sector representatives attended the meeting. Participants examined emerging money laundering and terrorist financing methods as well as trends in the context of two typology research projects. They focused on the ways in which money launderers operate through the insurance and private pension funds sectors as well as through the Internet gaming sector. The final reports on these two topics are expected to be available in the second half of 2010.

➤eucrim ID=0904092

MONEYVAL: 31st Plenary Meeting

At its 31st Plenary Meeting, MONEYVAL adopted the mutual Evaluation Reports about Serbia and about Bosnia and Herzegovina, thus concluding the third round of mutual evaluations. Furthermore, the first progress reports submitted by Azerbaijan and Estonia, the second progress reports submitted by Latvia as well as a fourth statement in respect of Azerbaijan were adopted.

The meeting also discussed the impacts of the global crisis on anti-money laundering and combating the financing of terrorism (AML/CFT) as well as policy options regarding the combating of proliferation financing.

At the plenary, MONEYVAL also elected for a mandate of two years its President, Mr. Vladimir Nechaev (Russian Federation), its Vice-President, Mr. Anton Bartolo (Malta), and three bureau members, Mr. Damir Bolta (Croatia), Mr. Alexandru Codescu (Romania), and Mr. Armen Malkhasyan (Armenia).

➤eucrim ID=0904093

MONEYVAL: Third Round Evaluation Report on Bosnia and Herzegovina

On 27 January 2010, MONEYVAL published its Third Round Evaluation Report on Bosnia and Herzegovina.

The report analyses the implementation of international and European standards to combat money laundering and terrorist financing, assesses levels of compliance with the Financial Action Task Force (FATF) 40+9 Recommendations, and includes a recommended action plan to improve the anti-money laundering (AML) and combating the financing of terrorism (CFT) system of Bosnia and Herzegovina.

Since MONEYVAL's first on-site visit and report in 2003, Bosnia and Herzegovina enacted a unified AML/CFT law at the state level to replace separate laws. In June 2009, however, this law was superseded by the Law on the Prevention of Money Laundering and Financing of Terrorist Activities, addressing a number of deficiencies in the old law, including the introduction of a risk-based approach and an improvement in preventive measures.

The report states that money laundering and terrorist financing are criminalised at all levels of legislation. All the definitions are largely in accordance with the relevant articles of the Vienna and Palermo Conventions, yet deficiencies still exist regarding the scope of the material elements required. Furthermore, the criminalisation does not cover the funding of terrorist organisations or individual terrorists. From the practical side, there have been a number of successful convictions for money laundering, including convictions of legal persons.

The report states that the current legal framework of confiscation and provisional measures seems rather complicated and raises concerns on its effectiveness, as there are parallel regimes both in terms of criminal substantive and procedural law. The high evidential standards as applied by trial courts, the structure of the confiscation regime, and the small number of confiscations all strengthen this assumption. Furthermore, provisional measures are rarely, if ever, applied in the preliminary stage of criminal proceedings.

MONEYVAL also points out the fact that not all financial institutions are allowed to freeze without delay the assets of persons and entities designated in the context of terrorism or financing of terrorism. Beyond that, the existing legal framework of generally parallel and overlapping regimes makes the system even more incomprehensive.

The Financial Intelligence Unit named Financial Intelligence Department (FID) was established, with operational independence, within the State Information and Protection Agency. It cooperates internationally as a member of the Egmont Group (informal group of FIUs to facilitate international cooperation) and shares information with its counterpart Financial Intelligence Units. The FID's actions as well as its power to disseminate financial information to domestic authorities are limited due to the restrictive interpretation of existing laws.

Financial institutions are required by law to file Suspicious Transaction Reports (STR), regardless of the amount and whether the transaction is an attempted or performed one. However, STRs were received only from the banking sector and none from the insurance and securities sectors or any Designated Non-Financial Businesses and Professions (DNFBPs).

While the banking and securities supervisors appeared to possess adequate power overall to monitor and ensure compliance with AML/CFT requirements, supervisors in the insurance market seem to lack such power.

The report concludes that the framework for international judicial cooperation in money laundering and terrorist financing cases is altogether comprehensive and offers all the necessary solutions for rapid and effective legal assistance. Furthermore, the arrangements for international judicial cooperation appear to be working in practice.

➤eucrim ID=0904094

MONEYVAL: Third Round Evaluation Report on Armenia

On 11 January 2010, MONEYVAL published its Third Round Evaluation Report on Armenia. The evaluation was

conducted by the International Monetary Fund and the report was adopted by MONEYVAL as a third round mutual evaluation at its 30th Plenary in Strasbourg.

The report also includes a recommended action plan to improve the anti-money laundering (AML) and combating the financing of terrorism (CFT) system of Armenia.

MONEYVAL compliments the considerable improvements Armenia has made in its AML/CFT framework within a relatively short time, e.g., replacing the AML/CFT law of 2005 with a more comprehensive law in 2008. However this new law still needs to be implemented effectively, especially by DNFBPs.

The knowledgeable and active Armenian FIU has been established within the Central Bank of Armenia but is, unfortunately, understaffed.

The report points out that the Armenian AML/CFT preventive measures for financial institutions operating in the financial system are comprehensive and relatively close to the Financial Action Task Force (FATF) Recommendations. Their implementation, however, is slightly more advanced in financial institutions in the banking sector than in other areas (securities, insurance, foreign exchange offices, and money remitters).

Although Armenia's criminal provisions for money laundering are basically sound and address many criteria under the FATF standards, MONEYVAL stresses that legal persons should also be subject to criminal liability under Armenian law. Furthermore, it still has to be ascertained through a court judgment whether money laundering can be prosecuted as an autonomous offence and in the absence of a conviction for the predicate offence.

Criminal provisions relating to terrorism financing are largely in line with international standards. However, they still do not cover cases involving the financing of individual terrorists and terrorist organisations without an intention or the knowledge that the funds will be used in the commission of a specific act of terrorism. In addition, the provisions relating to the confiscation of property involved in the commission of money laundering, terrorism financing, and predicate offences is not available for all FATF designated predicate offences. The report also suggests that Armenia review its current freezing mechanisms.

All DNFBPs, as described in the FATF definition, are covered by the AML/CFT Law, but the legal regime for DNFBPs is not as comprehensive as it is for financial institutions. By way of example, the implementation of preventive measures by DNFBPs is inadequate across the board and no DNFBP has yet filed a suspicious transaction report. The report furthermore suggests developing supervisory and regulatory regime for DNFBPs.

MONEYVAL welcomes the establishment of a national body with a wide mandate in relation to financial crime as a significant improvement. The legal framework for mutual legal assistance and extradition is also sound. Ultimately, the report calls for more accurate statistics across all sectors in order to enable a meaningful assessment of the effectiveness of AML/CFT measures.

➤eucrim ID=0904095

MONEYVAL – Public Statement on Azerbaijan

As reported in earlier issues (see eucrim 1-2/2009, pp. 32-33 for the first two statements and 3/2009, p. 85 for the third one), MONEYVAL published three public statements regarding Azerbaijan. At its 31st meeting in Strasbourg (7-11 December 2009), MONEYVAL noted that Azerbaijan has now created and implemented the legal basis for AML/CFT measures, and an FIU has commenced operations and is receiving and analysing reports. As a result, MONEYVAL withdrew its previous public statements and the advice to financial institutions made in its statement of 12 December 2008.

➤eucrim ID=0904096

Russia: MOLI-RU 2

There were plenty of developments within the follow-up project MOLI-RU 2, which aims at further developing Russia's AML/CTF system in view of both practice and legislation (see also eucrim 1-2/2007, p. 45; eucrim 1-2/2009, p. 33; and eucrim 3/2009, p. 85). From 15-17 December, the MOLI-RU2 Project supported the participation of representatives of the Russian FIU, other law enforcement agencies, and the International Training Center for Financial Monitoring at the third annual seminar on countering financing of terrorism (Giessbach III) in Lucerne. The main focuses of the seminar were on the regulatory/supervisory community and the financial sector. The seminar participants were given the opportunity to discuss views on how to develop practical solutions to critical issues.

From 16 to 17 December 2009, a two-day training course took place in Nizhny Novgorod for senior detective officers (for very serious crimes) and detective officers (specialising in budget-related crimes and AML) from 15 regions of Russia. The purpose of the activity was to raise awareness of the key elements of the AML/CFT regime and investigations methods.

From 2 to 4 December 2009, a seminar on AML/CFT supervision took place in Suzdal and focused primarily on issues of the efficiency of RBA supervision and further development of supervision practices.

On 30 November 2009, a steering group meeting took place in Moscow to review the activities carried out in 2009 as well as the lessons that could be learned and any outcomes. The planning for the first half of 2010 was also discussed. Special attention was paid to the issues raised by MONEYVAL/FATF/EAG evaluators as required by the CoE's 3-pillar approach, i.e., standard setting, monitoring, and technical assistance.

Between 24 and 27 November 2009, the Council of Europe, in cooperation

with the Financial Technology Transfer Agency (ATTF), organised a training course in Luxemburg with the purpose of raising awareness of AML/CFT issues, discussing practical questions of compliance and internal control, and learning international benchmarking practices. This was the second of two courses designed to address mainly the banking industry in Russia (see also eucrim 3/2009, p. 85).

From 24 to 5 November 2009, an International Conference on Countering Laundering of Proceeds from Illegal Use of Natural Resources: Timber and Sea Resources took place in Murmansk. The intention was to improve both interagency and international cooperation in the North West Federal District of Russia. This is one of several events held in the regions of the country in cooperation with the Rosfinmonitoring (Federal Financial Monitoring Service) interregional offices, which focus specifically on topics of utmost concern in the region where it takes place.

From 10 to 11 November 2009, the MOLI-RU2 team leader took part in the International AML Conference of the Banking Associations for Central and Eastern Europe in Budapest and made a presentation on the project, its main goal, and the results so far, with a view to contributing to the visibility of the project and the CoE's work in this sector.

From 2 to 3 November 2009, the MOLI-RU2 Project was presented at the International Seminar on Banking Supervision in the countries of the Eurasian Group (EAG) in Chisinau. The seminar dealt with the issues of countering money laundering and terrorist financing in the Eurasian group (EAG) countries. Two MOLI-RU2 experts presented issues of banking supervision from the FIU and the industry perspectives.

➤eucrim ID=0904097

Procedure and Jurisprudence of the European Court of Human Rights

Strasbourg, 8 – 9 June 2010

This ERA seminar aims to prepare the parties for a potential case before the Strasbourg Court on the practical aspects of its procedure. The seminar is geared towards lawyers in private practice, government officials, NGO's, and academics.

The following questions will be addressed:

- What are the admissibility criteria that have to be complied with?
- In particular: what national remedies must be sought before submitting an application to the Court in Strasbourg?
- What documents have to be submitted?
- What are the objectives of the written and the oral parts of the proceedings?

There will be two presentations in the course of the seminar. One will be on the protection of human rights and fundamental freedoms by the Strasbourg Court with a focus on the changes brought about by Protocol No. 14 and the evolution of the protection mechanism. The other presentation will give an overview on current trends in the jurisprudence of the Court.

The seminar will include a visit to a hearing before the Grand Chamber of the Court in two high-profile cases on the detention by coalition forces in Iraq (limited number of seats available). For participants without any prior knowledge, ERA offers the opportunity to prepare themselves using e-learning module. The seminar will be held in English and French with simultaneous interpretation.

Please find more about the mentioned event and further conferences/seminars at ERA at the following website:
➤eucrim ID=0904099

Procedural Criminal Law

15th Meeting of the CEPEJ Bureau

On 22 January 2010, the newly composed Bureau of the European Commission for the Efficiency of Justice (CEPEJ) held its 15th meeting in Strasbourg and focused mainly on the implementation of the mid-term activity programme and the CEPEJ activity programme for 2010. They had been previously approved at the plenary meeting on 9 and 10 December 2009.

The mid-term activity programme focuses on the main orientation for the work of the CEPEJ within the next four years. Central working principles were defined in the implementation of the CEPEJ Statute in its entirety:

- Smooth functioning of the human rights protection machinery of the CoE;
- Further developing cooperation with the EU;
- Promoting dialogue with other competent European and international bodies;
- Acting as an authority in the debate on justice in Europe requires widely promoting its work and enhancing CEPEJ's own role as a key source of information on the main issues relating to the functioning of judicial systems.

The pre-eminent mid-term priorities were defined in the following territories: evaluation of judicial systems on a regular basis and analysis of its results. Knowing the timeframes of proceedings in order to reach optimum and foreseeable judicial time remained a major concern of the CEPEJ's agenda (see also eucrim 3/2009, pp. 85-86). Central issues will also be:

- Promoting the quality of judicial systems and courts by improving tools, indicators, and means for measuring the quality of judicial work;
- Drafting concrete solutions to improve the organisation of the court system, particularly access to and funding of courts;
- Drafting concrete solutions to remedy dysfunctions in judicial activity.

➤eucrim ID=0904098

CEPEJ: 14th Plenary Meeting

The 14th Plenary Meeting of the CEPEJ of 9 and 10 December 2009 started with a study session on measuring the

performance of judicial systems and courts. During this meeting, the new CEPEJ mid-term programme and the 2010 activity programme were adopted. The CEPEJ Guidelines for a better application of the Recommendation on enforcement were also approved. The latter should help Member States to deliver justice fairly and rapidly, since the enforcement of judicial decisions is an essential element in the functioning of any nation state based on the rule of law.

The Guidelines lay down the principles and objectives of law enforcement. Regarding the court proceedings, they require ensuring that information on the enforcement process and activities is transparent. All stakeholders should have access to information, and effective communication should be assured. The Guidelines stress the importance of the language used if the alleged offender chooses to participate in the proceedings without legal representation. The same also applies to the notification of parties. The Guidelines underline the importance of a clear and comprehensive definition of what is considered an enforceable title.

Furthermore, it is important that the quality of enforcement should be guaranteed through enforcement agents. The document also points out the significance of reasonable and foreseeable time limits for law enforcement procedures, smooth and prompt enforcement, and reporting on both measures and the complete enforcement procedure. Ultimately, the Guidelines deal with questions of supervision and control.

➤eucrim ID=0904100

CEPEJ: External Audit of the Judiciary of Malta

On 2 and 3 December 2009, a CEPEJ delegation had two meetings in Valetta with members of the Maltese Judiciary. The request for an external audit of the judicial system and procedures had been made by the Chief Justice with a view to improving working methods within the court system and reducing court delays. While in Malta, the CEPEJ delegation also held meetings with the Chamber of Advocates and the Chamber of Legal Procurators, the Courts Administration, the Attorney General, and the registrars of the Arbitration Centre and the Mediation Centre.

➤eucrim ID=0904101

CEPEJ: Cooperation on Judicial Statistics – Peer Evaluation

The CEPEJ peer evaluation group held a study session in Moscow on 29 and 30 October 2009. The group was created in 2007 to improve the quality of judicial statistics in Europe and to bring statistics at the national level in line with the common indicators defined through CEPEJ's Evaluation Scheme.

The objective of this meeting was to share good practices and experiences concerning judicial data collection. Discussions were focused in particular on compatibility between the evaluation grid from CEPEJ and the Russian system of judicial data. The objectives and methodology of the pilot peer review cooperation process on judicial statistics can be found at:

➤eucrim ID=0904102

CEPEJ: Third Cycle of Evaluation of European Judicial Systems

CEPEJ has embarked on its third cycle for the evaluation of European judicial systems. Better understanding and judicial reform are the objectives of this evaluation.

Therefore, it is an important part of CEPEJ's work to provide policy makers (ministries, parliaments) as well as professionals working in the justice field (councils for the judiciary, courts, prosecution services, bar associations, etc.) with reliable public policy tools, thus enabling them to better orientate the necessary judicial reforms.

This third round establishes the first statistical series for comparison of judicial systems – between comparable countries and within the same country – in order to assess the evolution, throughout a given period, of indicators that have since been stabilised.

CEPEJ therefore stresses the necessity of each Member State being able to comply with the "GOJUST" Guidelines on judicial statistics, adopted by the CEPEJ. They aim, in particular, to collect and process homogeneous data as regards case-flow management, backlogs in courts, and the length of judicial proceedings for four categories selected by the experts: litigious divorces, employment dismissal cases, robberies, and intentional homicides.

CEPEJ underlined the importance of the quality of these data and national mechanisms that collect such data. Such a peer evaluation process enables a better understanding of the Member States' national statistical systems.

➤eucrim ID=0904103

CCJE/CCPE: Joint Opinion No. 12 on Relations between Judges and Prosecutors

On 20 November 2009, the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) adopted an opinion on relations between judges and prosecutors. The Council of Europe recapitulated that an independent, effective, and high-quality justice system is a precondition of the rule of law and therefore central to the CoE's policies in the sphere of justice.

The opinion underlines the importance of the internal and external independence of both judges and public prosecutors in respect of their functions and also from one another.

Jointly prepared by the two Councils, the opinion also reiterates that public prosecutors and judges ensure the guarantee of individual rights and freedoms at all stages of the proceedings, including those of victims of crime. Still, the rights of the accused to a proper defence are to be fully respected.

The independence and the impartiality of judges are based on freedom from any undue influence by the prosecution

or defence. Prosecutors must also be independent and autonomous in their decision-making and carry out their functions fairly, objectively, and impartially. The opinion stresses that the effectiveness of prosecution is strongly linked with transparent lines of authority, accountability, and responsibility. Furthermore, the sharing of common legal and ethical values by all the professionals involved in the legal process is essential.

The opinion analyses the roles between judges and public prosecutors in the pre-trial procedure, in the course of prosecution and court hearings as well as outside the criminal law field and in supreme courts. Furthermore, the rights of the defence should be analysed at all levels of the procedure. The opinion recommends joint trainings on topics of common interest for public prosecutors, judges, and lawyers.

The Council also called upon both judges and prosecutors to draw up a code of good practice or guidelines for each profession on its relations with the media. This would serve the interests of civil society to be provided with necessary information by competent authorities on the functioning of the justice system. Due respect should be paid, in particular, to the presumption of innocence of the accused, to the right to a fair trial, and to the right to private and family life.

Lastly, the opinion stressed the importance of an efficient international cooperation, notably between the CoE Member States, on the basis of values enshrined in relevant international instruments, particularly the ECHR. The CCJE and CCPE Joint Opinions final version of 8 December 2009 (with small formal modifications) can be found at:
➤eucrim ID=0904104

CCJE: Working Methods of the Consultative Council of European Judges

From 18 to 20 November 2009, at its 10th Plenary Meeting in Slovenia, the Consultative Council of European Judges (an advisory body of the CoE on issues related to the independence, impartiality, and competence of judges) approved a set of working methods intended as practical assistance enabling states to comply with the CoE standards on judges. The document came as a response from a special pool of experts of the CCJE, set up in 2008 upon the request of several Member States for guidance on judicial appointments, a code of ethics, and the responsibility and remuneration of judges – complying with the Council of Europe's standards.
➤eucrim ID=0904105

Legislation

GRETA: Fourth Meeting of the Group of Experts on Action against Trafficking in Human Beings

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its fourth meeting from 8 to 11 December 2009 in Strasbourg. The group examined and adopted the questionnaire for the first round evaluation of the implementation of the CoE Convention on Action against Trafficking in Human Beings (hereafter: Convention) by the Member States and also approved its timetable starting with 1 February 2010. GRETA also decided that the parties should respond to the questionnaire, at the latest, by the first day of the month, six months after the date of sending.

GRETA also had an exchange of views regarding other international organisations' activities in the field of trafficking in human beings and took note of the Joint Council of Europe/United Nations Study on trafficking in organs, particularly its main conclusion: the need to distinguish clearly between "trafficking in organs, tissues and cells" and "trafficking in human beings for the purpose of the removal of organs."

In addition, GRETA pointed out that, according to this Joint Study, the definition of trafficking in human beings as set out in the CoE Convention covers the removal of organs, meaning that there is no need for a new legally binding international instrument in this particular field at either the universal or regional level. By noting that recently no further signatures or ratifications of the Convention had been made, GRETA urged CoE Member States and the EU itself to proceed.
➤eucrim ID=0904106

The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings

Prof. Dr. Mar Jimeno-Bulnes*

I. Introduction

On 1 July 2009, a new "Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings" was presented by the Swedish Presidency of the Council of the European Union, setting out its vision of how to foster the right to a fair trial in the Member States.[1] The same Presidency also announced a Draft Resolution with a summary explanation of the grounds for such an initiative and the content of the previous Roadmap on 31 July 2009,[2] which was recently enacted on 30 November 2009.[3]

The aim of the present legislation is to invite the European Commission to submit proposals regarding the measures provided in the Roadmap, hopefully with more success than previous proposals.

The conclusions of the European Council on 10/11 December 2009[4] included an important reference to the development of the area of freedom, security and justice (AFSJ). Within this framework, approval of the Stockholm Programme concerning such a policy for the years 2010–2014 has also taken place. In fact, the European Council considered it a challenge "to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe" and "that law enforcement measures … to safeguard individual rights" in order to create a real and tangible area of freedom, security and justice as a "single area in which fundamental rights are protected"[5] be a priority.

After years of promoting European judicial cooperation in criminal matters, for the first time the balance between justice and security at the European level has been militated by the Council of the EU in favour of the latter, especially after the sad events that took place on 11 September 2001.[6] Now it is time to analyse the reality of this balanced new policy through the future Action Plan implementing the Stockholm Programme that is to be presented by the Commission and adopted "at the latest in June 2010"[7] under the Spanish Presidency.

II. Background

In its communication addressed to the Parliament and the Council on 10 June 2009, under the title "an area of freedom, security and justice serving the citizen,"[8] the Commission already pointed out the lack of any regulation concerning procedural rights in criminal proceedings at the EU level, claiming major efforts on the issue although, at that time, no reference to the present Roadmap was made.[9] For this reason, the Commission launched the suggestion to adopt a new multi-annual programme in order to "define the priorities for the next five years, take up the challenges of the future and make the benefit of the area of freedom, security and justice more tangible to the ordinary citizen."[10] This is the so-called Stockholm Programme. The initial four priorities proposed by the Commission were extended to six by the Council, according to the definitive text agreed upon on 2 December 2009,[11] and further approved by the European Council. The first of these priorities is the promotion of citizens' rights in order to create a Europe of rights.

It is here, in relation to the promotion of citizens' rights in Europe, that a future policy dedicated precisely to the rights of individuals in criminal proceedings is envisaged. Expressly "the protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union … in order to maintain mutual trust between the Member States and public confidence in the European Union."[12] In this context, the present Roadmap for strengthening procedural rights in all criminal cases throughout the EU is declared part of the Stockholm Programme. The European Council henceforth invites the Commission to submit concrete proposals to assure the implementation of the measures contemplated in this Roadmap.

It must be said that the chapter on the rights of individuals in criminal proceedings is one of the chapters where more progress has been made in the Council's negotiations, as the final text is more exigent with regard to the implementation of the proposals foreseen in the Roadmap while the initial draft foresaw the implementation of any procedural rights.[13] Also,

a new addition has extended the list of procedural rights contemplated in today's Roadmap because the European Council invites the Commission to "assess whether other issues … promote better cooperation in this area" with explicit mention of the presumption of innocence.[14] Finally, it is also commendable that, in the final version, a new chapter has been introduced concerning the area of detention, where the Commission is invited to reflect on initiatives in order to promote the exchange of best practices. Here, a reference to the procedural rights of the detainee should be included, too.[15] With such amendments in the final text of the Stockholm Programme, it looks as if the Council of the EU has taken up at least some of the priorities announced by the European Parliament in the field of criminal justice under the Resolution of 25 November 2009.[16]

However, the topic of procedural rights in criminal proceedings is clearly not new to European institutions. As already mentioned, a previous "Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union" (henceforth, the FWD Proposal) was already presented by the European Commission on 28 April 2004.[17] However, after the initial work carried out by the European Commission and the amendments proposed by the European Parliament, the proposal was never further developed. After several months and even years in the Council's hands, including arduous negotiations, a much lighter "counter-proposal" was set out in further texts presented by the Austrian, Finnish, and German Presidencies of the European Council in 2006 and 2007 till its final demise.[18] The cause of this demise was the tough opposition of certain state delegations – specifically the UK, the Czech Republic, Ireland, Malta, and Slovakia – as they considered the protection of procedural rights laid down in Articles 5 and 6 ECHR to be sufficient.

Because of the failure of previous attempts to establish joint legislation encompassing a common catalogue of procedural safeguards for suspects and defendants in criminal proceedings as part of the "due process of law," the European institutions now proceed with the regulation of such rights separately when there is a basic agreement between state delegations. Using this working method, the rights to interpretation and translation were tackled first. A proposal for a Council Framework Decision was already presented in July 2009[19] and is presently under negotiation by the Council of the EU and the European Parliament as a Directive due to the amendments to the legislative procedure made by the Treaty of Lisbon.[20] The outcome of this and other initiatives on the topic of procedural rights may be different now that the Treaty of Lisbon finally entered into force on 1 December 2009. The legal basis is now provided by Article 82 (2) of the Treaty on the Functioning of the European Union (TFUE). It renders the defensive argument founded on an inadequate legal basis put forward by certain national delegations untenable.[21]

Up till now, there were extensive discussions in the Council about the necessity to provide a catalogue of procedural rights at the EU level as far as the procedural rights provided in the ECHR could be considered as sufficient. It is well known that this was the argument of a set of Member States, such as those previously mentioned, in order to avoid any kind of regulation in this field and, for this reason, the failure of the former proposal on procedural rights resulted. However, this is no longer the case: a new perspective on procedural rights is necessary within the area of freedom, security and justice as a whole[22] and also as a complement to the increasing development of European judicial cooperation in criminal matters. Only then can justice and security in the EU be balanced. In order to accomplish this, the requirement of approximation and mutual recognition – both aims of the EU – needs to move in the same direction, which does not always happen.[23]

Ultimately, any approximation on the issue has a special significance because it not only implies a kind of sectorial approach, since a European regulation is provided in a specific area (as in the field of procedural rights), but also a kind of transversal or "horizontal approach."[24] Undoubtedly, the latter is more efficient, as the set of safeguards that is envisaged must be enforced in all criminal proceedings to be developed in the Member States (sectorial approach) as well as in all instruments aiming to facilitate judicial cooperation in criminal matters between the same Member States (transversal or horizontal approach).

III. Measures

After the Explanatory Memorandum, in which initial reference is indeed made to the ECHR and its protocols "as interpreted by the European Court of Human Rights" ("Strasbourg-proof")[25] together with other comments in favour of the European regulation of procedural rights,[26] a set of six measures has been included. Nevertheless, the list does not seem to be *numerus clausus* as the Council reserves the right to "consider the possibility of addressing the question of protection of procedural rights other than those listed in that catalogue."[27] As an example, a first step towards procedural rights was already launched through a sort of horizontal (and not sectorial) approach as mentioned above by amending various mutual recognition framework decisions as regards the provisions related to *in absentia* judgments.[28] Undoubtedly, this is a huge effort with regard to the harmonisation (now approximation) of a common agreement by the Member States in spite of some disappointments.[29]

The measures now envisaged are the following ones, taking into account that, as already mentioned, the present list does not seem to be exhaustive.[30] As is explicitly declared, the order of the proposed measures is only indicative:

Measure A: Translation and interpretation

"The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need and interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments." In this context, the new Article 2 (1) of the Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings explicitly provides the right to interpretation "before investigative and judicial authorities, including during police questioning, during all court hearings and during any necessary interim meetings and may be provided in other situations." It also provides that assistance to persons with "hearing impediments" should be respected in all criminal proceedings as well as in proceedings for the execution of a European Arrest Warrant.[31]

Measure B: Information on rights and information about the charges

"A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings." Both separate guarantees are provided as they are here: on the one hand, the right to obtain information on basic rights "orally or, where appropriate, in writing, e.g. by way of a Letter of Rights" as was included in the former FWD Proposal on procedural rights (2004);[32] on the other hand, the right to obtain information "about the nature and cause of the accusation against him or her" regarding the charges.

Measure C: Legal aid and legal advice

"The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice." In general, this encompasses the rights of defence, including two different procedural safeguards: first, the right to legal aid as a whole covering, *inter alia,* the costs of legal advice and previous interpretation/translation and, secondly, the right to legal counsel. In this context and as an initial recommendation – and according to the expression "at the earliest appropriate stage" – the right to legal advice should be available to every suspected person as soon as possible and, in any case, before answering questions in relation to the charge as specifically provided in the former FWD Proposal on procedural rights in 2004.[33]

Measure D: Communication with relatives, employers, and consular authorities

"A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty." According to the above-mentioned text, a stricter requirement is given for the suspect or accused when the case concerns this particular type of deprivation of liberty. In relation to the enforcement of such a right, it has been proposed[34] to draw up special protocols for police conduct in the overall context of the European Union in order to require arresting officers to inform suspects taken into custody of this right and to require them to contact the consular authorities when a foreigner is detained.

Measure E: Special safeguards for suspected or accused persons who are vulnerable

"In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition." The objective of this measure is explicitly explained here, as it is guarantees the fairness of the proceedings in accordance with ECHR standards. In this case, a sort of definition has been added to the proposed text of the draft resolution as in the initial Roadmap; a general clause was included regarding "vulnerable suspects and defendants" without mentioning who they are.

Measure F: A Green Paper on the right to review of the grounds for pre-trial detention

"The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper." This time, a completely new measure has been added in comparison with the former draft regulation on procedural rights. In fact, a new provision is made in the line of Article 5 ECHR and, in accordance with ECHR standards, for first time, there is an explicit reference to pre-trial criminal proceedings, which generally must also be welcomed.

IV. Criticism and Conclusions

Of all the proposed measures, at the present stage, only a Proposal for a Council Framework Decision (now an initiative for a Directive) on the rights to interpretation and translation in criminal proceedings, which corresponds to Measure A, has been adopted by the Commission on 8 July 2009. It is also disappointing that some references included in the former FWD Proposal on procedural rights enacted in 2004 have been lost in the new text as cited.[35] The new text of this proposal with respect to interpretation and translation would include free access to both guarantees, which is not explicitly indicated in the present Roadmap, as well as the explicit provision of both rights with regard to the EAW proceedings.[36]

Another general criticism in relation to the measures contained in the Roadmap elaborated by the Swedish Presidency of the Council of EU is the lack of a provision regarding the precise procedural stage, at which they should be guaranteed. In fact, neither the Explanatory Memorandum nor the different measures make sole reference to which procedural stages of every right contained in different measures should be protected, for instance, whether such procedural guarantees must be required only at the trial in order to preserve the general right to a fair trial according to Article 6 ECHR or whether they should start in the pre-trial proceedings or the investigative period (e.g., police detention) according to Article 5 ECHR.

The purpose is to remain "Strasbourg-proof" as announced in the present Roadmap. For this reason, it is desirable that the protection of the entire set of rights is ensured not only during the trial, but also during the investigative stage and, particularly, when a sort of criminal imputation or charge is alleged against the person who is then "converted" into a suspect (e.g., police detention or first questioning either in the police station or elsewhere), until the criminal proceedings are definitively finished with a *res iudicata* judgment (e.g., appeal, cassation, defence appeal, etc.).[37] The best solution, which was included in the former FWD Proposal on procedural rights, would be to provide information to the suspect of his or her rights in writing through a letter of rights to be offered in all police stations in an understandable language.[38]

As a final remark, some other considerations can be made. First, in relation to the formal perspectives provided in the new regulation, it is understandable that the new strategy of the European Commission is to make separate regulations for every procedural guarantee included in the present Roadmap due to the previous failure of a common agreement among Member States to adopt the entire set of guarantees. Recognising this fact, it must be taken into account that some procedural rights need to have a complementary regulation, and a special status is acquired by the right to legal advice. Secondly, it should also be welcomed that the creation of a non-exhaustive list of procedural rights to be considered different from the proposed ones can be included in the long term, too; for instance, the right to remain silent and the right of *habeas corpus*.[39] Both of these form part of the common constitutional tradition of the Member States and are included in interational statutory texts.[40]

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1 Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels, 1 July 2009, document No. 11457/09, DROIPEN 53, COPEN 120.

2 Presidency of the Council of the EU, Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Brussels, 31 July 2009, document No. 12531/09, DROIPEN 78, COPEN 150.

3 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4 December 2009, pp. 1-3 according to version presented on 24 November 2009, document No. 15434/09, DROIPEN 149, COPEN 220.

4 European Council (2009), Presidency Conclusions of the Brussels European Council, 10-11 December 2009, EUCO 6/09 available on the official website of the European Council.

Prof. Dr. Mar Jimeno Bulnes
Professor of Procedural Law, University of Burgos (Spain)
Mjimeno@ubu.es

5 Ibid., points 26 and 27.
6 This has been called the "September 11th' syndrome", e.g., Randazzo, E. (2007) Garanzie fondamentali e costituzione europea, in: T. Raffaraci (ed.), L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra prioritá repressive ed esigenze di garanzia, Milano: Giuffrè editore, pp. 163-67 at p. 164. See also on this topic Jimeno-Bulnes, M. (2004), After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples, European Law Journal, Vol. 10, No. 2, pp. 235-253.
7 Ibid., point 33.
8 European Commission (2009), Communication from the Commission to the European Parliament and the Council. An area of freedom, security and justice serving the citizen, COM (2009) 262 final, Brussels, 10.6.2009.
9 First reference under the title "rights of the individual in criminal proceedings" is made in: Presidency of the Council of the EU, Draft Multi-annual programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme), Brussels, 16 October 2009, document No. 14449/09, JAI 679, p. 9, point 2.4.
10 Ibid., pp. 4-5.
11 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, document No. 17024/09, DO EUR 3, JAI 896, POLGEN 229
12 Ibid, point 2.4.
13 Presidency of the Council of the EU, Draft Multi-annual programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme), op. cit., p. 9, point 2.4.
14 At the moment, only a Green Paper has been presented by the Commission; see European Commission (2006), Green Paper on the presumption of innocence, COM 2006 (174) final, 26.4.2006.
15 Point 3.2.6.
16 European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm Programme, P7_TA-PROV (2009) 0090, point 112 and further version on 18 November 2009, B7 0155/2009 retrieved from the official website http://www.europarl.europa.eu/RegWeb/application/registre/simpleSearch.faces (last visited on 26 January 2010).
17 COM (2004) 328 final, Brussels, 28.4.2004. See also Green Paper from the Commission "Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union", Brussels, 19.2.2003, COM (2003) 75 final.
18 See Jimeno-Bulnes, M. (2008), The Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, in: E. Guild and F. Geyer (eds.), Security versus Justice? Police and judicial cooperation in the European Union, Aldershot/Burlington: Ashgate, pp. 171-202; see also Irurzun Montoro, F. (2007), Negotiating the Framework Decision on procedural safeguards in the European Council, in: C. Arangüena Fanego (ed.) Procedural safeguards in criminal proceedings throughout the European Union, Valladolid: Lex Nova, pp. 25-45.
19 Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, COM (2009) 338 final, 8.7.2009.
20 Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings; at the time of writing this article, the most recent version was presented in Brussels, 22 January 2010, document No. PE-CONS 1/10, DROIPEN 6, COPEN 22, CODEC 41. See also Explanatory Memorandum in document No. 5673, DROIPEN 8, COPEN 25, CODEC 47.
21 See also Löof, R. (2006), Shooting from the hip: proposed minimum rights in criminal proceedings throughout the EU, European Law Journal, vol. 12, No. 3, pp. 422-430 as well as Arangüena Fanego, C. (2008), Procedural guarantees of suspects and defendants, in: M. de Hoyos Sancho (ed.), Criminal proceedings in the European Union: essential safeguards, Valladolid: Lex Nova, pp. 131-162.
22 Klip, A. (2009), European Criminal Law, Antwerp: Intersentia, p. 425.
23 In this context, see Guild, E. (2004), Crime and the EU's constitutional future in an area of freedom, security and justice, European Law Journal, Vol. 10, No. 2, pp. 218-234.
24 Mitsilegas, V. (2009), The third wave of third pillar law: Which direction for EU criminal justice?, European Law Review, Vol. 34, No. 4, pp. 523-560, at p. 547.
25 Point 13 Resolution of the Council of 30 November 2009, op. cit., although the mention of "Strasbourg-proof' included in the original draft roadmap has disappeared in the text of the Resolution since the initial version was published.
26 E.g., "it is now time to take action to improve the balance between these measures ("facilitate prosecution in the area of judicial and police cooperation") and the protection of procedural rights of the individual"; see Explanatory Memorandum, point 10, ibid.
27 Point 12, ibid.
28 Council FWD 2009/299/JHA of 12 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA and 2008/947/JHA, thereby enhancing the procedural right of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27 March 2009, pp. 24-36.
29 Unfortunately the final text has eliminated the common definition of such decisions rendered in absentia, which included custodial sentences or detention orders and was provided in the previous initiative presented by Slovenia, France, the Czech Republic, Sweden, Slovakia, the UK, and Germany, OJ C 52, 26 February 2008, pp. 1-18; only an approach to a common definition has been introduced in the above mentioned Article 2 FWD concerning each amended FWD.
30 Explicitly, "the rights included in this roadmap … could be complemented by other rights"; see Council's Resolution, p. 2, point 2.
31 Article 1 (1) Initiative for a Directive of the European Parliament and of the Council on the right to interpretation and to translation in criminal proceedings", cit.
32 Article 14; on the contrary, a specific provision on the second guarantee in order to provide information about the charges was not foreseen in such a FWD Proposal.
33 Arts. 2 (1) and 2 (2), respectively.
34 Blanco Peñalver, A. (2007) The rights to consular assistance and information, in: C. Arangüena Fanego, op. cit., pp. 345-354 at p. 350.
35 E.g., references to the accuracy of the translation and interpretation in order to obligate Member States to ensure that translators and interpreters employed are "sufficiently qualified to provide accurate translation and interpretation" as well as the existence of the guarantee for provision of the interpreter's or translator's replacement besides –although less important in the author's opinion – the recording of the proceedings (Articles 8 and 9 FWD Proposal).
36 Some national EAW implementations have not transposed any provision in respect of the right to an interpreter and only refer to the right to legal counsel; this is the case for instance of Finnish and Maltese EAW. See Jimeno-Bulnes, M. (2007), The enforcement of the European Arrest Warrant: a comparison between Spain and the UK, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14, No. 3-4, pp. 263-307 at pp. 292 ff.
37 In accordance with S. Allegrezza (2007), Formal aspects of the letter of rights, in: C. Arangüena Fanego, op. cit., pp. 367-373 at pp. 370 ff.
38 Art. 14. On this issue, see Sommovigo, F. (2007) Minimum content and structure of the letter of rights, in: C. Arangüena Fanego, op. cit., pp. 381-394.
39 Illuminati, G. (2007), The letter of rights: the lack of guarantees in the European approach to a common criminal justice system, in: C. Arangüena Fanego, op. cit., pp. 361-365 at p. 364.
40 Art. 14 (3) (g) International Covenant on Civil and Political Rights and Art. 5 (4) ECHR, respectively.

Asset Recovery: Possibilities and Limitations

Francis Desterbeck / Delphine Schantz*

The United Nations Convention against Corruption (UNCAC), adopted on 31st October 2003, entered into force on 14th December 2005. To date, 143 States have ratified the instrument. Most of the Member States of the European Union are State parties.

The UNCAC is the first international instrument that provides a comprehensive response towards tackling public and private corruption worldwide. The main purpose of the Convention is to combat important manifestations of corruption at the global level. Corruption affects all countries, but, in particular, presents a serious obstacle to economic and social development and undermines the work of the institutions, particularly of the developing countries. One of the fundamental principles of this Convention is the call for the recovery and repatriation of embezzled assets (Chapter V, Articles 51-59). The articles demonstrate the commitment of the international community to allow these proceeds to be returned to their country of origin. They offer a coherent set of rules, according to which this return should take place. In the context of the UNCAC, the term "recovery" entails the entire confiscation process as well as the return of the stolen assets, whereas in a classical interpretation it may only be used for the confiscation of the proceeds of crime.

In the fight against economic crime in general and against corruption in particular, the seizure and confiscation of the proceeds of crime as well as the recovery of assets can be considered as essential. It is no coincidence that the Stockholm Programme, that sets the future priorities of the EU's policy in the area of justice, freedom and security for the period of 2010–2014, explicitly pays attention to the subject. In order to reduce the number of opportunities available to organised crime as a result of the globalised economy, the European Council calls upon the Member States and the European Commission to identify and seize the assets of criminals more effectively. The Council also recommends mobilising and coordinating sources of information in order to identify suspicious cash transactions and to confiscate the proceeds of crime.[1] Asset recovery in the UNCAC context sends a strong signal that high-level corruption does not pay. It contributes to repairing damages to the victims, hence providing an incentive to set up the necessary legal and operational conditions required to facilitate action as well as an adequate framework for stronger cooperation. This contribution not only intends to provide an overview of the asset recovery provisions pursuant to the UNCAC. It also wishes to pay attention to recent initiatives with regard to asset recovery in general, which were launched at the time when the Convention entered into force. The authors will consider especially the CARIN network and the so-called ARO Council Decision of the Council of the European Union. We will examine if and in what measure these new initiatives can offer support in the practical implementation of the Convention.

Before 2003, it appeared easier for States to recover the proceeds of corruption through civil action than through mutual legal assistance. Moreover, the return of assets to a foreign country with the assistance of the criminal justice authorities depended on the goodwill of the State where the assets were found.

Some cases can be considered as successes. In the case of the identification, confiscation, and repatriation of the proceeds of crime of the family and associates of General Sani Abacha ─ who took power in Nigeria through a coup in 1985 and who died of a heart attack in June 1998 ─ about US$ 2 billion in ten jurisdictions was seized, most of which has been recovered by Nigeria through mutual assistance, forfeiture, or settlements.

In the case against the family of the former president of the Philippines, Ferdinand Marcos, who, together with his accomplices, looted an estimated amount of more than US$ 10 billion dollars (most of which was deposited in Swiss banks) during the twenty years of his presidency, the Philippine government was given permission by the Swiss Supreme Court to dispose of the assets, worth some US$ 683 million.

With regard to the case against Vladimiro Montesinos Torres, the main advisor to former Peruvian president Alberto Fujimori from 1990 to 2000, an amount of US$ 175 million could be recovered from three jurisdictions in a three-year period.[2]

In a decision of February 2009, the Swiss government ordered that US$ 6 million be paid to Haiti from the frozen bank accounts of former dictator Jean-Claude 'Baby Doc' Duvalier,

President from 1971 to 1986. In this case, even though criminal charges were never proven in Haiti, the Swiss judicial authorities found that there was sufficient evidence of criminal conduct by the Duvalier family that the burden of proof was reversed.

However, by a decision on 21 April 2009, the Attorney General of Switzerland decided not to follow up the criminal charges in the case against the entourage of the former Zaire (now Democratic Republic of Congo, DRC) dictator, Joseph-Désiré Mobutu Sese Seko, who was in power from 1965 until his regime was overthrown in May 1997. The Attorney General attempted to do what had been accomplished in the *Duvalier* case: convince the court that the Mobutu family had been operating as a criminal network, in order to sustain the criminal charges that are not subject to statutes of limitations and forcing the Mobutu family to prove the legitimate origin of the money. However, in the absence of the necessary legal assistance from the Government of the DRC, the action failed. As a result, the Swiss bank accounts belonging to the family of Mr. Mobutu Sese Seko had to be unfrozen.

In relation to the court decision cited above, the Swiss Federal Court ruled on 10 January 2010 that the assets of the clan of Jean-Claude 'Baby Doc' Duvalier, kept in Swiss bank accounts and frozen since 1986, could not be returned to Haiti. The seizure of the assets was nevertheless maintained.

With a view to addressing future cases similar to the *Mobutu* case, the Swiss Federal Commission has tasked the Federal Department of Foreign Affairs with formulating a new law that will enable Swiss courts to return stolen funds to the victims of corruption.

These cases underline the complexity of the legal challenges and pitfalls that both requesting and requested countries have to face while attempting to repatriate proceeds of corruption.

It is hoped that a successful implementation of the UNCAC will improve the success rate of asset recovery actions in corruption cases, especially because it provides the legal groundwork to make rapid action possible. In the past, one of the strategic weaknesses of formal mutual legal assistance in criminal matters as a tool for the tracing and recovery of assets was its slowness.

I. Recovery of Assets in the 2003 Convention against Corruption

The importance of this chapter for the treaty as a whole is underlined immediately by Article 51. This article puts first the return of assets as a key objective of the Convention. State Parties shall afford one another the widest measure of cooperation and assistance in this regard.

1. Prevention and Detection of Transfers of Proceeds of Crime (Article 52)

Article 52 of the UNCAC obliges the State Parties to establish a preventive system against money laundering of the proceeds of corruption. Such a system must facilitate the tracing of suspicious transactions linked to corruption. Many of these provisions provide an international legal basis for the newly updated recommendations of the Financial Action Task Force (FATF).

Financial institutions are required to take a number of preventive measures against money laundering. They must pay special attention in determining the identity of the beneficial owners of funds deposited into high-value accounts and in conducting enhanced scrutiny of accounts of persons entrusted with prominent public functions as well as those of their family and associates (so-called PEPs or Politically Exposed Persons) (Article 52.1).

The State Parties themselves also have a role to play in the process of assisting financial institutions in complying with this comprehensive regulatory framework. Compliance can be achieved by issuing advisories regarding the types of persons whose accounts must be handled with enhanced security, the types of accounts and transactions to which particular attention should be paid, and which appropriate account-opening, maintenance, and record-keeping measures to take concerning such accounts (Article 52.2 a)) as well as which lists of natural or legal persons to apply for enhanced due diligence. They shall, at the request of another State Party or on their own initiative, notify financial institutions of the identity of persons to whose accounts the institutions will be expected to apply enhanced scrutiny (Article 52.2 b)).

Furthermore, State Parties need to ensure that financial institutions maintain adequate records ("paper trail"), which may later be needed as proof of corruption and the laundering of money from the proceeds of corruption, and to prevent the establishment of "shell banks" (Articles 52.3 and 4).

Two non-mandatory provisions concern the establishment of disclosure systems for certain types of public officials as well as the possibility for State Parties to share at their discretion this information with the competent authorities in other State Parties. A State's own public officials can be obliged to report their interest in financial accounts in a foreign country (Articles 52.5 and 6).

Another key preventive measure is the consideration in Article 58 of establishing, a Financial Intelligence Unit to act as central entity for the receipt, analysis, and dissemination of information regarding possible money-laundering.

2. Direct Recovery of Property (Article 53)

Under the UNCAC, cooperation among the State Parties might be mandatory, even in the absence of a request for mutual legal assistance.

Article 53 of the Convention obliges State Parties to take measures to permit another State Party to initiate civil action in its courts in order to establish title to or ownership of property acquired through an offence, established in accordance with the Convention. The courts must also be able to order the payment of compensation of damages to another State Party that was harmed by such offence, and, when the courts have to decide on confiscation, they must be able to recognise the claim of the other State Party as the legitimate owner of property acquired through such offence. This provision is essential in a context where no prosecution could be pursued. Based on the evidentiary standard, either civil or criminal measures are left at the discretion of the State Parties.

Although Article 53 of the UNCAC can certainly be called unique, the entailed economic costs of such measures might hamper its effective enforcement.

3. Recovery of Property through International Cooperation in Confiscation Matters (Article 54)

The UNCAC requires in Article 31 the implementation of a domestic system of freezing and seizure and confiscation as a prerequisite to international cooperation as enshrined in Articles 54 and 55.

a) General

Article 54 obliges State Parties to take measures to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party and to permit its own authorities to order confiscation on the basis of proof, delivered by the requesting State Party (Article 54.1).

Along the same lines of thought, measures must be taken to freeze or seize property upon the freezing or seizure order of a court or competent authority of a requesting State Party, or to permit a State's own competent authorities to freeze or seize property on the basis of proof, delivered by the requesting State Party (Article 54.2).

b) Non Conviction Based Confiscation

According to Article 54.1 c) of the Convention, each State Party must consider taking the necessary measures to allow confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, or absence, or in other appropriate cases. Thus, the Convention makes reference to non conviction based asset forfeiture. Nevertheless, the establishment of such a legal system is not a positive obligation for the State Parties.

Non conviction based forfeiture (NCB forfeiture) is a form of confiscation that differs from criminal confiscation because it does not require a prior criminal conviction of the offender, but a trial before a civil tribunal or court. The objective is similar, namely forfeiture by the State of the proceeds and instrumentalities of crime. The underlying rationales are also the same for the two types of forfeiture: getting across the message that crime does not pay and deterring unlawful activity by means of forfeiture.[3]

There are important differences between criminal confiscation and NCB forfeiture. Criminal confiscation is the result of criminal prosecution and therefore implies an action against the prosecuted person (action *in personam*). NCB forfeiture is aimed against an object (action *in rem*). Criminal confiscation is part of the criminal charge against a person, and it is imposed as a penalty as part of a sentence in a criminal case. NCB forfeiture is filed by a government against an object, before, during, or after a criminal conviction, even if there is no criminal charge against a person or even in case of acquittal.

The standard of proof might differ as well. A criminal confiscation requires a criminal conviction. A crime must be proven "beyond a reasonable doubt" or according to the conviction of the court. For an NCB forfeiture, a criminal conviction is not necessarily required. The evidence of unlawful conduct might be obtained on a civil "balance of probabilities" standard, the result of proof to the contrary in civil cases.

In accordance with domestic principles of law, NCB is considered useful when a criminal confiscation is impossible. This can be the case when the violator is a fugitive, is unknown, is dead or dies before conviction, when the person is immune from criminal prosecution, or has been acquitted of the criminal offences. The use of this tool might also be contemplated, if legally feasible, in a case where a person is so powerful that a criminal investigation or prosecution is unrealistic or impossible. Furthermore, NCB forfeiture can be useful in cases when the property is held by a third party without a *bona fide* defence.[4] Article 54 recognises the challenges in obtaining a confiscation order and encourages State Parties to contemplate creative solutions.

4. International Cooperation for Purposes of Confiscation (Article 55)

If mutual legal assistance is conditional to the existence of a treaty, Article 55 of the UNCAC provides the legal basis by which to grant such assistance. The article in fact contains obligations to facilitate cooperation to "the greatest extent possible," either through the recognition of a foreign order and its immediate enforcement or by requiring the competent authorities to take a domestic order on the basis of information received from another State Party.

Article 54 describes how the international cooperation is to be effected, both when a State Party receives an order of confiscation issued by the court of another State Party (Article 54.1) as well as when property has to be identified, traced, seized, or frozen (Article 54.2). The content of a request for mutual legal assistance is also described in detail (Article 55.3).

It should be noted that Article 55 requires the requesting State Party to engage in a permanent close cooperation. By virtue of Article 55.7, cooperation by the requested State Party may only be refused if the requested State Party does not receive sufficient and timely evidence. The same is true if the property is of a *de minimis* value.

Cooperation is also necessary when the requested State Party considers lifting provisional measures. Article 55.8 obliges the requested State Party to give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

5. Return and Disposal of Assets, Property, Equipment, or Other Instrumentalities (Article 57)

According to the philosophy of the UNCAC, it is crucial that assets and funds in connection with corruption are returned to the country of origin in order to restore in the best possible way the most serious consequences of the offence. Article 57 specifies the principles that must be applied in practice after confiscation. If the occasion presents itself, these principles will be applied in practice on a case-by-case basis.

In cases of embezzlement of public funds and laundering of embezzled public funds, the confiscated property shall be returned to the State requesting it on the basis of a final judgement, a requirement that can be waived by the requesting State. In the case of proceeds of any other offence covered by the Convention, the property is returned upon proof of ownership or recognition of the damage caused to a requesting State and any similar conditionality of a final judgement. In all other cases, priority consideration is given to the return of confiscated property to the requesting State, to the return of such property to the prior legitimate owners, or to compensation of the victims.

II. Recent Forms of Cooperation and Assistance

In the last few years, some specific forms of cooperation and assistance between States have been developed concerning asset recovery at the bilateral level and through multilateral initiatives such as the United Nations Office on Drugs and Crime (UNODC)/World Bank (WB) Stolen Asset Recovery Initiative (StAR) or the International Centre for the Asset Recovery of the Basel Institute on Governance.

The CARIN network and the ARO Council Decision of the Council of the European Union will be discussed successively. It should be emphasised, in fact, that these forms of cooperation and assistance are not limited to corruption and money laundering of funds originating from corruption, but are applicable to all crimes.

1. The CARIN Network

CARIN stands for *Camden Asset Inter-Agency Network* and plays an important practical role in the preparation and execution of measures of seizure, freezing, and confiscation abroad. It is an informal network of judicial and law enforcement expert practitioners for criminal asset tracing, freezing, seizure, and confiscation. It was established in September 2004, on the initiative of the Dutch Asset Recovery Office BOOM (*Bureau Ontnemingswetgeving Openbaar Ministerie*), Belgium, Ireland, the United Kingdom, Austria, and Eurojust. At present, the network counts 45 members, including 39 countries.

CARIN does not replace existing institutions, but is aimed at creating the conditions for enhanced international cooperation between law enforcement and justice officials by facilitating mutual legal assistance and providing support to the judiciary in the execution of international decisions involving freezing or seizure. Support is also provided concerning the execution of confiscation requests.

2. The ARO Council Decision

In the European Official Journal L 332 of 10 December 2007, Council Decision 2007/845/JHA of 6 December 2007 was released in order to deal with cooperation between asset recovery offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (hereinafter "Aro Council Decision").

a) The National Asset Recovery Offices (AROs)

By virtue of Article 1.1 of the Council Decision, each Member State has to set up or designate a national asset recovery office[5] for the purposes of the facilitation of the tracing and identification of proceeds of crime and other crime-related property, which may become the object of a freezing, seizure, or confiscation order made by a competent judicial authority in the course of criminal or civil proceedings – as far as is possible under the national law of the Member State concerned.

Article 8.1 of the Council Decision stipulates that the Member States must ensure that they are able to cooperate fully in accordance with the provisions of this Decision by 18 December 2008. By 18 December 2010, the Council of the European Union will assess Member States' compliance with this Decision on the basis of a report made by the Commission (Article 8.3).

The last phrase of Article 1.1. enables the tracing and identification of proceeds of crime and other crime-related property in connection with a procedure of NCB forfeiture or civil forfeiture.

Ultimately, the ARO Council Decision leaves at the discretion of any Member State the decision regarding the type of asset recovery office to be established. An ARO can thus be part of an administrative, law enforcement, or judicial authority (comp. Article 2.2 *in fine*).

b) In Practice

As the title of the ARO Council Decision indicates, the Council Decision pays particular attention to the way in which asset recovery offices should cooperate, both within the Member State itself (Article 2) and internationally (Articles 3 and 4). It is worth noting that, in the Stockholm Program, the European Council calls upon the Member States and the Commission to facilitate the exchange of best practices in prevention and law enforcement, in particular within the framework of the Asset Recovery Network and the Anti-Corruption Network.[6]

■ *Exchanges of Information on Request:* For the cooperation of the AROs of the different Member States, a specific mode of operation is prescribed. AROs have to cooperate in the way set out by the Framework Decision 2006/960/JBZ,[7] also known as "the Swedish Framework Decision." For the exchange of information, the use of the forms added to the Framework Decision under annexes A and B is mandatory. The time limits that have to be observed for a response to a demand for information are striking. In urgent cases, the time limit for an answer can be limited to a period of eight hours (renewable). In other cases, the prescribed time limit is one week or 14 days. According to Article 3.2 of the ARO Council Decision, the requesting asset recovery office must specify in the form the object of and reasons for its request as well as the nature of the proceedings. Details on property targeted or sought and/or the persons presumed to be involved must also be provided. The details must be as precise as possible.

■ *Spontaneous Exchanges of Information between AROs:* Asset recovery offices or other authorities charged with the facilitation of the tracing and identification of proceeds of crime may, without a request to this effect, exchange information that they consider necessary for the execution of the tasks of another asset recovery office (Article 4).

c) Exchanges of Best Practices

Member States must ensure that the asset recovery offices exchange best practices concerning ways to improve the effectiveness of Member States' efforts in tracing and identifying proceeds from, and other property related to, crime that may become the object of a freezing, seizure, or confiscation order by a competent judicial authority (Article 6).

3. CARIN and ARO: Similarities and Differences

It is no coincidence that the CARIN network is explicitly mentioned in the considerations that precede the ARO Council Decision. In the preamble, it is indeed stated that the Council Decision completes the CARIN network by providing a legal basis for the exchange of information between asset recovery offices of all the Member States.

Thus, the CARIN network is at the core of the establishment of a network of asset recovery offices. Europol acts as the Secretariat for the CARIN network and the EC has been a steady contributor to the initiative. Nevertheless, important differences also exist between the CARIN network and the ARO network. These differences concern not only the concrete way information is exchanged, but especially the dimension of the networks. The ARO network has its origin in a Decision of the Council of the European Union and is therefore a purely European matter. Since its creation, the CARIN network has been a European-type network, but is extended to worldwide membership.

III. Towards a More Efficient Cooperation

1. Conference of the State Parties to the United Nations Convention against Corruption (COSP)

Pursuant to Article 63 of the UNCAC, the Conference of the State Parties was established to improve the capacity of and

cooperation between State Parties and to contribute to the effective implementation of the Convention.

The Conference promotes the exchange of information among State Parties to prevent and repress corruption and to repatriate the proceeds of crime. Several ad hoc working groups have been set up in the framework of the Conference to discuss and better enforce various aspects of the Convention. Technical assistance needs of Member States regarding the implementation of the Convention are also being addressed.

Thus, an Open-Ended Intergovernmental Working Group on Asset Recovery has been established, which aims to put in practice the measures of asset recovery contained in the UNCAC Convention. In a background paper prepared by its Secretariat for the 25 and 26 September 2008 session of the Working Group,[8] both the ARO Council Decision and the CARIN network have been recognised as innovative instruments and operations to effectively contribute to asset recovery. During its conference at Nusa Dua, Indonesia, held from 28 January to 1 February 2008, the COSP itself argued in favour of the creation of a worldwide network of contact points specialised in confiscation and the recovery of assets. In a background paper submitted for the session held in Vienna on 14 and 15 May 2009,[9] the establishment of CARIN-style regional networks of contact points is recommended. A CARIN-Style Network for Southern Africa was launched in March 2009,[10] and in December 2009 in South America under the auspices of the Financial Action Task Force (FATF) Style Regional Body, GAFISUD.[11] CARIN is supportive of the development of such regional networks.

Since 2006, three COSPs have been held. During the last conference, which took place in Doha in November 2009, a review mechanism was adopted as per Article 63, paragraph 7. This process, which was piloted for approximately one year, ought to be transparent, fair, and impartial. It should complement existing international and regional review mechanisms.

2. StAR (Stolen Asset Recovery Initiative)

The Stolen Asset Recovery (StAR) initiative originated in 2007 as a joint initiative of UNODC and the World Bank.

StAR promotes the ratification of the UNCAC and the implementation of its asset recovery chapter. The aim is to help States create the conditions for the recovery and return of assets as well as to enhance the understanding of underlying legal and operational issues in relation to the asset recovery process. This can occur through the dissemination of knowledge and tools for practitioners, including recommendations for the strengthening of preventive measures dealing with politically exposed persons (PEPs) their family and associates, non conviction based asset forfeiture (NCB), income and asset declarations, legal barriers to asset recovery, misuse of corporate vehicles, and a global architecture for asset recovery. StAR assists requesting countries in building legislative, investigative, judicial, and enforcement capacities.

This means concrete country assessments, gap analyses, legislative drafting, action planning, and training of officials, but not a direct involvement in casework. Partnerships are being developed, e.g., with the Organisation for Economic Co-operation and Development and the Council of the European Union or with ICAR.

Finally, StAR supports the development of a global Asset Recovery Focal Point Database with Interpol and Europol. This database was launched in January 2009. It is a helpdesk of contact persons in the State Parties, who can respond to emergency requests for assistance if failure to act immediately may lead law enforcement to lose the trail. Currently, the database includes data on more than 70 countries.

3. The Council of the European Union

Concerning the recovery of assets, the Council of the European Union has adopted a number of Common Positions. The Council explicitly supports the StAR initiative. The Council is also willing to coordinate existing bilateral and multilateral initiatives in the area of asset recovery with a view to avoiding duplication of work and overlap with existing initiatives. However, no further details are given on the concrete way this coordination is to take place, for instance with the ARO network.

4. Conclusion

All State Parties and institutions involved agree on the necessity of a more efficient application of the UNCAC in practice. This necessity has resulted in a series of initiatives by different authorities, each of which acts according to its own list of priorities. This testifies merely to the determination to apply the UNCAC in practice and in accordance with the will of the international community.

Nevertheless, this evolution has not taken place without harbouring a few specific dangers. A first problem is that lessons learnt from past asset recovery cases are not sufficiently taken into account. In addition, the key expertise, knowledge, and initiatives of institutions with broader competences going beyond mere corruption should be more closely examined. In this respect, the rapid development of a network of asset recovery offices in the European Union is an example worth exploring.

The Council of the European Union has already pointed out the need to coordinate the existing initiatives in the area of the recovery of assets. For instance, within the framework of the UNCAC, better use could be made of the fast developing expertise of the ARO network.

A second problem is that we tend to forget that the impressive series of initiatives, which have been undertaken until now with the aim to foster the operational implementation of the UNCAC in practice, are often the result of the efforts of institutions that are not State Parties (such as the StAR initiative). These institutions can take and develop initiatives, but, as such, they have no access to the CARIN or ARO networks. The initiatives to access these networks must be taken by the State Parties themselves.

Without strong and sustained political will and commitment on the part of the UNCAC State Parties, greater coordination among existing initiatives and the dissemination of good practices as well as sanitised cases that could benefit all State Parties, the innovative measures set out in the asset recovery chapter will not achieve their full potential.

Francis Desterbeck
Director of the Belgian Central Office for Seizure and Confiscation

Delphine Schantz
Anti-Money-Laundering Adviser
United Nations Office on Drugs and Crime (UNODC)

* The views expressed in this article are those of the author and do not necessarily reflect the views of United Nations.

1 Doc. 17024/09, pp. 48-49.

2 For details on the *Abacha* case, see *E. Monfrini,* The Abacha Case, in: M. Pieth (ed.), Recovering Stolen Assets, Bern, 2008, pp. 41-78; regarding the *Marcos* case, see *S. Salvioni*, Recovering the proceeds of corruption: Ferdinand Marcos of the Philippines, ibidem, pp.79-88, and *Simeon V. Marcelo,* The long road from Zurich to Manila: the recovery of the Marcos Swiss dollar deposits; ibidem, pp. 89-110; for information on the *Monesinos* case, see The Peruvian efforts to recover proceeds from Montesinos's criminal network of corruption, ibidem, pp. 111-132.

3 Regarding non-conviction based forfeiture, see *T.S. Greenberg, L.M. Samuel, W. Grant* and *L. Gray*, Stolen Asset Recovery. A Good Practices Guide for Non-Conviction Based Asset Forfeiture, The World Bank, 2009.

4 *T.S. Greenberg* et al., op. cit., pp. 14-15.

5 Article 1.2 specifies that two asset recovery offices can also be set up or designated. This article was introduced because of the specific situation of the United Kingdom, where two legal systems exist.

6 Doc 17024/09, p. 49.

7 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, Official Journal L 386 of 29/12/2006, pp. 0089-0100 and Official Journal L 200 of 01/08/2007, pp. 0637-0648.

8 Document CAC/COSP/WG.2/2008/2; http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2009-May-14-15/V0981905e.pdf.

9 http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2009-May-14-15/V0981905e.pdf.

10 Asset Recovery Inter Agency Network for Southern Africa (ARINSA), which also includes several countries from Eastern Africa and the Indian Ocean.

11 Red de la Recuperación de Activos de GAFISUD (RRAG).

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Fax: +49 (0)761 7081-294
Email: u.sieber@mpicc.de
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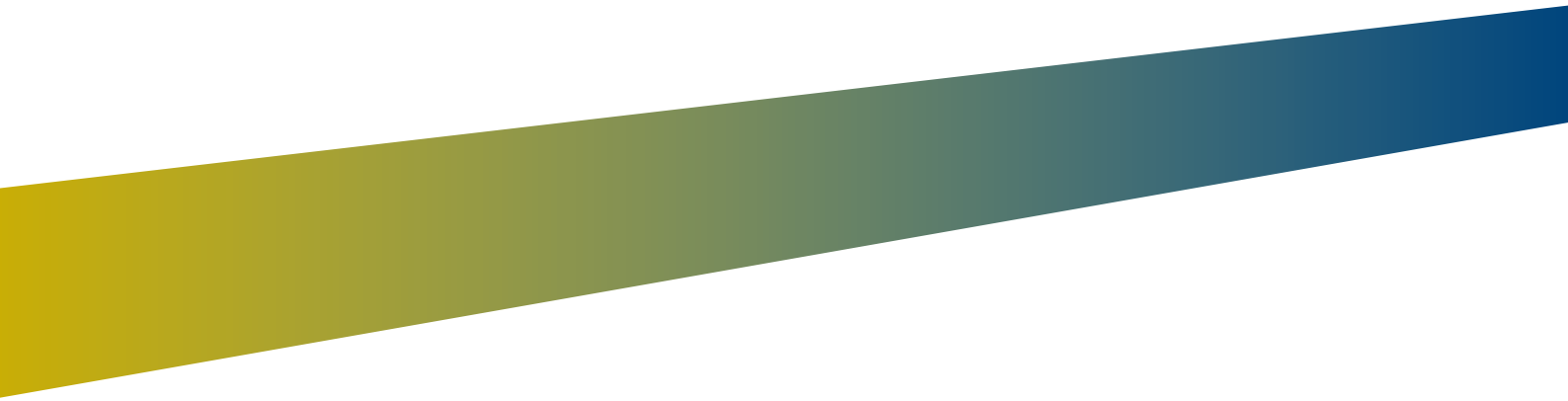
For further information, please contact:

Sabrina Staats / Els de Busser
Max Planck Institute for Foreign and International Criminal Law
Guenterstalstrasse 73,
79100 Freiburg i.Br./Germany

Tel: +49(0)761-7081-227 or +49(0)761-7081-0 (central unit)
Fax: +49(0)761-7081-294
E-mail: s.staats@mpicc.de, e.busser@mpicc.de



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