



### **Focus: Victims of Crime**

**Dossier particulier: Victimes de la criminalité**

**Schwerpunktthema: Opfer von Straftaten**

The European Protection Order

*Teresa Jiménez Becerril / Carmen Romero Lopez*

The Status of the Victim in European Union Criminal Law

*Dr. Massimo Fichera*

Minors as Victims in the Age of Information  
and Communication Technologies

*Emmanouil Billis / Panagiotis Gkaniatsos*

Rights of Victims in Slovenian Criminal Law According to the EU Framework  
Decision on the Standing of Victims in Criminal Proceedings

*Sabina Zgaga*

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## Imprint

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

# Editorial

Dear Readers,

With the support of the European Union Agency for Fundamental Rights (FRA), the Hungarian government, under its six-month Presidency of the European Union, hosted a conference in March 2011 on “Protecting Victims in the EU: the Road Ahead.” The conference coincided with the ten-year anniversary of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, a decade that has seen legislative developments for victims “on paper” but which has suffered from a lack of concrete action for victims in practice in a number of EU Member States. As research by the FRA on vulnerable victim groups has shown, many victims continue to underreport crime, which is exacerbated by the fact that certain groups tend to distrust the police (FRA “EU-MIDIS” survey, see eucrim 4/2010, p. 134). Recognising the need to improve responses to victims, the March conference was used as a platform to announce a “Victims’ Roadmap” under the Hungarian Presidency and as an opportunity for the Commission to promote its renewed focus on victims in the form of the “Victims’ Package” that was opened for consultation in 2010.

The “Victims’ Roadmap” mirrors the existing Council Roadmap for suspected and accused persons in criminal proceedings, as it proposes measures intended to meet victims’ needs and rights in specific fields. In addition, the key component in the Commission’s “Package” will be the newly drafted Victims Directive that will replace the existing Framework Decision within the EU’s post-Lisbon legislative landscape. In parallel, other EU-wide legislative developments – such as the new Trafficking Directive that was adopted by the Council of Ministers in March 2011 – should also improve the standing of particularly vulnerable victim groups, especially child victims of trafficking (the subject of a report by the FRA in 2009).

Along with these legislative and policy developments, there are recent initiatives that set out to improve current knowledge about the extent and nature of victimisation and which give new impetus to victimisation surveys in the EU. The Eurostat-driven “European Safety Survey” is at the heart of this process, as the survey – the results of which should be rolled out from 2013 – intends to shed light on the general population’s experiences of victimisation in the EU. At the same time, targeted surveys, such as the FRA’s first EU-wide survey on vio-

lence against women, which is currently being piloted, will provide data in an area that continues to be underresearched and underreported.

Given the continued shortcomings with respect to gleaning comprehensive knowledge about victims and implementing measures for victims *in practice*, a new victim-centred focus in the EU is to be welcomed. Although the Stockholm Programme, as the guiding policy for addressing crime in the EU for the period 2010–2014, *does* address victims of crime – and focuses on particular groups, such as victims of trafficking and terrorism – it does so from the initial stance of fighting serious and organised crime. However, encouragingly, the action plan implementing the Stockholm programme refers to fundamental rights, and herein states that “The Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another.” However, what these “fundamental rights” may mean for victims in practice – for example with respect to principles of access to justice and fair trial – will only become apparent in the coming years, once new legislation and policies have had time to take root. It has yet to be seen whether, in another ten years, there will be further calls for new legislation and policy responses to address ongoing shortfalls for crime victims in the EU. In this regard, evidence from new victimisation surveys, which the FRA will contribute to, and analysis of new “victim-centred” legislation in practice, will underscore how far we have progressed concerning crime victims in the 27 Member States of the EU.

Morten Kjaerum  
Director – European Union Agency for Fundamental Rights (FRA)



Morten Kjaerum



## European Union\*

Reported by Dr. Els De Busser (EDB), Sabrina Staats (ST), and Cornelia Riehle (CR)

### Foundations

#### Reform of the European Union

##### New Comitology Rules

On 1 March 2011, the new “comitology” rules entered into force. Comitology stands for the procedures under which the Member States control the Commission’s exercise of its implementing powers. This involves Member States representatives in a committee that is chaired by a Commission representative who does not take part in the vote. Art. 291 TFEU makes it possible for basic EU legislation to confer on the Commission the power to adopt implementing acts. It concerns those acts where uniform conditions are needed to implement legally binding EU acts by the Member States.

The new comitology rules introduce two new procedures by which to control the Commission’s exercise of its implementing power: the examination procedure and the advisory procedure.

The first new procedure, the examination procedure, applies in particular to measures that have a general scope (e.g.,

technical details related to the online collection system for statements of support for the European citizens’ initiative, the possibility for 1 million citizens to directly present initiatives to the Commission introduced by the Lisbon Treaty) and specific measures with a potentially important impact, e.g., in the area of trade and taxation.

The committee can either accept or oppose the draft implementing act or not deliver any opinion at all. If the committee delivers a positive opinion, the Commission shall adopt the draft implementing act. If the committee opposes the draft measures by qualified majority, the Commission shall not adopt the draft implementing act. In cases where an implementing act is deemed to be necessary, the Commission has two options. It may choose to send the same committee an amended version of the draft implementing act within two months or it may choose to submit the draft implementing act to the appeal committee for further deliberation within one month. If the committee does not deliver any opinion, the Commission may adopt the draft act under certain conditions that depend on the situation.

The second new procedure, the advisory procedure, is the general rule for the adoption of implementing acts in fields other than those mentioned in the examination procedure. In the advisory procedure, the Commission must take utmost account of the committee’s opinions. The committee adopts its opinions by simple majority.

In both procedures, the EP and the Council of the EU have the right to inform the Commission at any time that the proposed implementing act exceeds the Commission’s powers. This means that the Commission must decide whether to maintain, amend, or withdraw the proposed act. The EP and the Council have this right whenever the basic act was adopted under the codecision procedure.

With a view to simplifying the complex comitology rules, these new procedures replace the consultation, management, and regulatory procedures that were introduced in 1999. (EDB)

► [eucrim ID=1102001](#)

##### Commission Agrees to Limited Treaty Change for Financial Stability Mechanism

On 15 February 2011, the European Commission agreed to a small change to Art. 136 TFEU in order to establish a European stability mechanism to preserve the stability of the eurozone. Germany and France initiated this procedure in October 2010 in order to introduce a permanent financial stability mechanism to replace the temporary one (see [eucrim](#)

\* If not stated otherwise, the news reported in the following sections cover the period February – April 2011.

4/2010, p. 130). The Belgian government submitted a proposal in December 2010.

By simplified treaty amendment procedure, a new paragraph 3 will be inserted in Art. 136 TFEU by 2013: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”. According to the Commission, this new provision would not increase or dilute the competences of the EU. (EDB)

►eucrim ID=1102002

## Enlargement of the EU

### Last Stretch for Croatia as 28th Member State

The progress made by Croatia towards gaining EU membership has been reported on in previous eucrim issues (see eucrim 1/2011, pp. 2-3 and eucrim 4/2010, p. 131).

The European Parliament commended Croatia on its progress towards joining the EU but stresses that certain items need to be dealt with. They include the International Criminal Tribunal for the Former Yugoslavia request for important military documents that has so far remained unanswered and the need to proceed quickly with the prosecution of war crimes and improvement of witness protection.

On 2 March 2011, the European Commission adopted an interim report on the country's progress in the area of the judiciary and fundamental rights (Chapter 23). This report also confirms the considerable progress but highlights the areas in which further work is still needed:

- To establish convincing track records in the field of the judiciary and the fight against corruption;
- To address impunity for war crimes;

- To settle outstanding refugee return issues.

The plan is to conclude negotiations by June 2011. (EDB)

►eucrim ID=1102003

### Candidate Member States Turkey and Montenegro – State of Play

On 9 March 2011, a large majority of European Parliament Members adopted a Resolution on Turkey's progress in the accession negotiations to the EU. According to rapporteur Ria Oomen-Ruijten the key factors slowing down Turkey's progress are the Cyprus-Turkey deadlock, the lack of dialogue among national political parties, and the undermining of press freedom and other basic rights. The Resolution states that an overall constitutional reform is needed.

Montenegro was granted the status as candidate Member State by the Council on 17 December 2010, but negotiations have not yet begun. The European Parliament has expressed hope that accession talks will begin this year. However, the Parliament also sees challenges ahead in the areas of corruption, organised crime, and discrimination and is concerned about journalistic freedom and independence. (EDB)

►eucrim ID=1102004

## Schengen

### Commission Proposal to Amend Schengen Borders Code

On 10 March 2011, Commissioner for Home Affairs Cecilia Malmström presented a Commission proposal to revise the Schengen Borders Code. This Code is a Community Code that contains standards and procedures on crossing external EU borders and on reintroducing checks at internal borders.

Practical issues that emerged when applying the Schengen Borders Code during the first four years inspired the Commission to propose amendments aimed at facilitating the movement of

people across internal and external borders of the EU. Improving the cooperation with third states and speeding up border control procedures as well as lightening the administrative burden, e.g., for cargo ships and train crews, are aspects that are included in the proposed review. In addition, the amendments focus on increasing legal certainty for travellers and improving training for border guards.

The Commission mentioned that, if the proposed amendments are adopted in time, improved border crossing could already be practised during the European football championship being hosted by Poland and Ukraine in 2012. The Council and the European Parliament will be involved next in the decision-making process. (EDB)

►eucrim ID=1102005

### France and Italy Ask for Revision of Schengen Agreement

On 26 April 2011, French and Italian government leaders, Nicolas Sarkozy and Silvio Berlusconi, announced their bid for a revision of the Schengen Agreement. Following the recent events in North Africa, in particular the violence in Libya, an estimated 30,000 migrants arrived and crossed the EU external border via Italy. After Italian authorities issued temporary residence permits that were used by many to travel to France, Italy and France argued over the problem and finally asked the European Council and the Commission to accelerate the revision of the Schengen rules.

The most eye-catching proposal of the two Member States is the extension of possibilities for temporarily re-establishing border controls between two Member States. This is already possible in the current Schengen Agreement in cases of exceptional events, e.g., a world championship football match.

The European Commission presented its reflections on a better management of migration to the EU on 4 May 2011 and addressed the problem faced by Member States such as Malta, Greece, France,

and Italy who experience a larger influx of migrants due to their geographical location. The Commission's Communication focuses *inter alia* on the following:

- Completion of the Common European Asylum System by 2012;
- Strengthened border control and Schengen governance to address irregular immigration and to ensure that each Member State effectively controls its section of the external borders in line with the rules and spirit of EU law;
- Better targeted legal migration;
- A strategic approach to relations with third countries on migration-related issues.

Based on this Communication, a debate followed during an extraordinary JHA Council on 12 May 2011. During this debate the participants reflected on those aspects of the Communication that address the strengthening of the Schen-

gen Area, a new partnership with the countries of the Southern Neighbourhood (including Algeria, Egypt, Morocco, Syria, etc.), and asylum policy. According to all participating ministers the free movement of persons must be preserved and the control of the EU's external borders strengthened. In addition, cooperation with third states in the Southern Neighbourhood Region and in the Eastern Partnership Region should be increased. The establishment of a Common European Asylum System by 2012 (as foreseen by the Commission in its Communication) was reiterated.

The Commission was requested to present proposals for a comprehensive approach to migration to be endorsed by the European Council during its next meeting on 24 June 2011 when the next discussion on this topic will be held. (EDB)

► [eucrim ID=1102006](#)

## Legislation

### European Approach to Collective Redress

The European Commission has launched public consultation on identifying the common legal principles for collective redress.

Collective redress is a broad concept encompassing any mechanism aimed at taking legal action against unlawful business practices, which affect citizens and businesses that are victims of the same breach by the same company and who bundle their claims.

The public consultation has as one of its objectives to examine how common principles on collective redress could fit into the EU legal system and the legal orders of the Member States. Additionally, it aims to reflect on the fields in which collective redress could have an added value for improving the enforcement of EU legislation or for better protecting the rights of victims.

The consultation ran from 4 February to 30 April 2011. (EDB)

► [eucrim ID=1102007](#)

### Common abbreviations

AML	Anti-Money Laundering
CCJE	Consultative Council of European Judges
CEPEJ	European Commission on the Efficiency of Justice
CEPOL	European Police College
CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
COSI	Standing Committee on Operational Cooperation on Internal Security
DG	Directorate General
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECJ	Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court on Human Rights
EDPS	European Data Protection Supervisor
EIO	European Investigation Order
EJN	European Judicial Network
(M)EP	(Members of the) European Parliament
EPO	European Protection Order
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action Against Trafficking in Human Beings
ICTY	International Criminal Tribunal for the former Yugoslavia
JHA	Justice and Home Affairs
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
PNR	Passenger Name Records
SIS	Schengen Information System
SitCen	Joint Situation Centre
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

## Institutions

### Council

#### Council and Commission Strengthen Implementation of Charter of Fundamental Rights

During the JHA meeting from 24-25 February 2011, the Council adopted conclusions on ensuring the effective implementation of the Charter of Fundamental Rights of the EU. Following the entry into force of the Lisbon Treaty, the Charter is now a legally binding document (see Art. 6 TEU) and applies to all EU institutions, bodies, offices, and agencies as well as all national legal acts implementing EU law. In its conclusions, the Council called on all Member States and EU institutions to ensure that



legislative initiatives are consistent with fundamental rights throughout the legislative process. The Council commits itself to acting in full conformity with the Charter with respect to all its legislative instruments and internal decision-making procedures. The Council also calls on the Working Party on Fundamental Rights and Citizenship and the Council Legal Service to draft methodological guidelines on how to identify and solve problems raised by the Council's own proposals in relation to their compatibility with fundamental rights. The Council expects from the Member States a close examination of new proposals for amendments in the light of their conformity with the Charter. The Council furthermore invited all involved parties to make more use of the Council's Legal Service and to consult with the Fundamental Rights Agency on the development of policies and legislation with implications for fundamental rights.

On 15 February 2011, the Commission published an agenda for the rights of the child, including specific measures to enhance the well-being and safety of children, e.g., promoting child-friendly justice, informing children better about their rights, and making the Internet safer for them. The actions include a proposal for a Directive on victims' rights (see also p. 64), a proposal for a Directive on special safeguards for suspected or accused persons who are vulnerable (including children), and the implementation of the 2007 EU Guidelines on the Protection and Promotion of the Rights of the Child that focus on combating all forms of violence against children. The Commission's agenda is part of its efforts to implement the Charter of Fundamental Rights. (ST)

►eucrim ID=1102008

### Legal Value for Electronic Version of the Official Journal

During the JHA meeting from 11-12 April 2011, the Commission presented its proposal for a Regulation concerning the electronic edition of the Official

Journal of the EU, which was adopted on 4 April 2011. The new proposal aims to give legal value to the electronic edition of the Official Journal of the EU in order for everyone to be able to rely on it as being official, authentic, up-to-date, and complete. Until now, only the paper version has had legal value. (ST)

►eucrim ID=1102009

### Court of Justice of the EU

#### Greece Sentenced for Not Transposing Directive in a Timely Manner

On 31 March 2011, the ECJ ordered Greece to pay a lump sum of €3 million for late transposition into national law of the Directive on compensation to crime victims. The Directive was to be transposed by the Member States by 1 July 2005 at the latest. The Court delivered a first judgement on the case in 2007, in which Greece was found to have extended the implementation deadline. The Commission brought a second action for failure to fulfil obligations before the ECJ when Greece still had not transposed the Directive by October 2009.

Greece adopted a law implementing the Directive in December 2009. The Court did take into consideration Greece's ability to pay in its current dire economic state. Still, the Court found that the period of time between the first judgement and the adoption of the national law implementing the Directive was far too long and constitutes a serious breach of the country's obligations. It therefore ordered Greece to pay. (ST)

►eucrim ID=1102010

#### ECJ Annuls Commission Decision on Compliance of National Legislation with EU Law

On 29 March 2011, the General Court rendered its judgement in a case regarding the Commission's rights to examine whether a Member State has fulfilled its obligations under EU law.

By judgement of 14 October 2004, the Court of Justice found that Portugal failed to fulfil its obligations by not repealing its national legislation on awarding damages to persons harmed by a breach of EU law. In January 2008, the Court of Justice found that Portugal still had not complied with its first judgment of 2004, as the contested legislation had not yet been repealed. Portugal was then ordered to pay penalty payments for each day it did not implement the necessary measures to comply with the first judgement of 2004, from the date of delivery of the second judgement, 10 January 2008 on.

Portugal has since adopted a set of laws repealing the legislation in question in 2007. However, the Commission took the view that the adopted legislation still does not adequately transpose the Directive and thus does not comply with the 2004 judgement. Portugal adopted more legislation on 17 July 2008, amending the previous laws from 2007. The Commission decided on 25 November 2008 that only the laws adopted in July 2008 comply with the 2004 judgement and therefore sought payment of €3.665.088 for the period from 10 January (second judgement) to 17 July 2008 (second set of laws adopted). Portugal challenged this decision, insisting that the law adopted in 2007 already complied with the Directive and therefore there was no penalty payment to pay.

The General Court has now annulled the decision of the Commission. After deciding on its jurisdiction of the case, the Court found that, although the Commission was responsible for recovering the amounts ordered by the Court of Justice, the Commission has no obligation to check whether the adopted laws constitute an adequate transposition of EU law. Such evaluation falls within the exclusive jurisdiction of the Court of Justice and goes beyond determining whether or not the national legislation was effectively repealed. The General Court found that the Commission overstepped its competencies with its

decision and should have sought new infringement proceedings instead. (ST)  
 > eucrim ID=1102011

### Court of Justice and General Court Present Decrease in Duration of Proceedings

On 2 March 2011, the ECJ presented the 2010 statistics for its judicial activity. In 2010, a total of 1406 cases were brought before the three courts comprising the ECJ. The number of references for a preliminary ruling before the Court of Justice has increased, with a total number of 385 cases compared to 302 cases in 2009. The General Court and the Civil Service Tribunal have seen the highest number of new cases filed, with 568 new cases brought before the General Court and 139 new cases brought before the Civil Service Tribunal. The duration of proceedings before the Court of Justice and the General Court has been reduced, with the average duration of a reference for a preliminary ruling before the Court of Justice amounting to 16,1 months and the average length of proceedings before the General Court decreasing to

24,7 months. The average duration of proceedings before the Civil Service Tribunal has increased, however, from 15,1 months in 2009 to 18,1 months in 2010. (ST)  
 > eucrim ID=1102012

## OLAF

### Commission Proposes Reform of OLAF

On 17 March 2011, the Commission adopted a proposal to reform the EU's Anti-Fraud Office, OLAF. In July 2010, Algirdas Šemeta, European Commissioner for Taxation and Customs Union, Audit and Anti-Fraud, had reopened the discussion about a reform of OLAF by presenting a reflection paper on the matter (see eucrim 3/2010, pp. 87-88).

Although OLAF has so far proven to be very successful in the fight against fraud, the reform is intended to enhance OLAF's capacity to tackle fraud by proposing measures to ensure more efficiency, more accountability, and more cooperation with its partners.

■ In order to increase efficiency in OLAF's investigations, the Commission has foreseen that, if an investigation is not completed within 12 months, the office should inform the Supervisory Committee and explain why it needs an extension of the deadline. Furthermore, an internal body should be established within OLAF to help decide which investigations OLAF shall carry out. For decisions on whether or not to take on an investigation, OLAF should be guided by the financial impact of the suspected fraud when setting its operational priorities. The proposal also provides for more ways to exchange information on cases and prosecutions following the joint investigations between OLAF and the Member States concerned. Member States should, upon request, report on measures taken in response to OLAF's case reports and provide a closer follow-up on previous investigations. Each Member State is asked to designate a contact point to facilitate the cooperation of national authorities with OLAF.

■ The proposal also stresses the need to strengthen the fundamental rights of persons under investigation and reinforce OLAF's accountability. It includes a set of measures to safeguard individual rights, e.g., the right to receive a summary of the issue under investigation, the right to make one's views known before conclusions are drawn up, the right to be assisted by a person of choice, and the right to use an official EU language of choice.

■ Another important issue is the need for closer cooperation between OLAF and its partners. The Commission proposes a flexible procedure for the exchange of views between OLAF and the Commission, Parliament, and the Council. To strengthen cooperation between OLAF and third countries, the proposal includes a mandate for the office to conclude administrative arrangements with competent services in third countries. The text also includes a mandate to conclude administrative arrangements with Europol and Eurojust. (ST)

> eucrim ID=1102013

## Report

### Fight Against Irregularities – Administrative and Criminal Law Aspects

Warsaw, Poland, 14–16 April 2011

The conference was implemented by the European Law Research Association in Poland. It was co-financed by the European Commission (OLAF) under the Hercule II Programme as well as by the Kozminski University, a private university located in Warsaw, Poland.

The event was attended by approximately 120 participants: legal practitioners (public prosecutors, attorneys, and judges), representatives of Polish public institutions (mainly officials working in fiscal control offices and police officers), representatives of EU institutions, representatives of other EU Member States as well as legal academics and NGO representatives.

The objective of the conference, which included five panel discussions, was to debate and exchange ideas on combating acts affecting EU financial interests with the instruments provided for in the criminal and administrative law.

First, the introductory part of the conference presented the theoretical legal framework related to infringements detrimental to the EU's financial interests. The second part of the conference was devoted mainly to exchanging practical experiences relating to the fight against irregularities and to vertical and horizontal cooperation in this respect. During the closing session, the challenges for the future were addressed.

Panel discussions proved to be very effective. The active participation of the audience was guaranteed at all stages of the event.

The conference languages were English and Polish (with simultaneous interpretation).

*Dr. Celina Nowak, European Law Research Association*



### Illegal Cigarette Factory Raided Following Investigations Coordinated by OLAF

On 15 March 2011, OLAF published information on the raid of a large cigarette factory in Poland. Following investigations in several Member States coordinated by OLAF, Polish authorities searched an illegal cigarette factory near Warsaw, arrested 32 people, and seized over 50 tonnes of cut tobacco and nearly 5 million cigarettes ready for distribution. As part of the same operation, four people were arrested in Germany and over 70 tonnes of tobacco were seized in Lithuania shortly after the raid. Due to the factory's size and capacity, the EU and Member States would have lost an estimated €6 million per week if the factory had continued to run. (ST)

►eucrim ID=1102014

## Europol

### Cooperation with the SECI Center/SELEC

On 7 April 2011, the "Joint Declaration regarding the smooth and successful transition of SECI Center to SELEC" was signed, transforming the SECI (East Southeast European Cooperation) Center into SELEC, the Southeast European Law Enforcement Center, once two thirds of its Member States have completed ratification.

At its meeting from 11-12 April 2011, the JHA Council adopted conclusions on cooperation between Europol and the SECI Center/SELEC.

The purpose of the conclusions is to ensure compatibility between the SECI Center/SELEC and Europol's legal framework in order to avoid a possible duplication of roles and tasks. According to the conclusions, the SECI Center/SELEC shall strive to combine its activities with Europol in a complementary manner and make use of Europol's existing criminal analysis capabilities. Europol will post one or more liaison

officers as key analytical adviser(s) to the SECI Center/SELEC. The five EU Member States that are also part of the SECI Center/SELEC are asked to systematically use Europol's Secure Information Exchange Network Application (SIENA), to assist the SECI Center in the process of transition from the SECI Center to SELEC and to ensure that the transition process will not lead to duplication of Europol's roles and tasks. Finally, the conclusions underline the vision that Europol should have a leading role as the EU body responsible for the fight against organised crime and other forms of serious crime. Future EU Presidencies are invited to maintain appropriate relations with the SECI Center/SELEC.

The SECI Center was launched in 2000 with headquarters in Bucharest, Romania. The centre is a regional operational organisation in which police and customs liaison officers from 13 Member States (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Hungary, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia, and Turkey) work together in direct cooperation, coordinate joint investigations, and facilitate information exchange. (CR)

►eucrim ID=1102015

### Operation Rescue

In March 2011, a three-year investigation involving thirteen countries worldwide and supported and coordinated by Europol for the past 1.5 years resulted in the arrests of 184 suspected child sex offenders, the identification of 670 suspects, and the safeguarding of 230 children across the world. The latter is the highest success rate ever achieved for this type of investigation.

The combined efforts of national covert police Internet teams and Europol analysts managed to crack the security features of a key computer server at the centre of an online forum called 'boy-lover.net' that promoted sexual relationships between adults and young boys,

thereby uncovering the identity and activity of the suspected child sex offenders. Subsequently, Europol issued over 4000 intelligence reports to police authorities in over 30 countries in Europe, which fed this operation, the largest of its kind so far. The website has now been shut down. (CR)

►eucrim ID=1102016

## Eurojust

### Vice-President Michèle Coninx Re-Elected

For the second time, Belgian National Member, Michèle Coninx, was elected as Vice-President to Eurojust for a three-year term. Ms. Coninx will continue to substitute for Eurojust's President, UK National Member Aled Williams, together with Vice-President and National Member for Estonia, Raivo Sepp.

Before joining Pro-Eurojust as deputy prosecutor general and National Member for Belgium in 2001, Ms. Coninx worked as a Belgian national prosecutor in charge of coordinating the fight against organised crime and terrorism at the national level. Ms. Coninx' long-standing career in Eurojust has included the Presidency of Pro-Eurojust as well as chairmanship of the Casework Committee and the Counter-Terrorism Team. From December 2009 until February 2010, she was also acting President of Eurojust. (CR)

►eucrim ID=1102017

### Strategic Seminar Results: Eurojust and the Lisbon Treaty

The Belgian Presidency has published a report informing CATS (Committee of Article Thirty-Six, an advisory committee for the Council of the EU) about the results of the strategic seminar "Eurojust and the Lisbon Treaty: towards more effective action."

The seminar held from 20-22 September 2010 was organised by Eurojust in cooperation with the Belgian Presi-

gency (see also eucrim 4/2010, p. 133). Its purpose was to reflect on the future development of Eurojust in light of the new provisions introduced by the Lisbon Treaty, particularly under Art. 85 TFEU, and the possible establishment of a European Public Prosecutor's Office (EPPO) from Eurojust under Art. 86 TFEU. It was understood that both provisions were open to different interpretations, presumably as a result of the Member States' struggle to agree on a compromise text. The problem of interpretation is caused by an ambiguous text that, on the one hand, links both Articles (e.g., by mentioning Eurojust in Art. 86 TFEU) but, on the other, does not clarify the relationship between them. It cannot, for example, be resolved from the text whether a continued development of Eurojust would be necessary in case an EPPO was established.

Another open question brought to light in the seminar concerned the exact meaning of the term "initiation of criminal investigations" in Art. 85 TFEU. Does it mean that Eurojust can make a request or order or is it allowed to decide and take action?

Finally, the EPPO itself was seen as a yet unknown entity, giving rise to numerous open questions, and peaking in the question of his appearance before a European (Criminal) Court.

In conclusion, the following three steps were seen as necessary to proceed:

- First, discussions about the above-mentioned issues should be continued under the successive Presidencies, which should first decide whether a step-by-step approach towards establishing the EPPO or whether a parallel/complementary approach (also considering his appearance before a European Court) should apply;

- Second, the revised Eurojust Decision should be fully implemented in respect of the fixed deadline of June 2011;
- Third, Eurojust's partnerships with crucial actors such as the EJN, OLAF, and Europol should be strengthened.

Director General of the Directorate-

General for Justice of the European Commission, Françoise Le Bail, who also attended the seminar, informed the participants that Vice-President and Commissioner for Justice, Viviane Reding, had already announced her intention to put forward a proposal for the establishment of an EPPO during her mandate. (CR)

► eucrim ID=1102018

## Frontex

### Frontex Regulation Update

At its meeting from 11-12 April 2011, the JHA Council agreed to accelerate negotiations on amending the Frontex Regulation (see eucrim 1/2010, pp. 9-10 and eucrim 1/2011, p. 6) in cooperation with the European Parliament, with a view to reaching agreement by June 2011. Some of the outstanding issues concern, for instance, details regarding the monitoring of return operations, the processing of personal data collected in the context of operational activities for the purpose of risk analysis, and the involvement of third countries, EU agencies, and international organisations in Frontex activities.

To provide for an overview of all positions with regard to the draft Regulation, the Hungarian Presidency has drawn up a table comparing the commission proposal, current draft Council text, LIBE (Committee for Civil Liberties, Justice and Home Affairs) amendments, and Council comments. (CR)

► eucrim ID=1102019

### Results of "Measure 6" Project Group

On 21 March 2011, the so-called "Measure 6" Project Group presented its final report and recommendations to the Council.

This project group was established within the framework of the implementation of the 29 measures to reinforce the protection of external borders and to combat illegal immigration that were

adopted by the JHA Council in March 2010. Measure 6 concerns the activities of Frontex, with the aim of improving the collection, processing, and systematic exchange of relevant information between Frontex, other EU Agencies, and Member States. The project group was led by the Belgian Directorate of Administrative Police Operations and consisted of representatives of Estonia, Finland, and the UK. The group was assisted by experts of Frontex, Europol, and Eurojust.

The tasks of the group were performed in three steps:

- The first step was to form an accurate picture of the current situation as regards the information gathered and/or processed within the Member States and within Frontex, Europol, and Eurojust on illegal immigration, illegal immigration networks, and trafficking in human beings. In addition, as a longer term objective, other forms of cross-border crime covered by integrated border management were included.

- In a second step, the group was tasked with making an inventory of the existing data collection plans in the different agencies and bodies and of the contribution of the Member States, the existing analytical plans in the different agencies and bodies, the existing intelligence products in the different agencies and bodies, and their use in the Member States as well as the practical information flow for a Frontex joint operation and Europol Analysis Work File (AWF). The information gathered here was translated into a chart outlining the information flow of strategic and operational information between the partners.

- In the last step, the project group was asked to detect gaps and recommend measures for improvement.

During its work, the project group found several gaps revealing, for instance, that requested data is not readily available at the national level; that personal data collected during joint operations or routinely during border checks are not systematically transferred by

Member States to Europol; that a genuine impact analysis of the intelligence products, which could be provided by Europol or Frontex, is missing; that integrated intelligence on different criminal activities provided to the Member States for their integrated border control is lacking; and that Frontex is not involved in the preparation of Joint Investigation Teams.

Therefore, the project group recommended the following measures:

In order to avoid communication problems caused by the fact that Frontex' Risk Analysis Unit and its Joint Operation Unit work with different channels of communication, Frontex should opt for a single entry point via a single channel (tool) and use the same templates. This tool could then also be used for the collection and dissemination of strategic and operational information via the National Frontex Point of Contact.

However, as Frontex and Eurostat, the statistical office of the EU, both collect data from national statistical institutes on illegal migration, if in another format, both agencies should perform a comparative analysis of the produced statistics and agree on common definitions and working terms as well as on a single data collection form.

In order to respond to Member States' need for integrated intelligence with respect to different criminal activities, enhanced cooperation and coordination would be needed between EU Agencies as well as initiatives to further develop the cooperation referred to in the Council Conclusions on the creation and implementation of the EU policy cycle for organised and serious international crime.

A consensus should be found among the partners on a network, advisably an existing one, to be used as a secure communication link.

To make data available to Frontex, each Member State should define rules in order to ensure that they receive data from their various border control units regularly, have enough time to process

each contribution in a central database, and fill out the Frontex template.

Regarding Europol, the group believes that it should be possible to request the Europol National Units (ENUs) to receive all the collected data. This would also allow Europol to produce better strategic intelligence products concerning issues of trafficking in human beings, which could have a strategic and operational impact on the work of Frontex as input for proactive intelligence-led operations. Furthermore, it would be useful to both agencies to have a comparative inventory of all the products available in each Member State and agency, to know what can be shared between all the partners. With regard to operations, the group sees the need for better cooperation between the agencies. For instance, Frontex should be involved in operational briefings of Joint Investigation Teams, and Europol must be involved in Joint Operations by Frontex. There should be a common activity programme. (CR)

►eucrim ID=1102020

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Commission Tackles Crime Related to EU Emission Trading System Registries

Following recent cyber-thefts from EU Emissions Trading System (EU ETS) registries, on 23 February 2011, the Commission proposed a series of actions to strengthen the European carbon market.

The proposed actions include, *inter alia*, conducting regular reviews and updates of registry security plans and facilitating the exchange of information on new accounts between the Member States. The Commission also intends to propose a modification of the EU Registry Regulation, to initiate a public

consultation on enhanced carbon market oversight, and to meet with stakeholders to discuss registry security measures. (ST)

►eucrim ID=1102021

## Corruption

### Cooperation and Verification Mechanism Reports on Romania and Bulgaria Released

On 18 February 2011, the Commission released its latest reports on progress under the Cooperation and Verification Mechanism (CVM) in Romania and Bulgaria (see also eucrim 1/2011, p. 4 and see Marinova and Uzunova in eucrim 2/2010, pp. 76-84). The Commission's analysis of both countries is based on an assessment of progress by the Bulgarian and Romanian authorities and on information by Member States, international organisations, independent experts, and other sources as well as on responses given by both countries to a detailed questionnaire prepared by the Commission.

The report from July 2010 (see eucrim 3/2010, pp. 89-90) stressed that the Romanian judiciary and disciplinary procedures urgently require improvement and that the country thus far has shown insufficient political commitment in reforming its judiciary. The latest report now notes that there has been significant progress in Romania since July 2010, e.g., several initiatives to speed up the handling of cases or the preparation of a new legislative framework in civil and criminal law. Overall, compared to the last report, the new report describes a very constructive response on the part of Romanian authorities and greater commitment in Romania to reform its judiciary system. Nevertheless, the report criticizes the fact that the Romanian parliament prevented investigations into allegations of corruption against a former minister and that the budget of the National Integrity Agency was significantly

## Report

**International Symposium on the Fight Against Fraud and Corruption in the EU****Reinforcing Cooperation between Judicial and Administrative Authorities**

Budapest, 5-6 May 2011

This symposium was implemented by the Academy of European Law (ERA) and the Hungarian Association for the Protection of the Financial Interests of the EU. It was organised within the framework of the Hungarian Presidency of the EU and co-financed by the European Commission (OLAF) under the Hercule II Programme.

The event was attended by approximately 90 participants: legal practitioners, representatives of Member State governments, representatives of EU institutions as well as legal academics and NGO representatives. The objective of the conference, which included two specially designed panel discussions, was to debate and exchange ideas on combating financial crimes in the EU, including the protection of the financial interests of the EU, from a strictly practical perspective. The conference mainly aimed at discussing the operative challenges in investigations for judicial and administrative authorities.

The meeting also aimed at promoting, facilitating, and supporting European and international cooperation and technical assistance in the prevention of and fight against financial crime. It provided up-to-date information on new institutional tools and on the work of other national law enforcement organisations in the EU.

Altogether, the major European and international instruments to prevent and fight financial crime were presented. Round tables and panel discussions proved to be very productive. The active participation of the audience was guaranteed at all stages of the symposium.

The symposium languages were English, German, and Hungarian (with simultaneous interpretation).

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reduced for 2011, a reduction which the Commission fears may lead to setback for the transparency of assets. The Commission recommends that Romania focus on improving the duration of high-level corruption trials and strengthen general anti-corruption policy.

With respect to Bulgaria, the report of July 2010 recommends that the country improve judicial practice and work on conflict-of-interest cases related to local politicians and their families. The latest report confirms that Bulgaria has taken some very important steps towards strengthening the accountability of the Supreme Judicial Council and improving the system of appointments, professional training, appraisal, and promotions in the judiciary. Apart from one appointment decision, the Supreme Judicial Council has developed a better disciplinary track record. Furthermore, Bulgaria decided to create a specialised

court and prosecution office for cases related to organised crime. Following the Commission's suggestions of July 2010, Bulgaria adopted amendments to strengthen the law on conflict of interest. Overall, the Commission welcomes Bulgaria's commitment to reforming its judicial system and suggests that Bulgaria consider the establishment of an authority to identify and sanction conflicts of interest as well as focus on the track record in corruption cases and cases of organised crime.

Both mainly positive documents on the progress made in Romania and Bulgaria may help to calm down discussions on the accession of both countries to the Schengen area. (see this issue of *eu crim*, p 51) Bulgaria and Romania were to join Schengen in March 2011, but this has not yet happened due to Bulgarian border control issues and political opposition to the accession, particularly

from Germany and France. The opposing countries have indicated willingness to decide on the matter based on the July 2011 CVM report. (ST)

► *eu crim* ID=1102022

**Counterfeiting & Piracy****Anti-Counterfeiting Trade Agreement – State of Play**

After many rounds of negotiations, it seemed as though a compromise had been found on the text of the new Anti-Counterfeiting Trade Agreement (ACTA) in December 2010 (for more information on ACTA, see *eu crim* 4/2010, p. 135; 1/2010, p. 10). In March 2011, however, MEPs and a group of European academics restarted discussions on the scope of the agreement, arguing that it goes beyond EU law because it imposes requirements to enforce anti-counterfeiting measures. There are also concerns regarding the protection of fundamental rights and personal data (see *eu crim* 3/2010 p. 90).

To recall: the objective of the ACTA agreement (formal negotiations started in June 2008) is to have a multilateral treaty to more effectively combat trade in counterfeit and pirated goods and to improve global standards for the enforcement of intellectual property rights. Although the negotiating parties jointly agreed on a confidentiality clause, updated versions of the negotiated text were leaked in between negotiation rounds.

On 4 May 2011, several MEPs proposed a motion for a resolution, requesting that the EP refer the text of the agreement to the ECJ in order to hear the ECJ's opinion on whether the agreed upon text complies with EU law. The request is expected to be discussed in June 2011. Aside from the requested referral, the agreement still needs the EP's approval under Lisbon Treaty rules, which gives the EP a right of veto over international agreements. (ST)

► *eu crim* ID=1102023



### New Directive on Counterfeit Medicinal Products on the Way

On 16 February 2011, the EP adopted a legislative resolution on the proposal for a Directive amending Directive 2001/83/EC as regards the prevention of entry into the legal supply chain of medicinal products which have been falsified in relation to their identity, history, or source (COM(2008) 668). The amendments adopted by the EP are the result of a political compromise reached between the Parliament and the Council.

The new Directive aims at preventing counterfeit medicines from entering the legal supply chain by introducing new safety and traceability measures, e.g., by monitoring manufacturing processes, imports, and Internet sales. It also includes revised penalties applicable to infringements of the national provisions.

Adoption of the text by the Council is now pending. (ST)

►eucrim ID=1102024

## Organised Crime

### Directive on Trafficking in Human Beings Adopted

After a political consensus among the Commission, the Council, and the Parliament was reached as well as a vote in favour of the new Directive by the EP in December 2010 (for a detailed report on the new Directive, see eucrim 1/2011, p. 9), the Council adopted the new Directive on trafficking in human beings on 21 March 2011. Both Cecilia Malmström, Commissioner for Home Affairs, and Myria Vassiliadou, EU Anti Trafficking Coordinator, welcomed the swift adoption of the Directive and see it as a major step towards an effective fight against trafficking in human beings. The Directive constitutes the first legal instrument mutually created by the Council and the EP in the area of substantive criminal law after entry into force of the Lisbon Treaty.

The Directive is to be implemented by the Member States (except for Denmark and the UK) by March 2013. (ST)

►eucrim ID=1102025

### Report on Asset Recovery Offices Released

On 12 April 2011, the Commission adopted a report on the functioning of national Asset Recovery Offices (AROs). The AROs identify illegally acquired assets on their national territories and exchange the obtained information with EU authorities. The report notes that, while some Member States have not yet established an ARO, the cooperation between the existing offices has been an important tool in tracing assets throughout the Member States.

In 2011, the Commission plans to propose further measures to facilitate the tracing of assets derived from crime.

These proposals will help the Member States to confiscate assets that were transferred by investigated or convicted persons to third parties as well as assets which go beyond the direct proceeds of a crime. (ST)

►eucrim ID=1102026

## Cybercrime

### Attacks Against Information Systems – State of Play

During the JHA Council meeting of 11-12 April 2011, the Council held an orientation debate on the proposed Directive on Attacks against Information Systems, with a view to agreeing on a general approach in June 2011 in order for the negotiations with the EP to begin. The proposed Directive aims to amend Framework Decision 2005/222/JHA.

Discussions focused on:

- The level of penalties;
- The question of jurisdiction;
- The criminalisation of the use of tools such as malicious software;
- The criminalisation of attacks linked to identity theft.

A new element introduced by the Commission in its initial proposal (see eucrim 4/2010, p. 136) is also the criminal offence of illegal interception of computer data.

In comparison to the Commission proposal, the Council has excluded minor cases (examples of minor cases are given in the preamble) from the scope of the Directive, and two new aggravating circumstances have been added: when the attack has caused serious damage and when it has been committed against a critical structure information system. In addition, the Council wants more flexibility regarding the maximum penalty when aggravating circumstances apply, namely a maximum term of imprisonment of at least three to five years, depending on the gravity of the offence. (EDB)

►eucrim ID=1102027

### Commission Report Assesses Member States' Protection Against Cyber Attacks

On 1 April 2011, Commission Vice-President for the Digital Agenda Neelie Kroes presented a report that reviewed the Member States' efforts to protect themselves against cyber attacks. The Commission praises national efforts made in the past two years but acknowledges that more work is to be done.

The majority of Member States have set up Computer Emergency Response Teams (CERTs), and the remaining Member States and EU institutions should do the same by 2012. Furthermore, strategic partnerships with key non-EU countries in this area, such as the US, should be established. In addition, more national as well as pan-European cyber security simulations (see eucrim 1/2011, pp. 10-11) should be organised. (EDB)

►eucrim ID=1102028

### Transatlantic Cooperation on Cyber Security Strengthened

The EU-US JHA Ministerial meeting in Gödöllo, Hungary on 14 April 2011



## Fighting Cybercrime

### Seminar 3: The Cooperation of Law Enforcement Agencies and the Internet Industry : the Role of Interpol, Europol, and the G8 24/7 Network

ERA, Trier, 10-11 November 2011

This project, mainly sponsored by the European Commission, consists of three major seminars. Each seminar has a specific focus:

- Seminar 1 (London, Queen Mary University of London, 11-12 November 2010): “National experiences with regard to the implementation of cybercrime instruments;”
- Seminar 2 (Lisbon, Centre of Judicial Studies, March 2011): “Child pornography on the internet and cooperation with internet service providers;”
- Seminar 3 (Trier, Academy of European Law, November 2011): “Cooperation of law enforcement agencies and internet service providers: the role of Interpol, Europol and the G8 24/7 Network.”

Building up on the first two seminars held in London and in Lisbon, the third and last meeting in the series is intended to be a platform for debate and assessment of the effective cooperation between law enforcement agencies and the Internet industry in order to prevent, detect, and respond to crimes committed using the Information and Communication Technology (ICT) facilities.

In this context, law enforcement authorities and the Internet industry should be encouraged to engage in information exchange in order to strengthen their capacity to identify and combat emerging types of cybercrime.

During the seminar, the most recent European legal acts and complementary measures, such as the Council of Europe Convention on Cybercrime (2001) and the two new Directives to replace Council Framework Decision 2005/222/JHA on attacks against information systems and Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, will be discussed.

After the introductory lectures by national, EU, and Council of Europe experts, panels of experts will discuss the concrete implementation of these measures at the domestic level as well as the differences in national legislative acts, which impede the efficient fight against cybercrime.

The seminar will be held in English.

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focused on the tasks of the EU-US Working Group on Cyber Security and Cybercrime that was established on 20 November 2010 (see eucrim 1/2011, p. 12). Commission Vice-President for the Digital Agenda Neelie Kroes, Commissioner for Home Affairs Cecilia Malmström, and Secretary of the US Department of Homeland Security Janet Napolitano identified the issues that this Working Group should be dealing with.

These issues include:

- Expanding incident management response capabilities through a cooperation programme, culminating in a joint

EU-US cyber-incident exercise by the end of 2011;

- Engaging the private sector, especially on key areas such as the resilience and stability of the Internet;
- Setting up a programme of joint awareness raising activities;
- Continuing cooperation to remove child pornography from the Internet;
- Advancing the Council of Europe Convention on Cybercrime.

The Working Group will report at the next EU-US Summit to be held at the end of 2011. (EDB)

➤ eucrim ID=1102029

## EU Institutions Hit by Cyber Attack

On 23 March 2011, the European Commission confirmed that both the Commission and the External Action Service had been hit by a “major” cyber attack prior to an important EU summit. The Commission did not comment on the scope of the attacks but warned its staff via internal e-mail and shut down both external access and its Intranet.

The attack happened shortly before the start of the first EU summit from 24-25 March 2011 under the Hungarian presidency. One of the most important aspects of the summit was the discussion on the war in Libya. The Commission did not confirm whether or not the attack was targeted at documents related to the summit and its subjects. (ST)

➤ eucrim ID=1102030

## Environmental Crime

### EU Steps Up Against Illegal Fishing

On 12 April 2011, the Commission adopted an Implementing Regulation laying down detailed rules for the implementation of Regulation 1224/2009/EC, which establishes a control system for ensuring compliance with the rules of the Common Fisheries Policy (see eucrim 1-2/2008, p. 26). With the Implementing Regulation, the EU’s new system for fisheries control is fully operational. The EU now has the means to carry out controls to ensure traceability at all stages of the supply chain. Sanctions have been harmonised and a new point system was set up to ensure that serious infringements lead to similar consequences in all Member States. The new Regulation also sets out detailed administrative rights of the Commission to ensure full compliance by the Member States, e.g., suspension or withdrawal of EU funds as well as reduction of quotas and fishing efforts whenever the control system of a Member State appears to be ineffective. (ST)

➤ eucrim ID=1102031

## Member States Face Court Proceedings over Breach of EU Environmental Legislation

The Commission is taking several Member States to the ECJ for not complying with EU environmental legislation despite having received warnings from the Commission.

■ Although Slovakia received a reasoned opinion in June 2010, it failed to provide the requested information on a landfill site in Považský Chlmec. Directive 1999/31/EC on landfill waste requires the landfill operator to prepare a conditioning plan, including information on water control, leachate management, protection of soil and water, gas control, and hazards. Slovakian authorities have so far not provided information that this requirement has been fulfilled in the case of the Považský Chlmec site. On 16 February 2011, the Commission therefore decided to refer the case to the ECJ.

➤eucrim ID=1102032

■ The Commission is taking Ireland back to the ECJ for failing to implement an earlier ruling concerning potential harm to the Irish countryside. According to Directive 85/337/EC on the assessment of the effects of public and private projects on the environment, Member States are required to establish systems to decide whether individual projects must undergo an environmental impact assessment. In November 2008, the ECJ found that, since the thresholds set by Irish authorities for undertaking an environmental impact assessment for certain types of projects were too high, many projects were approved unchecked and thus damaged or destroyed archaeological finds. In March 2010, the Commission sent a letter asking Ireland to comply with the Court ruling, but the respective authorities have failed to adopt legislation to resolve the issue. On 16 February 2011, the Commission decided to refer the case back to ECJ and is now asking the Court to impose a lump sum fine of more than €4000 per day for the period between the first Court ruling and

the second Court ruling as well as a daily penalty payment of more than €33,000 for each day after the second Court ruling until the infringement ends.

➤eucrim ID=1102033

■ On 16 February 2011, the Commission decided to start proceedings before the ECJ against Poland for failing to fully implement the Birds Directive (2009/147/EC). The Commission is concerned that the Polish transposition does not provide for the protection of all bird species found in Europe and that the scope of exemptions from the system of protection is wider than the Directive allows. In March 2010, Poland agreed to amend its national laws, but the Commission believes that the respective amendments have not yet been adopted and is therefore referring the matter to the ECJ.

➤eucrim ID=1102034

■ France faces proceedings before the ECJ for failing to ensure that a number of industrial installations meet the requirements of the Integrated Pollution Prevention and Control (IPPC) Directive (96/61/EC). The Directive required Member States to issue new permits or revise existing permits for all industrial installations with a high pollution potential (that were in operation before 30 October 1999) by 30 October 2007. The Commission believes that at least 62 industrial installations in France are still operating without a permit in full compliance with the requirements of the IPPC Directive. On 14 March 2011, the Commission decided to refer the case to the ECJ.

➤eucrim ID=1102035

■ On 6 April 2011, the Commission decided to refer Austria to the ECJ over outdated permits for their industrial installations. Under the Integrated Pollution Prevention and Control (IPPC) Directive (96/61/EC), new permits for all industrial installations with a high pollution potential (that were in operation before 30 October 1999) were to have been issued by 30 October 2007. Despite having received a warning in November

2009 and a reasoned opinion in March 2010, seven plants in Austria still lack the required permits. The Commission has therefore decided to refer the case to the ECJ. (ST)

➤eucrim ID=1102036

## Sexual Violence

### Fighting the Sexual Exploitation of Children

On 14 February 2011, Members of the European Parliament's Civil Liberties, Justice and Home Affairs Committee discussed the proposed Directive on combating sexual abuse, sexual exploitation of children and child pornography. The Council had already reached a general agreement on the proposal in December 2010 (see eucrim 1/2011, p. 13).

MEPs hotly debated the EU-wide mandatory blocking of websites containing child pornography. They proposed a compromise on the subject, which requires the Member States to first remove content containing child pornography at source and only block the sites when the hosting server is in a country unwilling to co-operate or if there are delays in removing abusive content. Apart from removing the mandatory blocking of the websites, MEPs also called for extra safeguards to protect Internet freedom rights.

The Commissioner for Home Affairs, Cecilia Malmström, fears that the MEPs' amendments might be a step backwards in the fight against child pornography. The Commissioner said that the primary tool in the fight against online child pornography is blocking the websites and, although she strongly believes in freedom of speech, making the blocking of the websites more difficult would mark a setback in the fight against child pornography.

Whether or not to mandatorily block the websites containing child pornography was also discussed by the JHA Council during their meeting from 11-12 April

2011. Other outstanding issues were, *inter alia*, the level of penalties or jurisdiction in cases of sex tourism.

Both the Parliament and the Council are expected to further discuss the proposed Directive in June 2011. (ST)

► eucrim ID=1102037

### Still a Long Way to Go in the Fight against Gender-Based Violence

On 15 March 2011, the Parliament's Women's Rights and Gender Equality Committee passed a resolution calling for a Directive to combat gender-based violence. The resolution aims at the EU-wide recognition of rape and sexual violence as a crime as well as automatic prosecution of the perpetrators.

Rape is not treated as a state offence in several Member States and cultural, traditional, or religious practices, including so-called "crimes of honour" and female genital mutilation, are still recognised as a mitigating factor. The resolution addresses the need to help the victims of sexual violence, e.g., by providing more shelters for the victims, and calls for minimum standards to ensure proper legal aid for the victims of gender-based violence. (ST)

► eucrim ID=1102038

## Procedural Criminal Law

### Procedural Safeguards

#### Right to Information in Criminal Proceedings – State of Play

During the JHA meeting of 11-12 April 2011, the Council discussed EU-wide minimum standards concerning the right to information in criminal proceedings. These discussions were based on the general approach reached in December 2010 (see eucrim 1/2011, p. 13).

In the meantime, meetings between the Council, the Commission, and the European Parliament have taken place

with a view to reaching agreement on a first text for a proposed Directive by June 2011. However, the Council has pointed out that, on certain key issues, the European Parliament and the Commission have expressed a strong position against the aforementioned general approach. For this reason, the Council has presented a list of outstanding issues and compromise proposals, stressing that it will continue to insist on maintaining the text of the general approach with regard to the remaining issues.

The three outstanding issues are:

- The scope of application of the proposed Directive;
- The moment at which to provide information about a person's procedural rights;
- The right of the suspected or accused person to be informed of the accusation against him.

The Council is now relying on COREPER, which takes its acronym from the French *Comité des représentants permanents*, to provide guidance on reaching an agreement on these outstanding issues. (EDB)

► eucrim ID=1102039

## Data Protection

### Discussions on EU System for Passenger Name Record Data

After the Commission's proposal for a Directive on the use of flight passenger data for protection against terrorist offences and serious crime of 2 February 2011 (see eucrim 1/2011, p. 15), the Council discussed the draft text during the JHA meeting of 11-12 April 2011.

PNR data are already stored in the air carriers' reservation systems and concern information provided by passengers when booking a flight and when checking in on flights. Several Member States have national legislation in place for using these data for law enforcement purposes. The aim of the Commission's proposal is to install an EU-wide system

for using PNR data for law enforcement investigations into terrorist offences and serious crime.

The key discussion point regarding the Commission's proposal was its scope: the future system should either be limited to the storage of the PNR data for flights from and to third countries or it should also cover flights within the EU. The majority of Member States preferred including an option for each Member State to decide for itself whether to mandate the collection of PNR data – also with regard to intra-EU flights.

A total of 24 Member States will participate in the adoption of the proposed Directive. Denmark will not be bound by the new rules. As far as the UK and Ireland are concerned, they are to give notification as to whether they want to opt-in or not.

On 28 March 2011, the EDPS presented his opinion on the Commission's proposal. His main concern is that the necessity and the proportionality of the use of PNR data for law enforcement purposes have not been sufficiently demonstrated. The reason behind this concern is the collection and use of PNR data for making risk assessments of *all* passengers instead of only those passengers that pose a serious threat. The retention of PNR data and the evaluation of the PNR system are among the other concerns expressed by the EDPS. (EDB)

► eucrim ID=1102040

### Commission's Evaluation Report on the Data Retention Directive

On 18 April 2011, the Commission adopted an evaluation report of the rather controversial Directive 2006/24/EC, known as the Data Retention Directive (see also eucrim 3/2010, p. 94 and eucrim 2/2010, p. 50).

The Data Retention Directive obliges telecommunication providers to store telecommunications data for potential use by police and prosecutors in the investigation, detection, and prosecution of serious crime and terrorism. The *potential* use was one of the main data pro-

tection concerns regarding the Directive, as it did not correspond to the requirement of necessary and proportionate data processing.

The evaluation report offers an analysis of the national implementation of the Directive by the Member States as well as an assessment of the use of retained data and their impact on operators and consumers. The report concludes that Member States' national legislations vary regarding the period of retention – from six months to two years – and also regarding the purposes for which data can be used as well as the procedure for accessing them. The differences between Member States are not surprising due to the fact that the Directive only partially harmonises national law, thus giving the Member States plenty of discretion.

The Commission is convinced of the necessity of the data as a tool in criminal investigations. Most Member States concur. Commissioner for Home Affairs Cecilia Malmström referred to the success of “Operation Rescue” (see this issue of *eu crim*, p. 55) in which retained data helped reveal the identities of 670 suspected members of an international paedophile network.

With regard to the reimbursement of the expenses that telecommunication providers face when complying with the Data Retention Directive, the Commission will consider ways of providing more consistent reimbursement. Due to the risk of violations of privacy, the Commission also aims to introduce more stringent regulations of storage, access to, and use of the retained data. (EDB)

► *eu crim* ID=1102041

### Guidelines on the Use of RFID Tags

On 6 April 2011, the Commission signed a voluntary agreement with industry, civil society, ENISA (European Network and Information Security Agency), and privacy and data protection watchdogs in Europe aiming to develop guidelines on the use of Radio Frequency Identification Devices (RFID) and on the data

protection issues they imply. The Agreement is part of the implementation of a 2009 Commission Recommendation concerning RFID tags and is referred to as the “Privacy and Data Protection Impact Assessment (PIA) Framework for RFID Applications.”

RFID or smart tags resemble bar codes and are often built into bus passes, mobile phones, and stickers on cars in order to pay motorway tolls. With their widespread use, data protection concerns over the use of these tags, e.g., to identify a person's location, triggered the Agreement that affects a wide range of stakeholders.

Under this Agreement, companies vow to carry out a comprehensive assessment of privacy risks and take measures to address the risks identified before a new smart tag application is introduced onto the market. For the first time in Europe, a clear methodology to assess and mitigate the privacy risks of smart tags has been introduced that can be applied by all industry sectors using smart tags. (EDB)

► *eu crim* ID=1102042

### Commission Requests Sweden and Germany to Comply with Judgements

On 6 April 2011, the Commission asked both Sweden and Germany to comply with two separate judgements ruled by the Court of Justice.

In the case of Sweden, a judgement of 4 February 2010 (Case C-185/09) finds the Member State guilty of not transposing the Data Retention Directive in its national law. The deadline for transposing the Directive was 15 September 2007. Sweden had informed the Commission that draft legislation was pending, with adoption scheduled for March 2011. However, the Swedish parliament deferred the vote for another 12 months. The Commission considers Sweden's lack of transposition as likely to have a negative effect on the internal market for electronic communications and on the ability of police and justice authorities to detect, investigate, and prosecute

serious crime. For these reasons, the Commission refers Sweden back to the Court, requesting financial penalties to be imposed.

In the case of Germany, the original decision was a ruling of the Court of Justice of 9 March 2010 (Case C-518/07, see *eu crim* 4/2009, p. 137). The Court ruled that Germany had failed to correctly transpose the requirement that data protection supervisory authorities had to act in “complete independence.” The Commission considers the judgment as not having been fully implemented yet because no relevant legal measures were adopted in 15 of 16 federal *Länder*. Therefore, the Commission refers Germany back to the Court, requesting imposition of a lump sum or penalty payment if the Member State fails to comply within two months. (EDB)

► *eu crim* ID=1102043

### Joint EU-US Review Report on the TFTP Agreement

Commissioner for Home Affairs Cecilia Malmström presented the results of the first joint review of the EU-US Agreement on the processing and transfer of Financial Messaging data from the EU to the US for the purposes of the Terrorist Finance Tracking Program (TFTP, see *eu crim* 2/2010, pp. 49-50) on 17 March 2011.

The Agreement entered into force on 1 August 2010 and regulates the transfer of financial data from the EU to the US Department of the Treasury (UST). In accordance with Art. 13 of this Agreement, a review of the implementation of the Agreement was to be organised by both parties within the first six months of its entry into force.

The first review took place on 17-18 February 2011 in Washington. However, the report only provides the views and recommendations of the EU representatives and not those of US representatives. The EU team consisted of three Commission officials, two data protection experts, and a judicial expert from Eurojust.



The report's main recommendation focuses on ensuring that Europol – which receives and verifies the requests for data held by the private company SWIFT – receives as much in written form as possible in order to comply with the terms of the Agreement. Increasing the transparency of the TFTP and further enhancing Europol's verification procedure are among the other recommendations. In addition, more feedback is desired on the added value of the Agreement to counter-terrorism investigations. The next review should address these recommendations and assess whether they have been sufficiently implemented or not. (EDB)

► eucrim ID=1102044

### Critical Notes on Europol's Role in TFTP Agreement

A report issued by the Europol Joint Supervisory Body (JSB) on 2 March 2011 raises serious data protection concerns regarding the EU-US TFTP Agreement.

The Europol JSB has the task of reviewing Europol's activities to ensure that individuals' rights are not violated by the storage, processing, and use of the data held by Europol. With regard to Europol's key role in the implementation of the TFTP Agreement – all incoming requests from the US for data transfers must be approved by Europol before SWIFT can execute them (see eucrim 2/2010, p. 49) – the JSB performed a first inspection in November 2010. This inspection aimed at monitoring whether Europol respects the provisions of personal data protection principles in the TFTP Agreement when deciding on the admissibility of the USA's requests to SWIFT.

The JSB inspection team concluded that some data protection requirements were not being met. Europol received four requests from the UST in the first six months in which the TFTP Agreement was operational. The most important finding was that these requests were not specific enough; rather, they were too general and too abstract for Europol

to decide whether they were necessary or proportionate. Nevertheless, these requests were still approved. Additionally, Europol stated that oral instructions were received from the UST with the stipulation that no record be made. This orally provided information nonetheless played a role in Europol's verification of the requests for data transfer.

Therefore, the JSB concluded that it was not possible to make an effective inspection of Europol's role in the TFTP Agreement.

Members of the EP reacted with great concern and threatened to block future data transfer agreements. Some even mentioned taking legal action against the TFTP Agreement. (EDB)

► eucrim ID=1102045

## Victim Protection

### Victims' Rights Package Presented by Commission

On 18 May 2011, Vice-President and Commissioner for Justice Viviane Reding presented the anticipated victims' rights package.

The package contains a proposal for a Directive that provides minimum standards for victims of crime in every EU Member State. Unlike the already adopted legal instruments on procedural rights (see eucrim 4/2010, pp. 138-139), the proposed victims' rights Directive is a comprehensive package in which all legal rights are joined in one legal instrument. Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings will be partially amended by the provisions of the proposed Directive.

The proposal is based on the considerations that victims' rights vary in the Member States and that citizens, who have become the victim of a criminal act in a Member State other than their home state, should receive a minimum amount of protective measures. By offering them this protection, they would

receive the same treatment as in their home state. The following are among these minimum standards:

- Ensuring respect and protection during investigations and trials, including the rights for victims to have their complaints acknowledged and to be heard as well as rights in the case of a decision not to prosecute and in the case of mediation and other restorative justice services;
- Victim support services should exist in every Member State;
- Victims should be protected in order to prevent secondary victimisation, including vulnerable victims;
- The right to compensation, reimbursement of expenses, and legal aid are equally covered.

A significant part of the proposal is the right for victims to receive information from their first contact with a competent authority, especially information about their case. Logically, the right to interpretation and translation is also foreseen in the text of the proposal. Special attention is awarded to vulnerable victims such as children and victims of domestic violence.

The legal basis of the proposed Directive is Article 82 §2 of the TFEU which provides for the introduction of EU-wide victim protection rules.

Because the proposed victims' rights Directive is being developed parallel to the discussions in the EP and the Council on the European Protection Order, the latter has been narrowed down to criminal matters (see Jiménez Becerri and Romero Lopez in this issue on pp. 76 and eucrim 1/2011, p. 15). The Commission also presented a complementary Regulation on mutual recognition of protection measures in civil matters on 18 May 2011.

In addition, a communication from the Commission was released on the same date on strengthening victims' rights in the EU (COM(2011) 274/2) and explaining the need for both the proposed Directive and Regulation. (EDB)

► eucrim ID=1102046



## Cooperation

### Police Cooperation

#### CEPOL Work Programme Adopted

At its meeting from 11-12 April 2011, the JHA Council adopted the CEPOL Work Programme for the year 2011.

The priorities of the programme include CEPOL's support to the national colleges in implementing common curricula; developing e-learning modules covering Joint Investigation Teams and the Lisbon Treaty; evaluating CEPOL's training activities; and strengthening its external relations, especially its cooperation with Frontex, Eurojust, and Interpol. Further emphasis is placed on the police exchange programme for 2011-2012, support for relevant research and science as well as taking a leading role in comprehensive relevant European law enforcement projects, especially with regard to professional cybercrime training.

According to the programme, 86 training activities are planned for 2011, the majority in the form of four-day courses. The courses shall cover 16 different areas such as community policing; counter terrorism, terrorism, and extremism; economic, financial, and environmental crime; prevention of crime; police cooperation, police cooperation with third countries; strategic management and leadership; violation of human rights; and language development. Details with regard to the planned activities can be found in a course calendar attached to the Work Programme.

The Work Programme also outlines CEPOL's plans for governance and network meetings in 2011 as well as the appropriations assigned to each activity. For instance, appropriations of €2,802,000 are foreseen for courses and seminars in 2011. The new European Police Exchange Programme (see eucrim 4/2009, p. 139 and eucrim 2/2010, p. 15), which envisages the exchange of approx. 200 senior officers, training

### The Schengen Area Put to the Test

Trier, 22– 23 September 2011

In 2010, the Schengen Agreement celebrated its 25th anniversary with 25 European countries belonging to the Schengen area. Only one year later, the Schengen area faces one of the biggest challenges since its establishment in 1985.

The influx of migrants following the democratic uprisings in North Africa has given rise to a new border debate. While Italy and France called on the European Commission to facilitate the reinstatement of border checks, Denmark announced the reintroduction of customs checks, citing rising crime concerns. On 12 May 2011, EU interior ministers met to discuss the criteria under which border controls could be temporarily reintroduced. European Commissioner for Home Affairs, Cecilia Malmström, announced to table proposals introducing clear rules and procedures for such exceptional temporary reinstatement of border controls by June 2011.

Together with experts of the European Commission, Frontex, national border guards and law enforcement officers, this seminar will discuss and present these latest challenges to the Schengen area looking at:

- The new Commission proposals for temporary reinstatement of border controls to be tabled by June
- FRONTEX's operational capacities, especially under its new Regulation to be adopted this June
- Protecting the EU's external borders with the support of FRONTEX and Europol
- The second generation of the Schengen Information System (SIS II)
- The accession of Romania and Bulgaria
- Measures for "European Integrated Border Management" such as a European Border Surveillance System (EUROSUR)
- ABC and RTP: New technologies to ensure border control
- The EU's asylum and migration policy

The conference will be held in English.

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staff, and specialists in different fields this year, foresees appropriations of €335,000. (CR)

➤ eucrim ID=1102047

#### Network of Police Dog Professionals in the EU

The Council adopted a resolution on the use of police dogs in the EU. According to the resolution, EU Member States are invited to create a network of police dog professionals in Europe. The network shall be called KYNOPOL and aim at enhancing cooperation and coordination of the activities of the Member States' law enforcement authorities regarding the use of police dogs.

To establish and run the network, Member States are asked to designate national contact points to participate in the activities of KYNOPOL and to serve

as information exchange centres. They shall draw up a list of national contact points and keep the list up to date by informing the General Secretariat of the Council. Furthermore, Member States are asked to encourage the active participation of national contact points in KYNOPOL's work, joint training courses, and operations as well as to promote the exchange of best practices on the use of police dogs within the EU via KYNOPOL. Finally, they shall consider integrating the solutions proposed by KYNOPOL into their national practice and actively contribute to the efficient implementation of the proposed measures, where applicable.

The function of a permanent secretariat for KYNOPOL will be performed by Hungary.

Frontex and CEPOL shall integrate

## Criminal Defence in the Context of European Criminal Justice and Judicial Cooperation in the EU

**Seminars are scheduled to take place in October 2011, December 2011, February 2012, April 2012, June 2012, and September 2012 in Barcelona, Brussels, Edinburgh, Helsinki, Prague, and Vienna.**

This EU-wide project offers defence counsel training on EU criminal justice instruments and judicial cooperation. While most training projects at the EU level in recent years have exclusively addressed judges and prosecutors, this project closes the gap by offering training to defence lawyers in the EU Member States. The project also feeds into the step-by-step approach agreed on by the EU regarding the establishment of certain procedural safeguards by presenting the approach itself and discussing the proposed safeguards with defence lawyers throughout the EU.

The impact of the developing area of European criminal law on the daily work of the defence in the EU Member States, especially with regard to the increasing use of instruments based on the principle of mutual recognition, forms the main content of training.

At the heart of the training are problems and questions arising from the perspective of the defence with regard to cross-border cases that involve investigative measures where EU instruments are already in force – namely the European Arrest Warrant and freezing and confiscation orders – or planned, especially in the field of obtaining evidence across internal EU borders.

The programme offers a mixture of training methods, varying from lectures to interactive workshops. In order to guarantee valuable practical training, the topics will be dealt with by means of “national” workshops. In these workshops, a national expert will present and analyse the topics and conducts a case study based on the individual national criminal justice system. In this way, participants will benefit from training that is tailor-made to deal with the questions and problems arising in their daily practice when dealing with cross-border cases. In order to benefit from different perspectives, the groups of experts conducting the seminars consists of judges, prosecutors, and academics with longstanding experience in judicial cooperation in criminal matters in the EU.

The project consists of six seminars conducted throughout the EU. Each one targets different groups of selected Member States (approx. 25 participants from 4-5 Member States per seminar). The 1,5 day training runs from noon on Friday to late afternoon on Saturday.

The project is co-financed by the European Commission under the Criminal Justice Programme. It is supported by the European Criminal Bar Association (ECBA), the Czech Bar Association, the D el egation des barreaux de France (DBF), the Finnish Bar Association, the  sterreichischer Rechtsanwaltskammertag (Austrian Bar), the Scottish Faculty of Advocates, and the Barcelona Bar Association.

The number of seminar places is limited (5-10 places/national group/seminar; 25 places/seminar). They will be allocated among the eligible applicants on a first-come, first-serve basis.

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actions related to the use of police dogs at the EU level and in cross-border operations into their annual work plans and actively cooperate with KYNOPOL by sharing current common training methods and knowledge.

Finally, the Council invited the European Commission to consider the possibility of providing appropriate funding to support the network’s activities. (CR)

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## Judicial Cooperation

### Financial Penalties: Country-By-Country Chart

The General Secretariat has published the answers given by the Member States to its questionnaire on the implementation of the Framework Decision on the application of the principle of mutual recognition to financial penalties.

In the questionnaire, Member States were asked about the following:

- Their status of implementation of the Framework Decision and its applicability to financial penalties imposed before the implementation;
- The competent issuing and executing authorities;
- The role of potential central authorities;
- The decisions made by the authorities involved;
- The procedures foreseen with regard to the competence of authorities other than courts or courts having jurisdiction, in particular, in criminal matters;
- The possibility to allow the executing state to apply alternative sanctions if it was not possible to enforce the financial penalty and/or the possibility to do so themselves;
- The possibility to compensate victims;
- The decisions made regarding the (optional or mandatory) use of the €70 threshold;
- Statistics on the implementation;
- Whether they deem the instrument useful and if measures were needed at the EU level to facilitate its application.

Detailed answers to all the above-mentioned questions were received from Bulgaria, the Czech Republic, Germany, France, Ireland, Hungary, the Netherlands, Austria, Romania, Sweden, and the UK (for England & Wales) that have all implemented the Framework Decision, except Ireland, which is currently working on a draft. All of them opted for the Framework Decision as being a useful instrument, some with a few reservations. Suggestions for measures at

the EU level to facilitate the application included using and updating the EJN website, raising awareness, and providing for training. (CR)

➤ [eucrim ID=1102049](#)

### European Crime Prevention Network: Annual Report 2010

At its meeting from 11-12 April 2011, the Council of JHA Ministers endorsed the Annual Report of the European Crime Prevention Network (EUCPN) for the year 2010 (see also [eucrim 3/2009](#), p. 76 and [eucrim 4/2009](#), p. 140).

The report reveals that the year 2010 was one of very intense activity for the EUCPN for the following reasons:

- The EUCPN had to implement its new legal basis and adopt new rules of procedure.
- A new Secretariat had to be established by setting-up its structure, functions, and a seat, for which Belgium was selected. Furthermore, an application for financial support via the ISEC programme (a general funding programme on Security and Safeguarding Liberties) had to be submitted.
- Apart from its institutional development, EUCPN also organised two events, together with the trio-Presidency: an expert seminar and a best practice conference, both on the topic “A secure home in a safe community through prevention, policing and restoration.” Based on the results of the latter conference, the Annual Report also provides recommendations for the prevention of and actions against domestic burglary, domestic violence, and cyber security as well as for actions to establish neighbourhood mediation, new safety and prevention professions, and cyber security.

On another note, the European Crime Prevention Award (ECPA) could be further developed by introducing the possibility of involving experts to assist jury members. In addition, feedback on strengths/weaknesses and proposals for improvement to all ECPA entries could be made. The website of the EUCPN could also be improved.

From the eight projects included in its Work Programme of June 2010, four could be implemented so far:

- The ECPA;
- Restorative justice in the criminal procedure;
- Crime prevention in school;
- The development of estimates of the economic costs of crime.

The ongoing projects deal, for instance, with domestic violence in partnership, domestic crime prevention, the development of a European centre of expertise in the prevention of crime, promotion of social inclusion and the reduction of recidivism among young adults.

Finally, in December 2010, the EUCPN Board adopted its Multiannual Strategy, outlining its goals for the next five years. They are: to become a point of reference for its target groups, to disseminate qualitative knowledge on crime prevention, to support crime prevention activities at the national and local levels, and to develop EU policy and strategy and various aspects of crime prevention at the EU level in respect of the strategic priorities of the EU. (CR)

➤ [eucrim ID=1102050](#)

### European Arrest Warrant

#### Council of Europe Human Rights Commissioner Criticises EAW

The events regarding the surrender of Wikileaks founder, Julian Assange, from the UK to Sweden on charges of harassing and raping two women in March 2011 caused Council of Europe Human Rights Commissioner, Thomas Hammarberg, to criticise the EAW system as being over-used and a threat to human rights.

In his blog, Hammarberg argues that human rights organisations (such as Fair Trail International) have documented several cases in which human rights violations have occurred, some of which are now pending before the European Court of Human Rights. Problems leading to this situation include the absence

of an effective remedy against a decision to extradite an individual subject to an EAW, the considerable lapse of time between the date of the alleged offence and the issuance of an EAW, and the impossibility for individuals in some Member States to have an EAW against them cancelled, even when their innocence has been established or a Member State has decided not to surrender them. Further problems could result from the way evidence is obtained or investigations are conducted in the requesting state and result in possible unfair trial. Hence, Hammarberg sees the clear need to strengthen the human rights safeguards in EAW procedures.

Hammarberg therefore urges the EU to follow its Stockholm programme, which foresees the possibility to render legislative proposals “to increase efficiency and legal protection for individuals in the process of surrender.” (CR)

➤ [eucrim ID=1102051](#)

#### Third Commission Report Published

On 11 April 2011, the Commission published its third report on the implementation of the Council Framework Decision on the EAW.

Since the coming-into-force of the EAW on 1 January 2004, available statistics contrast favourably with the pre-EAW situation (e.g., the average surrender time has dropped from a one-year average to an average of 14-17 days for requested persons that did consent to their surrender, and to 48 days for those surrendered without consent). Nevertheless, the latest Commission report also reacts to increasing concerns in relation to the operation of the EAW and, in particular, its effects on fundamental rights.

Hence, the report finds there is a need for action in six areas:

- Transposition of the EAW;
- Fundamental rights;
- Proportionality;
- Training;
- Implementation of complementary instruments;
- Statistics.

Where required, Member States are asked to take legislative action to comply with the Framework Decision. The measures included in the roadmap on procedural rights for suspects and accused persons should be adopted and implemented to ensure fundamental rights. Judicial authorities are asked to use the EAW system in a proportionate way.

To ensure a uniform application of proportionality, Member States are asked to take steps to ensure that the amended EAW handbook is used. With regard to training, the Commission is also preparing a Communication for September 2011, addressing the need for specific training for both judicial authorities and legal practitioners on the implementation of the EAW and on the new measures for strengthening procedural safeguards.

Furthermore, it is hoped that the implementation of the complementary Framework Decisions concerning the transfer of sentences, *in absentia* judgments, conflicts of jurisdiction, and mutual recognition of supervision orders will further improve practical operation of the EAW. Finally, in order to meet shortcomings concerning statistical data, the Commission announced its intention to look into ways of improving its collection of statistics and strongly urges Member States to meet their obligation to report.

The accompanying document to the third Commission report on the EAW contains nine parts:

- The first part provides an overview of the legislative changes in the Member States since 1 April 2007. While 12 Member States have not made any amendments, although they were recommended to do so, 14 Member States have adopted new legislation since April 2007. The document also provides a brief descriptive analysis of these amendments.

- The second part provides an overview of the current situation with regard to recommendations of the Council made

in the final report of the fourth round of mutual evaluations concerning the EAW (see eucrim 2/2010, pp. 54-55 and eucrim 4/2009, p. 143). Recommendations endorsed and/or accepted by the Commission include: the flexible approach to language requirements, the time limit of six working days for the provision of language-compliant EAWs, legislative initiatives at the national level for “provisional arrests” if the matter creates difficulties, national action regarding accessory offences, flagging of EAW-based SIS alerts by a competent judicial authority, measures to promote direct communication between judicial authorities of the Member States, and the idea of use of a form to communicate the final decision on a EAW to the issuing authority.

- The third part briefly lists and explains the instruments amending or complementing the Framework Decision on the EAW concerning mutual recognition of custodial sentences, *in absentia* judgments, non-custodial supervision measures, and conflicts of jurisdiction.

- The fourth part outlines the relationship between the EAW and the SIS, finding a steady increase in the number of alerts concerning arrests for extradition purposes (from 19,199 alerts in 2007 to 28,666 in 2009).

- The fifth part offers a short summary of the role of Eurojust in the operation of the EAW, indicating that EAW cases represented 19% of Eurojust’s total case load in 2008 and 2009.

- The sixth part provides a summary of all relevant decisions of the European Court of Justice in relation to the EAW, such as *Advocaten voor de Wereld* (see eucrim 1-2/2007, pp. 38-39), *Wolzenburg*, (see eucrim 3/2009, pp. 76-77) etc.

- The reference numbers by which to search the Council’s register for its evaluation reports on the Member States’ applications of the EAW can be found in part seven of the document.

- The eighth and most extensive part of the document includes a table that sets out the responses of the Member States

to the recommendations of the individual evaluation reports of the Council; general information on the application of the EAW in the Member States (e.g., their language flexibility, the use of provisional arrest, and the proportionality test); their responses to the observations set out in the implementation report of the Commission from 2007; and insight into Member States’ relevant national case law.

- The final part is comprised of statistical charts outlining the numbers of EAWs issued and executed in each Member State from 2005 until 2009. (CR)

► eucrim ID=1102052

## European Investigation Order

### Follow-Up Document

On 31 January 2011, the Hungarian Presidency sent a modified draft of the Directive on the EIO in criminal matters following the meeting of the Council on 8-9 November 2010 and the Working Party on 11-12 January 2011. Modifications mainly concern the provisions regarding deadlines for recognition or execution, transfer of evidence, legal remedies, grounds for postponement of recognition or execution as well as the provisions regarding costs and confidentiality. (CR)

► eucrim ID=1102053

### Opinion of Eurojust

Following the request of the Hungarian Presidency, on 4 March 2011, Eurojust recently sent to the Working Party on Cooperation in Criminal Matters (CO-PEN) its opinion regarding the draft Directive on the EIO in criminal matters.

Among its general observations, Eurojust points out that a single mutual recognition instrument covering all practitioners’ needs in terms of gathering of evidence would constitute a more unified, general, and transparent legal regime as opposed to the current, frag-



mented mutual legal assistance system. The introduction of a standardised form for requests could help smoothen the execution of requests and simplify translation, which often leads to misunderstandings. Also, the introduction of time limits for execution is seen as a good tool to increase efficiency and effectiveness of judicial cooperation.

Eurojust also points out the high degree of flexibility and efficiency that the current mutual legal assistance framework can provide and emphasises that the success of the EIO strongly depends on a similar level of efficiency. Hence, Eurojust sees the added value of the EIO as being dependent on its scope, meaning that the EIO should be a “stand-alone” instrument that is at least as effective as the current legal framework and covering all relevant investigative measures at best. One remaining concern is the effect that the adoption of the EIO may have on practitioners when replacing the European Evidence Warrant recently implemented in some Member States. Here, the EIO should at least clearly state which provisions are being replaced.

In its detailed opinion on the draft EIO Directive, Eurojust suggests including the freezing of assets to the scope of the EIO replacing Framework Decision 2003/577/JHA to again avoid the need to issue two different forms and to set up a unique, coherent, and comprehensive legal regime. Eurojust strongly supports the introduction of a concise, standardised EIO form.

In order to insure that the EIO is in line with the current mutual legal assistance framework, the EIO should also refer to administrative proceedings, where the decision may give rise to proceedings before a court having jurisdiction particularly in criminal matters.

In outlining the importance of the issue of proportionality, Eurojust sees a good balance between the application of the principle of mutual recognition and proportionality requirements in the current draft.

With a view to the transmission of EIOs and possible facilitation by the EJN, Eurojust would like to also see a statement in the text mentioning that the EIO may also be transmitted via Eurojust. In general, Eurojust would welcome the introduction of a recital underlining the possibility to involve Eurojust in any issue related to the EIO.

The possibility for the issuing authority to be present during the execution of the investigative measures requested is strongly supported by Eurojust, which would like to see only very limited grounds for refusal in this regard.

Concerning the recourse to a different type of investigative measure, Eurojust sees a role for itself in assisting and facilitating eventual consultation. However, it underlines that this flexibility, given to the executing authority in the choice of the investigative measure, should not give rise to evidence getting lost.

Looking at the four categories of investigative measures set up in the EIO allowing for different grounds for refusal, Eurojust fears that practitioners may face problems applying and distinguishing between these complex regimes. In general, in Eurojust’s opinion, grounds for refusal should be as limited and specific as possible.

According to Eurojust, the immediate transfer of evidence to the issuing authority assisting in the execution of the request should not be limited. Furthermore, in all cases where documents or transcripts are concerned, at least a copy of them should be handed over immediately to the issuing authority.

With regard to the use of videoconferencing, Eurojust would no longer make the hearing of witnesses and experts subject to “the fundamental principles of the law of the executing State.” Furthermore, Eurojust recommends the inclusion of a specific provision on interception of telecommunications.

Finally, Eurojust urges ensuring that costs do not become an “indirect” ground for refusal and that the trans-

fer to the issuing state of part or all the costs arising from the execution of the EIO should be limited to “extraordinary” costs. If deemed appropriate by the Member States, Eurojust would offer assistance in facilitating agreements regarding cost issues in particular cases. (CR)

►eucrim ID=1102054

## Criminal Records

### ECRIS Manual

In March 2011, COPEN had a first exchange of views on the draft manual for the European Criminal Records Information System (ECRIS), a non-binding manual for practitioners setting out the procedure for the exchange of information through ECRIS. The Hungarian Presidency has now sent an extended draft to COPEN, asking delegations to reflect on a number of issues such as splitting the manual into two parts, a general part and a country-specific part, and the need for a helpdesk as well as the appropriate forum. (CR)

►eucrim ID=1102055

## Law Enforcement Cooperation

### Cooperation Between JHA Agencies 2010: Report and Scoreboard

In January 2011, the General Secretariat of the Council published a report, together with a complementary draft scoreboard, on the cooperation between JHA agencies. The report was jointly drafted by CEPOL, Eurojust, Europol, and Frontex.

Since 2006, formal JHA inter-agency cooperation has taken place in the form of an annual JHA Heads of Agencies Meeting. In 2009, this cooperation was boosted by the Swedish presidency requesting all four agencies to improve their cooperation by evaluating their existing cooperation and consequently



looking into new methods and possible actions. This resulted in the final report of 9 April 2010. To implement the provisions of this report, a draft scoreboard has been put in place, listing all measures and the respective state of play. In general, the report sees the new systematic approach towards inter-agency cooperation as the major achievement of the measure so far.

Among the needs identified in the report is the need to also further cooperation with other agencies active in the JHA area such as the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Fundamental Rights

Agency (FRA), OLAF and the Joint Situation Centre (SitCen).

As to bilateral cooperation, the report concludes that this area were able profit from a boost in cooperation activities in 2010. Key achievements in the area of bilateral cooperation in 2010 include, for instance:

- The setting-up of a staff exchange programme between Eurojust and Europol starting in 2011. Both agencies could improve their cooperation with regard to the promotion of Joint Investigation Teams. Eurojust now increasingly contributes to the Organised Crime Threat Assessment (OCTA), and it was

possible to settle its participation in Europol's "Heroin" Analysis Work File (AWF). Finally, the agencies are on the way to agreeing on a table of equivalence to exchange classified information above the level of "EU restricted."

- Europol and Frontex have established contact points in various areas for operational cooperation, have involved each other in relevant meetings, and have mutually contributed to each other's products.

- Eurojust and Frontex are planning to sign a cooperation instrument.

- CEPOL has begun to develop an e-learning tool on Europol and align its training activities with OCTA findings. It is also increasingly involving Eurojust and Frontex in its training courses.

With a view to multilateral cooperation, the report finds that joint efforts have already resulted in a significant synergy effect. Examples for key achievements of the agencies include:

- The (re)establishment of a working group on planning and performance measurement to streamline annual planning documentation;

- Regular attendance at governance meetings;

- The implementation of the EU Policy Cycle for organised and serious international crime, with Europol in a leading role;

- Improved coordination with EU bodies, working groups, etc. in the field of EU institutional affairs and external relations. (CR)

➤ [eucrim ID=1102056](#)

### Road Safety Directive: Council Adopted Its First-Reading Position

At its meeting of 17-18 March 2011, the Council (Agriculture/Fisheries) adopted its first-reading position on the draft Directive of facilitating the cross-border exchange of information on road safety related traffic offences (for details, see eucrim 1/2011, pp. 17-18). In its statement of reasons, the Council underlines that it shares the same objectives and underlying principles as the Commis-

## The Use of New Technologies in Criminal Proceedings

### Seminar 3: Transnational Use of Video Conferencing – EU Member State Experiences with Cross-Border Video Conferencing in Criminal Proceedings

ERA, Trier, 24-25 November 2011

This project, sponsored mainly by the European Commission, consists of three major seminars to take place in Barcelona (Spanish Judicial School), Budapest (Hungarian Judicial Academy), and Trier (Academy of European Law – ERA). Each seminar will have a specific focus:

- Seminar 1 (Barcelona, 26-27 May 2011): "E-evidence: validity and admissibility of electronic evidence in criminal proceedings;"
- Seminar 2 (Budapest, 9-10 June 2011): "The European Criminal Records Information System (ECRIS): State of play and experiences to date in EU Member States;"
- Seminar 3 (Trier, 24-25 November 2011): "Transnational use of video conferencing: EU Member State experiences of cross-border video conferencing in criminal proceedings."

In several Member States of the European Union, video conferencing is already being widely used and proving to be an efficient tool to facilitate and speed up cross-border criminal proceedings while reducing the costs involved. The E-Justice Portal, launched in 2010, attaches great importance to the awareness-raising of videoconferencing.

However, even if the benefits of increased video conferencing are clear (savings of time, money, and travel; increased flexibility; etc.), it is undeniable that there are risks and potential drawbacks involved that must be considered before there is a headlong rush to adopt video conferencing in EU cross-border criminal proceedings (the concerns are mainly linked to the status of the suspects held in custody and their access to lawyers).

The seminar will debate the actions that must be undertaken to make judicial authorities aware of the use of video conferencing in criminal cross-border criminal proceedings. It will present existing national, European, and international experiences with the use of this instrument, and it will ultimately assess how the use of video conferencing can help to rationalize, simplify, or possibly even complicate criminal procedures and trials. The seminar will be held in English.

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sion proposal. However, the Council position differed from the Commission's proposal in some regards:

First, the Council and the Commission had different opinions concerning the proposed Directive's legal basis. While the Commission proposal based the Directive in the field of transport (Article 71(1) (c) TEU), the Council saw its legal basis in the field of police cooperation (Article 87(2) TFEU).

Furthermore, the Council added four more offences to the scope of the proposed Directive, namely: driving under the influence of drugs, failing to wear a safety helmet, use of a forbidden lane, and illegally using a cell phone or any other communication devices while driving.

The Council position also included a template for the offence notification to be sent to the holder of the vehicle registration certificate.

The Commission proposed Directive 95/46/EC to ensure data protection under the Directive. The Council considered it more appropriate, however, to refer to the data protection provisions set out in the Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (2008/977/JHA), as well as in the "Prüm" Council Decisions (2008/615/JHA and 2008/616/JHA).

To ensure that EU citizens are informed, the Council included in its position the obligation for the Commission to make available on its website a summary – in all official EU languages – of the rules in force in the Member States on road safety.

The position, together with the statement of the Council's reasons, was sent to the EP for a second reading. The EP should finish the second reading by 23 June 2011 and have a plenary session in July 2011. For the moment, the UK and Ireland have decided not to opt-in to the Directive, arguing that significant costs would be incurred. (CR)

► eucrim ID=1102057



## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

#### Reform of the European Court of Human Rights

##### New Rule 61 Codifies "Pilot-Judgement Procedure"

In the final declaration at the February 2010 Interlaken Conference on the future of the ECtHR, the Court was asked to develop clear and predictable standards for its pilot judgement procedure. (see also eucrim 4/2009 p. 147). On 31 March 2011, the legal basis of the procedure was set by the Court by introducing a new provision (Rule 61) in its Rules of Court. It establishes a clear regulatory framework by which to handle potential systemic or structural human rights violations. The regulation takes into account and codifies the Court's already existing practice regarding cases in which the systemic or structural dysfunction of a national legal system could give rise to similar applications before the Court.

The aims of the pilot judgement procedure are:

- To help the contracting parties of the ECHR resolve systemic or structural problems at the national level;
- To provide redress more quickly for the individuals involved;
- To help the ECtHR deal with its caseload more efficiently and quickly by reducing the number of similar cases it needs to examine in detail.

Among other things, Rule 61 sets out the following:

- The Court will consult all involved parties concerned before starting the procedure;
- The Court shall identify the type of remedial measures required at the respective national level, may impose a time limit on the adoption of such measures, and may also adjourn similar cases pending adoption of remedial measures;
- Any friendly settlement must also cover general measures and redress for other/potential applicants;
- Where a State fails to abide by a pilot judgement, the Court will normally resume examination of the adjourned cases.

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### Specific Areas of Crime

#### Corruption

##### GRECO: Third Round Evaluation Report on Romania

On 15 March 2011, the CoE's GRECO published its Third Round Evaluation Report on Romania. As usual, the report focused on two distinct areas in need of improvement: the criminalisation of corruption and the transparency of party funding. GRECO made a total of 20 recommendations to the country. The find-

\* If not stated otherwise, the news reported in the following sections cover the period February – April 2011.

ings identified major shortcomings in both matters.

Regarding the criminalisation of corruption, GRECO acknowledged the fact that Romania has ratified the CoE's Criminal Law Convention on Corruption (hereinafter: the Convention) and its Additional Protocol. The country has a comprehensive legal framework on corruption, including the provisions of the Criminal Code and Law no. 78/2000 (on preventing, discovering, and sanctioning acts of corruption) as well as the future provisions of the new Criminal Code (entry into force expected in October 2011). The report found shortcomings, however, concerning the criminalisation of bribery of public officials and trading in influence, whether or not the act of the official is within the scope of his/her formal competence. Furthermore, a particular source of concern is the current arrangement of effective regret, given the limited safeguards in place to prevent their abuse by the givers of bribes. Of additional concern is the fact that, in the current political situation, anti-corruption bodies struggle to preserve their legal powers and ability to deal with cases involving the political and economical elite.

As for party financing, it was stated that the country's legislation provides for a variety of measures that could increase the transparency of political activities. The legislation is, however, at times overambitious and contains limitations difficult to enforce in practice. By contrast, some significant loopholes, such as the fact that all donations up to €420 fall outside the scope of the regulations, restrict the law's effectiveness. The report also recommended more clear regulations for in-kind donations and loans and movements of assets within political parties. Currently, the supervision of party and campaign financing is the joint responsibility of the Permanent Electoral Authority (PEA) and the Court of Accounts. The distribution of responsibility is not satisfactory, however, and therefore GRECO urges the PEA to take

over the lead responsibility in this area. Furthermore, the report found the penalties for infringements of these rules to be inadequate.

Overall, GRECO calls for rapid improvements in this field, since political financing in Romania has been accompanied by numerous allegations of dubious practices.

► [eucrim ID=1102059](#)

### **GRECO: Third Round Evaluation Report on Cyprus**

On 4 April 2011, GRECO published its Third Round Evaluation Report on Cyprus with a total of eight recommendations to the country. The main conclusions drawn concern the clear need for a uniform anti-corruption legal framework, the application of such legislation, as well as the need for greater transparency of financing of political parties.

Regarding the criminalisation of corruption, Cyprus has ratified the Convention and its Additional Protocol and made the offences contained therein directly applicable as domestic law. So far, the prosecutorial authorities and the courts have never applied this legislation, despite its being in force for several years. Instead, the authorities have continued to exclusively apply old legislation on corruption offences, which does not comply with the requirements of the Convention and its Additional Protocol. This coexistence of overlapping old and new legislation makes the legal framework with respect to corruption offences inconsistent. Therefore, legal clarity is required to establish a uniform legal framework and to make sure that it is applied in practice.

As for party financing, GRECO commends adoption in 2011 of the "Law on Providing for Registration, Funding of Political Parties and Other similar Matters," which would establish a legal framework for political parties, their legal status, and registration requirements. Furthermore, it would regulate the transparency of their financial administration. The supervision of the financing of po-

litical parties has been entrusted to the Auditor General, an independent institution under the Constitution of Cyprus.

The report identifies major shortcomings, however, on the part of legislation: it fails to sufficiently address areas providing for transparency of private funding of political parties as required by Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (hereinafter: Recommendation Rec(2003)4). For instance, political parties are not obliged to report and make public the sources of their donations and sponsorships; the accounting requirements are rather general in character, and the scope of the monitoring by the Auditor General needs further clarification.

► [eucrim ID=1102060](#)

### **GRECO: Third Round Evaluation Report on Moldova**

On 6 April 2011, GRECO published its Third Round Evaluation Report on Moldova with a total of 17 recommendations. It acknowledged the improvements in the anti-corruption legislation but called for improvements to anti-bribery legislation and for stricter supervision of political funding.

Regarding the criminalisation of corruption, GRECO welcomed the measures taken to align the country's legal framework with the CoE's Convention and its Additional Protocol. However, several deficiencies were identified. Most importantly, the concept of "persons holding positions of responsibility" used in the relevant bribery provisions fails to cover all civil servants and public employees, on the one hand, and does not ensure coverage of foreign and international public officials or foreign jurors and arbitrators, on the other. Furthermore, the report states that active and passive bribery offences in the public sector lack consistency and clarity, and bribery in the private sector and trading in influence have not been fully addressed by legislation. The report fur-

ther identifies a potential possibility for misuse of the line of defence known as “effective regret,” as it can also be invoked when an offender reports a crime after its commission.

Concerning the transparency of party funding, GRECO acknowledged that Moldova has gradually introduced legislation on political funding, which incorporates many of the principles of Recommendation Rec(2003)4, and also welcomed the plan to introduce state aid for the regular financing of political parties. Nonetheless, the legislation and its application in practice lack in-depth, proactive supervision, and the restrictive range of sanctions have rarely been applied so far for infringements of the rules on political financing. The level of disclosure obligations relating to conventional party funding needs to be increased, and supervision should cover services provided in kind as well as entities related to a political party or under its control.

► eucrim ID=1102061

### **GRECO: Third Round Evaluation Report on Armenia**

On 11 April 2011, GRECO published its Third Round Evaluation Report on Armenia. GRECO addressed a total of 19 recommendations to the country. The findings concluded the necessity of further amendments to the Criminal Code in order to comply with CoE standards, the strengthening of the supervision of party funding and election campaigns, as well as more effective application of the relevant legislation.

Regarding the criminalisation of corruption, GRECO welcomed the 2008 amendments to the Criminal Code but found that legal provisions need to be further amended in order to fully comply with the standards of the Convention. Therefore, it is necessary to ensure that the mere request for a bribe can be prosecuted, that all persons who work in the private sector are covered, and that Armenia can prosecute all corruption offences committed by its citizens abroad.

The main challenge was identified as being the effective application of legislation. Armenia is strongly urged to take further measures to increase understanding amongst practitioners of the relevant legal provisions.

Concerning the transparency of party funding, GRECO acknowledged the ongoing reform process to improve the accountability and transparency of political finances. Armenia should thereby address the deficiencies identified in the Law on Political Parties and Election Code, e.g., the lack of caps on private donations and expenses outside of election campaigns, the lack of regulation of donations in kind, and the lack of transparency in the funding of election campaigns at the local level.

GRECO urges punishment of all violations of the rules and calls for proportionate sanctions. The main challenge, however, might be the strengthening of supervision of party funding and election campaigns. Therefore, an independent monitoring mechanism is needed that has the authority as well as financial and human resources to investigate infringements.

► eucrim ID=1102062

### **GRECO: Third Round Evaluation Report on the Czech Republic**

On 29 April 2011, GRECO published its Third Round Evaluation Report on the Czech Republic. The report addressed a total of 13 recommendations to the country and stressed a more effective application of the anti-corruption legislation and a more substantial and proactive supervision of political financing.

Regarding the criminalisation of corruption, GRECO concluded that the provisions on corruption in the new Criminal Code of January 2010 are largely in line with the Convention and its Additional Protocol. Some specific deficiencies exist, however, particularly clarification that bribery of all categories of employees in the public sector is covered and ensuring that bribery of foreign arbitrators and foreign jurors is ad-

equately criminalised. Although the new Criminal Code provides a sound basis for the investigation, prosecution, and adjudication of corruption offences, the report identifies the effective application of this legislation as the main challenge.

Concerning political financing, the Czech legislation reflects several principles of Recommendation Rec(2003)4. The report however, criticises the lack of substantial and proactive monitoring of the financing of political parties and election campaigns. It concludes that the establishment of an effective supervisory mechanism and adequate enforcement of the rules in this area must be a matter of priority.

In addition, the report requires further measures to ensure easier access by the public to the financial reports of political parties and urges an increase in the transparency of the funding of election candidates (who campaign independently from political parties and movements). More flexible sanctions for violations of the legislation should also be provided for.

► eucrim ID=1102063

### **GRECO: Belarus Becomes 49th Member of GRECO**

On 13 January 2011 – with the entry into force of the agreement between Belarus and the CoE concerning the privileges and immunities of the representatives of members of GRECO – Belarus became the 49th member of GRECO.

► eucrim ID=1102064

## **Money Laundering**

### **MONEYVAL: 3rd Horizontal Review of Mutual Evaluations Reports**

On 1 April 2011, MONEYVAL published its review of the third round of mutual evaluations conducted between 2005 and 2009 (for more information, see the short summary of these reports in every issue of eucrim from 1-2/2007, except eucrim 3/2010). The report notes



significant progress in the legislation of the MONEYVAL countries regarding AML and CFT. It calls for more success, however, in the field of law enforcement, particularly in asset recovery and convictions in major money laundering cases.

The report points out that, despite the fact that all MONEYVAL countries have achieved convictions in the field of money laundering, a culture of proactive actions in connection with criminal proceeds still needs to be expanded. In addition, more significant results on the part of law enforcement would better support the considerable efforts by and resources of the private sector, the financial intelligence units (FIUs), and the supervisory authorities regarding the implementation of preventive measures.

The report concludes that MONEYVAL countries have made significant progress in preventive measures, but compliance needs to be increased in the non-financial sector, particularly the designated categories of businesses and professionals where compliance and AML/CFT supervision need enhancing. The review ultimately identifies issues that need to be addressed and which are being followed up in MONEYVAL's ongoing fourth round of assessment visits.

► eucrim ID=1102065

### **MONEYVAL: Summary of Outcomes of FATF Experts Meeting**

On 27 February 2011, MONEYVAL participated in an Experts Meeting on Corruption organised within the framework of the second plenary of the Financial Action Task Force (FATF) under the Mexican Presidency. (See eucrim 4/2010 pp.150-151 for the summary on the first plenary).

This platform ensured the exchange of views between operational-level anti-money laundering and anti-corruption experts, policy makers from both developing and developed countries, international standard setters, and assessment/monitoring bodies (103 delegates from 26 jurisdictions and 18 international bodies participated). The key objectives

for this meeting were to gather expert information on how effectively AML/CFT measures are working and to discuss how to enhance the synergies between AML/CFT measures and anti-corruption (AC) efforts.

The following general observations were made regarding the topics presented:

- The international community should strengthen the links between AML/CFT and AC efforts, as these regimes often operate in isolation at both the policy and operational levels. Awareness should be raised on how AML/CFT tools can be effectively used in the fight against corruption. High-risk jurisdictions, which have not sufficiently implemented AML measures and/or lack the political will to do so, need to be identified and encouraged to improve implementation in order to provide for a robust legal framework and sufficient institutional capacity in this field. Typology studies on corruption need to be undertaken in order to enhance the understanding, in both the public and private sectors, of the genuine benefits that AML/CFT measures can contribute to the fight against corruption.

FATF's unique assessment process has proven its effectiveness in the area of AML/CFT. Therefore, FATF encourages the development of similar processes in other international organisations. The current FATF assessment process fails, however, to focus satisfactorily on the effectiveness of measures. Therefore, it has to be made an integral part of the FATF assessment process as well. Furthermore, FATF encourages the development of national, regional, and global strategies to challenge large-scale corruption, as well as the provision of targeted training and technical assistance.

- In order to effectively identify persons with prominent functions who may be engaging in corrupt activities, FATF recommends the following measures:

- Strengthening standards that focus on politically exposed persons in a broad context (going beyond corruption);

- Developing guidance on how to better implement these requirements;
- Undertaking a review of standards, to strengthen those relating to transparency.

- As the prosecution of ML cases can be a useful tool for the prosecution of corruption cases, prosecutors need to creatively reflect upon the synergies between ML and corruption offences and how they can best be utilised. FATF will therefore undertake a review of its recommendations relating to investigative and prosecutorial capacity, resources, and public sector integrity. This review should be complemented by an effective and sustainable international cooperation and information exchange on how prosecution of related offences are handled in different countries.

- Prosecutors also need to think creatively about what types of information might be used to support asset recovery actions, as it is a key requirement of the United Nations Convention against Corruption (UNCAC). Stolen assets are difficult to trace and, even when they are found, it is often difficult to garner sufficient capacity in the requesting and requested states to facilitate asset recovery. Good working relationships with foreign counterparts are needed to obtain actionable information in relation to asset recovery and related ML cases. In February 2010, FATF issued a Best Practices Paper on Confiscation, which highlighted some of the challenges that the international community faces in this area.

- Developing effective mechanisms for sharing information related to the above-mentioned topics is proving to be challenging for some countries. Many agencies, particularly in developing countries, have a low capacity level by which to facilitate international cooperation and exchange relevant information. Furthermore, since many countries do not maintain sufficient statistics in this area, it is often difficult to assess the effectiveness of mutual legal assistance (MLA) and international cooperation mechanisms. In order to address this



problem, the FATF standards already require jurisdictions to collect and maintain statistics *inter alia* on the number of MLA and extradition requests as well as other formal requests for assistance made/received, including whether they were granted or refused. Additionally, FATF has issued guidance on Capacity Building for Mutual Evaluations and Implementation of the FATF Standards within Low Capacity Countries, which prioritises the implementation of international cooperation mechanisms.

➤ [eucrim ID=1102066](#)

### **MONEYVAL: The Holy See to Subject of MONEYVAL Evaluation**

On 30 December 2010, Pope Benedict XVI issued an Apostolic Letter for the “prevention and countering of illegal activities in the area of monetary and financial dealings,” applying to the Holy See the Law of the Vatican City State concerning the prevention and countering of the laundering of proceeds from criminal activities and of the financing of terrorism. The law came into effect on 1 April 2011.

On 7 April 2011, it was confirmed that the Holy See (including the Vatican City State) will participate in the mutual evaluation process of MONEYVAL following a participation request by the Holy See (including the Vatican City State), which was adopted with immediate effect. The Holy See has been a permanent observer of the CoE since 1970. The first evaluation report, after adoption, will become a public document.

➤ [eucrim ID=1102067](#)

## **Cybercrime**

### **CDPC: Decisions Taken at Bureau Meeting**

At its meeting on 19-20 April 2011 in Prague, the Bureau of the European

Committee on Crime Problems (CDPC-BU) decided to acknowledge the work of the Cybercrime Convention Committee (T-CY), including possible new standard-setting with regard to Internet jurisdiction. Furthermore, it decided to examine the preliminary draft opinion of the T-CY on criteria and procedures for the accession of non-member states to the Budapest Convention.

In relation to all CoE conventions in the criminal field, the CDPC Secretariat is additionally preparing a draft opinion for the CDPC plenary meeting in June 2011 on the criteria and procedures to follow in cases of accession of non-member states.

➤ [eucrim ID=1102068](#)

## **Procedural Criminal Law**

### **CCJE: Magna Carta of Judges**

Due to incoherence between the English and French versions and in order to achieve better coherence with Opinion No. 3 of the CCJE (paragraph 57), the Secretariat modified paragraph 22 of the Magna Carta as officially adopted by the CCJE in November 2010 (see [eucrim 1/2011 pp. 21-22](#)).

➤ [eucrim ID=1102069](#)

### **CEPEJ: Newsletter on the Dematerialisation of Judicial Processes**

The CEPEJ Newsletter of April 2011 prompted debate on the topical issue of dematerialising the judicial process. In his introductory lines, Mr. Lacabarats, French member of CEPEJ, summarises the benefits of dematerialisation and computerisation of judicial processes. In his view, the users of the public judicial service are required to take certain steps due to dematerialised access to the institutions. Therefore, it is highly ap-

propriate to provide for the possibility to obtain documents released by a court by means of an application submitted via the Internet or electronic mail. Furthermore, he remarked that virtualisation aids access to justice.

The establishment of virtual procedures solve problems, such as the remoteness of some courts, and also reduces the management costs of proceedings, because computerised transmission simplifies the exchange of documents. Ultimately, a more timely observation of progression of the respective case can be assured. Dematerialisation and computerisation of the judicial process allows courts to rationalise the handling of case files (keeping track of cases; interconnections under more secure conditions; the framing of judgements with the aid of templates to avert strictly procedural errors).

Most notably, however, computerisation enhances the judge’s intellectual work by enabling entrance to databases with decisions in similar matters, access to preparatory work on identical questions of law, access to authoritative commentaries on the decisions delivered by a court. In general, judges are given the possibility to connect with the various legal sites available and thus amplify their knowledge of foreign law. All these factors help to improve the effectiveness of judicial institutions.

The Newsletter reviews a number of national examples, such as the large level of electronic support within the Austrian court system or the lessons learned from the dematerialisation of judicial systems and its effect in Turkey.

➤ [eucrim ID=1102070](#)

In other news, the evaluation report of judicial systems is available in Russian, as the Russian authorities have translated the CEPEJ evaluation report of European judicial systems (2010 edition).

➤ [eucrim ID=1102071](#)

# The European Protection Order

Teresa Jiménez Beceril / Carmen Romero Lopez

In March 2010, the authors were both appointed as rapporteurs of the draft Directive of the Council and the European Parliament on the European Protection Order (hereinafter EPO).<sup>1</sup> This initiative was led by the Spanish Presidency,<sup>2</sup> which found enough support within the Member States to activate the new powers conferred by the Lisbon Treaty in criminal matters.

This proposal legally emerged from the Stockholm Programme guidelines adopted by the European Council on December 2009, which is a 5-year plan for the EU to settle on a common policy for justice and home affairs, including fundamental rights and the protection of citizens.<sup>3</sup> These guidelines indicate that the area of freedom, security and justice must, above all, be a single area where fundamental rights and freedoms are protected.

Moreover, mutual trust between authorities and services in the different Member States is seen as the basis for efficient cooperation in this area and as one of the main challenges in the future. Judicial cooperation in general, especially in criminal matters, is one of the pillars enabling mutual trust and, according to Art. 82(1) of the Treaty on the Functioning of the European Union (TFEU), shall be based on the principle of mutual recognition of judgements and judicial decisions.

The EPO is a mutual recognition instrument enabling the protection stemming from a protective measure adopted according to the law of one Member State (issuing State) to be extended to another Member State into which the protected person moves (executing State), regardless of the type or duration of obligations or prohibitions contained in the protective measure.

## I. Objective

The EPO aims to provide continuous protection to victims of violence when they move from one Member State to another.<sup>4</sup> Therefore, if a person has been granted protection, through a so-called protection order, in one Member State and wishes to move from this Member State to another Member State, this person can request an EPO to be issued so that he can move securely within the EU.

According to the EPO procedure, the Member State into which the victim moves is under an obligation to grant an equivalent protection measure under its national law. The intention is to make it unnecessary for the protected person to start new court proceedings in the new Member State and to facilitate the move, which is often guided by a desire to run away and start afresh.

As European citizens, we have welcomed the European Protection Order wholeheartedly as a great instrument that will significantly help those who suffer from violence and who literally wish to escape it. It will also be an important step for the consolidation of an area of freedom, security and justice. Since there is an absolute lack of official data concerning protection orders issued in the EU, the Spanish Presidency – when assessing the need for such an instrument (on the basis of the answers to a survey provided by 18 of 27 Member States) – estimated that, in 2008, there was an average of 118,000 restraining orders issued in the EU, mostly for cases of gender violence.<sup>5</sup>

There are no official data either on how many victims with a protection order move from one Member State to another. However, by estimating that at least 1% of these victims would move, we extrapolate an average of 1180 potential EPO users in 2008 in the EU.

The harassment of victims, particularly victims of gender violence, has a global dimension, rather than a merely regional one; it concerns all the countries of the globe, including all EU countries. According to the 2003 United Nations Development Fund for Women document, “Not a Minute more,”

one woman in three across the world will be exposed to gender violence in their lifetime; or will be beaten, raped, assaulted, will be victims of trafficking, bullied or forced to submit to acts which damage their health, such as female genital mutilation. According to Eurostat figures, between 700 and 900 women in the EU die each year as a result of gender violence.<sup>6</sup>

The EPO is intended as a tool to protect victims of gender violence, but also victims of any crime, as long as they have an identified perpetrator, such as victims of human trafficking, genitalia mutilation, organised crime, and terrorism. To activate the EPO procedure, basically consisting of recognising and applying the protection order issued in one Member State

in another Member State into which the victim moves, it is solely necessary to have an identified perpetrator to whom a protection order can be applied.

## II. Legal Controversy

During the entire legislative process, including the bilateral talks between the European Parliament and the European Council, then held by the Belgian Presidency, we have always stuck to the convictions of both the EPP Group and S&D,<sup>7</sup> namely that victims of domestic violence and other crimes in the EU should be able to move with confidence and the assurance that they will be protected, wherever they are. In the process of achieving this, however, legal complications arose between the European Commission and the European Council.

In order to understand the disputed legal deficit in the European Protection Order, just like the Directive on Human Trafficking, there is a need to emphasise the legal discussion between the Council's consent to the Directive by means of its initial proposal and the Commission's scrutiny.

The draft directive has been put on legal footing by several Member States dealing with judicial cooperation in "criminal matters." For the Commission, the EPO, as proposed and supported by the Council, goes beyond the interpretation of the notion of criminal matters. Therefore, according to the Commission's interpretation, only purely criminal procedures could be dealt with under the mutual recognition mechanism adopted under the chosen legal basis, i.e., Art. 82 of the TFEU. Hence, all civil and administrative procedures imposing protective measures adopted in an EU Member State would be excluded from the application of such an instrument. In order to be complete and cover all jurisdictions, the Commission proposes narrowing down the EPO to criminal procedure and complementing this instrument with a civil one by spring of this year.

The Council, supported by the legal service of the Parliament, has a broader interpretation of the notion of criminal matters in that they should be interpreted "autonomously," "i.e., *not necessarily by exclusive reference to the national laws and legal systems of the Member States.*" According to this theory, only an autonomous interpretation is capable of securing legislative acts, adopted on the basis of Art. 82 of the TFEU, meaning full efficacy and uniform application throughout the Union. It is not the authority taking a particular decision in this respect, but the nature of the act that gives rise to the decision and the nature of the decision itself.<sup>8</sup>

The EPO, or the national measure behind it, has the objective of safeguarding the protected person against behaviour of

another person who may endanger his or her life, physical or psychological integrity, personal liberty, or sexual integrity. These personal rights correspond to fundamental values recognised and upheld in all the Member States to the effect that, in all Member States, acts or behaviour endangering or violating these rights constitute criminal offences.

The battle is still open, and the European Commission – more precisely Vice-President Viviane Reding – indicated several times that, if adopted in its current form, it would seek annulment of the Directive in the Court of Justice of the European Union. Ms. Reding says that the Commission will propose an instrument this spring to look at civil orders as part of a package of measures to protect victims.

## III. Outcome

As rapporteurs of the report on the draft directive on the EPO, we advised the European Parliament to follow the line of the Council, as was initially suggested, and to broaden the scope. From our point of view, the Parliament has played a conciliatory role in negotiations between the institutions and has used its co-decision powers wisely. We have tried to reach an agreement in which there is a balance between the needs of victims and a legal basis that takes in account the different procedures among Member States.

Throughout the entire discussion during the Belgian Presidency, we sought to improve the Directive with regard to several issues:

- Most importantly, there is a lack of data in the EU on victims of violence, particularly victims of gender violence. We therefore strongly urged making this a key factor for the EPO, namely recommending the collection of accurate information and statistics on gender violence. Although the Council was reluctant to add this point, we managed to reach a consensus.
- The same goes for translation rights for the victim, as different languages are involved when an EPO is issued between two Member States.
- In addition, using the EPO as a tool to prevent violence from happening and implementing awareness-raising campaigns were part of these negotiations.
- We have also raised the attention paid to minors, because domestic violence does not solely involve the mother or, in some cases, the father, but also the child. The child is a completely defenceless victim who needs extra protection.

Although the EPO received a majority vote in the Parliament last December, since then it has become silent with regard to the Directive. The Hungarian Presidency has so far not responded to further procedures for the adoption of the EPO in the Council.

This hesitation is understandable in part. On the 18th of May, the European Commission will present a proposal for a complete victims' package, which will probably contain two directives and one regulation. One directive will be a "criminal law version of the EPO," another directive will be on victims' rights, and one regulation will concern a "civil law version of the EPO." This will eliminate legal complications. Let us state clearly that we very much welcome this initiative on the part of the Commission and that we are very glad to finally hear that one proposal from the Commission will consolidate the rights of all types of victims.

Regardless of the objectives of the Commission, however, we believe that the EPO will pass with a majority in the Council. In November of last year, the European Parliament's Civil Liberties, Justice and Home Affairs Committee and Women's Rights and Gender Equality Committee voted clearly in favour of the EPO. This success was repeated a month later in the plenary, where it was adopted by a grand majority. In other

words, Europe has provided a clear signal that it wants to go ahead with the European Protection Order. Furthermore, the EPO will serve as a vital tool and as a pilot-directive before a protracted victim's package is put in place by the Commission. It will be a first step in allowing victims of violence to demand the same level of protection in all EU countries. Many victims of crime, especially victims of domestic violence, will once more be able to live in freedom, thanks to the European Protection Order.



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- 1 European Parliament, Report on the draft directive of the European Parliament and of the Council on the European Protection Order, A7-0354/2010, 7 December 2010.
  - 2 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order, O.J. C 69, 13 March 2010, p. 5-18.
  - 3 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, O.J. C 115, 4 May 2010, p. 1-38.
  - 4 The definition of "move" refers to art. 5, §1 of the draft Directive: "A European protection order may be issued when the protected person decides to reside or already resides in another Member State, or when the protected person decides to stay or already stays in another Member State. When deciding upon the issuing of a European protection order, the competent authority in the issuing State shall take into account, inter alia, the length of the period or periods time for which the protected person envisages to stay in the executing State and the seriousness of the need for protection."
  - 5 Council of the European Union, Impact Assessment of the Proposal for a Directive of the European Parliament and of the Council on the European Protection Order, SN 5025/09, 1 December 2009, p. 8.
  - 6 *Ibid.*, p. 8.
  - 7 Respectively Group of the European People's Party and Group of the Progressive Alliance of Socialists & Democrats in the European Parliament.
  - 8 See European Parliament, Report on the draft directive of the European Parliament and of the Council on the European Protection Order, A7-0354/2010, 7 December 2010, Annex, Opinion of the Committee on legal affairs on the legal basis and Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, 8703/10, 19 April 2010.

# The Status of the Victim in European Union Criminal Law

Dr. Massimo Fichera

## I. Procedural aspects of EU Criminal Law

EU criminal law has been a fast-developing area of law over the last decade. Its developments have spurred controversy as well as enthusiasm. It has been observed that its primary focus has been on procedural mechanisms to facilitate cooperation, such as the principle of mutual recognition or the principle of availability (respectively, within judicial and police cooperation in criminal matters) rather than on guarantees for individual rights.<sup>1</sup>

In order to support and strengthen the interaction between judicial and police authorities across the EU, Art. 82 (2) of the Treaty on the Functioning of the European Union (TFEU) confers upon the European Parliament and the Council the power to approximate Member States' procedural rules by establishing minimum rules.<sup>2</sup> The matter is rather delicate as criminal law is one of the core attributes of state sovereignty. It is not surprising that the same provision includes guarantees that take into account the differences between the European traditions. In this context, one of the aspects that deserve particular attention is the role and legal position of victims of crime. Their rights are explicitly mentioned by Art. 82 (2) TFEU as one of the areas where minimum approximation shall be pursued. Although it may at first sight look like a marginal procedural issue, the way of dealing with victims of crime reflects a variety of theoretical approaches on how crime, punishment, and the relationship between the individual and the state are being conceived. The importance that is given to the victims' interests in a legal system discloses a specific conception of the criminal trial and the reasons and procedures for the infliction of punishment.

## II. The Status of the Victim from a Theoretical Perspective

Looking at crime as a "civil" or "private wrong" underpins an understanding of the criminal act as a conflict between individuals. As a result, the best way of solving this conflict is by imposing on the offender the obligation to pay financial compensation for the harm suffered by the victim rather than

criminal punishment.<sup>3</sup> Apart from the question of how compensation should be estimated the problem of "social justice" is particularly relevant. This emerges from the consideration that the balance between the victim and the offender would be altered whenever the latter belongs to the lower classes, because in these cases the State's punitive reaction might be disproportionate to the seriousness of the criminal conduct. This approach has also been criticised from different theoretical perspectives. On the one hand, when viewing crime as a "public wrong" the *expressive* function of a sanction, its capacity to communicate the moral reprehensibility of a criminal act, would be undermined if the state merely claimed compensation on behalf of the victim.<sup>4</sup> By identifying punishment as censure, the state officially recognises that the victim has rights and that these rights have been violated by the criminal conduct.<sup>5</sup> On the other hand, one could argue that because the trial represents the interests of the community at large, a crime is a wrong that is committed not only against individual citizens, but also against the entire community.<sup>6</sup> As a result, the victim does not only have rights, but also duties (besides the conventional duty to participate in the trial), for instance the duty to report the crimes that have been committed against him/her, to give witness, and to face cross-examination.<sup>7</sup>

## III. The European and International Agenda

Of course, these approaches do not emerge from the Treaty of Lisbon although their broad implications have been discussed at the European and international level. The protection of victims both within and outside of the trial has been on the agenda of the Council of Europe, the European Commission and the European Parliament at least since the 1970s.<sup>8</sup> A 2006 Recommendation of the Committee of Ministers of the Council of Europe, which invoked discussions on the protection of the right to privacy and the right to information as well as the need for adequate training of the competent personnel, required Member States to adopt compensation schemes for victims of serious, intentional, and violent crimes, including sexual violence, and to compensate the victim's immediate family and dependants in case of the victim's death. The possibility of considering compensation for pain, suffering, and for damage



to property, is also included. In addition, measures are suggested to deal with all difficulties deriving from the victim residing in a state other than the one where the offence was committed (so-called “cross-border victims”).

The issue of the rights of victims of crime officially became part of the EU policies in the area of freedom, security and justice in 1998 (Vienna Action Plan)<sup>9</sup> and 1999 (Tampere conclusions).<sup>10</sup> The Commission pointed out that compensation alone would not be sufficient to ensure adequate protection of crime victims and would not be effective if crime prevention, assistance to victims, and the legal standing of victims in the criminal procedure were not addressed beforehand.<sup>11</sup> It was also noted at that time that there was great divergence in the Member States as regards the compensation schemes. Following the indications from Vienna and Tampere, the 2001 Framework Decision focused on the standing of victims in criminal proceedings: Its purpose is to approximate national legislation on the protection of victims and its scope of application is clearly limited to natural persons who have suffered harm, including physical or mental injury, emotional suffering and economic loss.<sup>12</sup>

The Framework Decision lists a set of rights, ranging from the right to be informed about the progress of the case to the right to receive legal support, the right to privacy and the right to compensation both from the offender and the state. Three main issues which all stem from the lack of harmonisation of procedural and substantive law are worth pointing out. First, the problems related to “cross-border victims” and diverging national legislation on procedural rights have not been properly addressed. One of the effects of establishing freedom of movement within the EU is that those who exercise this freedom risk being treated differently from those who stay in one country. Although Art. 11 specifically deals with victims who are residents in other Member States and the general provisions of the Framework Decision do not distinguish between resident and non-resident victims, many situations can be envisaged in which different procedural rules apply depending on the territory on which the offence is committed. The Framework Decision has not filled some of the most important gaps. To give an example, the provisions on communication safeguards which aim at ensuring that the victim is able to follow the proceedings (due, for instance, to language difficulties or legal technicalities) only apply to victims that are either witnesses or parties (Art. 5). This leaves out all those victims who do not possess this legal status. With respect to the implementation aspects, it has been pointed out that too much room for manoeuvre has been left to Member States and that it is difficult to assess the level of implementation.<sup>13</sup>

Another major legal question concerns the issue of compensation. The creation of the area of freedom, security and justice

in the EU has always been propelled by the ambition to ensure to its citizens a high level of security and better access to justice. “Justice” includes the right to fair compensation for the harm suffered, regardless of the place where the harming event has occurred. As the Commission has admitted on several occasions, this presupposes a certain degree of compatibility and convergence between the legal systems of the Member States.<sup>14</sup> In this context, the need to protect the four freedoms (free movement of persons, goods, capital and services) serves once again as a justification for the establishment of minimum standards, in accordance with the prohibition of discrimination on grounds of nationality (Art. 18 TFEU). This means that victims who are residents in other Member States, particularly in cross-border situations, ought to be treated equal to victims who are nationals of a Member State. The Court of Justice was well aware of this principle in 1989, when it ruled that one effect of the freedom to receive a service is that a state may not make the award of compensation for harm deriving from an assault in its territory subject to the condition that the person is a resident or a national of that state.<sup>15</sup> However, this ideal faces the harsh reality of economic, cultural and social divergences existing in the EU countries. The Commission noted in its analysis that, while unfair treatment would be effectively reduced only in a situation of full harmonisation, national approaches to compensation schemes vary considerably: hence the need to have common minimum standards.<sup>16</sup> Access to compensation in cross-border situations is now governed by a Directive which applies to violent crimes committed in a Member State other than where the victim normally resides.<sup>17</sup>

The issue of standardisation is closely related to the third hurdle that is worth mentioning: the definition of “victim”. As indicated above, the Framework Decision on the standing of victims restricts the scope of its provisions to natural persons. This excludes legal persons and the Court of Justice has also taken this view. On the one hand, this is confirmed by many provisions of the Framework Decision (which *inter alia* allude to the dignity of the individual and the need to protect the family of the victim or persons in a similar position – the so-called “indirect victims”).<sup>18</sup> On the other hand, the Directive on the compensation of victims of crimes is not relevant, because it has a different scope of application. While the Framework Decision seeks to approximate domestic laws on the protection of the interests of crime victims, the Directive seeks instead to facilitate access to compensation to crime victims in cross-border situations.<sup>19</sup> Moreover, “victim” does not extend to legal persons for the purposes of guaranteeing penal mediation between the victim and the offender in the course of criminal proceedings.<sup>20</sup> At the same time, since the Framework Decision does not intend to promote full harmonisation, Member States are free to decide whether or not legal persons fall within its scope of application.<sup>21</sup> The case law of the Court

of Justice as illustrated above shows that the competence of Member States in determining the categories that fall within EU legislation is seen as rather extensive. National legislation providing for schemes of penal mediation that are applicable to legal persons is not in contrast to the Framework Decision. However, a restrictive interpretation of the provisions of the Framework Decision (in the sense of ruling out legal persons) is non-discriminatory and perfectly justifiable due to the specific nature of the interests of a natural person, in particular his or her right to life and physical well-being.<sup>22</sup> One may notice the Court's challenging effort to promote approximation without affecting the value of "unity in diversity".

#### IV. Conclusion

Indeed, the role and concept of victims within and outside of criminal proceedings present multiple challenges. They are very much context-dependent. It is evident that the needs of victims of human trafficking or other serious cross-border offences (*inter alia*, organised crime) are different from the needs of victims of crimes committed in one state. In the first case, victims will have to be provided with special psychological and material support. They especially need to be protected from threats and intimidation when serving as a witness in a criminal trial. However, the Framework Decision only applies to victims during the criminal proceedings. As a result, whenever the proceedings are terminated or not carried out, or for any reason the victims do not take part in them, these persons will be in a particularly vulnerable position. Although the Framework Decision on trafficking of human beings contains a provision on victims, this is clearly too superficial and inadequate, as it does not specify, for example, what type of assistance and support may be provided to victims, the conditions under which they may be envisaged, the measures aimed at preventing "secondary victimisation" (when a victim undergoes unnecessary or intrusive questioning or cross-

examination before and during the trial).<sup>23</sup> In this respect, the new Draft Directive on human trafficking provides for a much higher level of protection before, during and after the trial and devotes much more attention to child victims.<sup>24</sup>

The notion of victims and the procedural rules governing their position, powers, and ensuring their protection are also affected by cultural and social factors. The decision on how the relationship between the victim and the offender should be shaped and how central the role of the victim in the trial has to be entails a certain view of crime and the function of criminal law in a society. However, this presupposes the existence of a minimum set of shared values, a common ground that is not always evident in European criminal law. Nevertheless, there seems to be a trend in the EU towards enhancing the role of the victim, with a particular emphasis on victims of terrorism. This is shown by the Stockholm Programme which encourages the adoption of measures for the protection of victims and calls on the Commission and the Member States to ascertain whether a comprehensive instrument, joining together the Directive and the Framework Decision, can be elaborated.<sup>25</sup> In an effort to preserve diversity, the principle of mutual recognition has been applied to draft a proposal on a European Protection Order. This order can be issued upon request by the competent authority whenever a person who already has benefited from a protection order in the Member State of origin moves to another Member State and applies for continued protection (especially in cases of threats towards his or her life, physical or psychological integrity, personal liberty or sexual integrity).<sup>26</sup> A new package on victims' rights was presented in May<sup>27</sup> and it will be interesting to see how the new measures will address the complex questions that arise from the lack of full harmonisation in the European judicial area. It will also be interesting to see whether prioritising the issue of the protection of victims might render the effort to forge common minimum standards for the rights of the defence less effective.

1 M. Fichera, *The implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice*, Intersentia, 2011 especially pp. 176-189.

2 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), O.J. C 115, 9.5.2008.

3 K. Lüderssen, *Abschaffen des Strafansatzes*, Frankfurt a.M. 1995, p. 259.

4 A. von Hirsch, *Proportionality in the Philosophy of Punishment*, *Crime and Justice: A Review of Research*, 16/1992, pp. 55-98.

5 J. Feinberg, *Doing and deserving: Essays in the Theory of Responsibility*, Princeton University Press, 1970 pp. 95-118.

6 See e.g. S. E. Marshall/R. A. Duff, *Criminalisation and sharing wrongs*, *Canadian Journal of Jurisprudence*, 11/1998, pp. 7-22.

7 S. E. Marshall, *Victims of Crime: Their Station and Its Duties*, *Critical Review of International Social and Political Philosophy*, 7/2004, pp. 104-117.

8 See e.g. Council of Europe Resolution 77 (27) on the compensation of victims of crime, 28.9.1977; Council of Europe Convention on the Compensation of Victims of

Violent Crimes, Strasbourg, 24.11.1983; Recommendation (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 28.6.1985 and Recommendation (2006) 8 of the Committee of Ministers to Member States on assistance to crime victims, 14.6.2006.

9 Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on An Area of Freedom, Security and Justice, O.J. C 19, 23.1.1999, p. 1.

10 Conclusions of the Presidency of the European Council, Tampere, 15-16 October 1999 (esp. point 32), which called *inter alia* for minimum standards on the protection of victims, in particular regarding access to justice and right to compensation for damages.

11 Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee- Crime Victims in the European Union, COM(1999) 349 final, Brussels 14.7.1999.

12 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing



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of victims in criminal proceedings, O.J. L 82, 22.3.2001, p. 1, esp. Article 1 (a).

13 M.S. Groenhuijsen/A. Pemberton, The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?, *European Journal of Crime, Criminal Law and Criminal Justice*, 17/2009, pp. 43-59.

14 See e.g. Commission Green Paper on Compensation to Crime Victims, COM(2001) 536 final, Brussels 28.9.2001, p. 6.

15 ECJ Case 186/87 *Cowan v. Trésor Public* ECR [1987] I-195.

16 Commission Green Paper on Compensation to Crime Victims, *supra* p. 21.

17 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, O.J. L 261, 6.8.2004, p. 15.

18 ECJ Case C-467/05 *Dell'Orto* ECR [2007] I-5557 par. 55-56.

19 *Ibid.* par. 57.

20 Article 10 Council Framework Decision 2001/220/JHA, *supra*. ECJ C-205/09 *Eredics nyr* par. 31.

21 *Ibid.* par. 29.

22 *Ibid.* par. 30.

23 Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, O.J. L 203, 1.8.2002, p. 1, Article 7.

24 Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking, and protecting victims, COM(2010) 95 final, Brussels, 29.3.2010, Articles 10-14.

25 Council of the European Union, The Stockholm Programme – An open and secure Europe, serving and protecting the citizens, Doc. 17024/09, Brussels, 2.12.2009, par. 2.3.4.

26 Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, O.J. C 69, 18.3.2010, p. 5.

27 See European Union News in this issue of *eu crim*.

## Minors as Victims in the Age of Information and Communication Technologies

### The Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse and its Implementation in Greece\*

Emmanouil Billis / Panagiotis Gkaniatsos

Children belong, mainly due to their mental immaturity and physical vulnerability, to the group of people more likely to become victims of criminal abuse acts.<sup>2</sup> The inability of minors to efficiently defend themselves against or stay safe from threats as well as the massive (bodily or psychological) harm risks resulting from criminal behaviour demand in today's globalized society the establishment of an effective legal net of national and international measures concerning especially the protection against such damaging conduct as sexual exploitation and sexual abuse.<sup>3</sup> This kind of protection is conceivable in two ways: by preventing and combating sexual-related crimes against children as well as by providing assistance to and protecting the victims of such behaviour from further victimization.

Taking into account the need for special measures because of the inherent gravity of sexual offences against children and the consequences resulting therefrom, the Council of Europe Convention on the Protection of Children against Sexual Ex-

ploitation and Sexual Abuse (CETS No. 201, hereinafter: the Convention) sets a comprehensive legal framework which categorizes various sexual abuse forms as criminal offences and comprises preventive measures, victim protection measures and international cooperation rules.<sup>4</sup> More specifically, the Convention obliges the Signatory Parties to take a minimum of measures responding to the main purposes set in Art. 1, the prevention and combat of child sexual exploitation and abuse, the protection of the rights of child victims and the promotion of national and international cooperation in both fields. The Convention was adopted by the Committee of Ministers on 12 July 2007, opened for signature on 25 October 2007 in Lanzarote, Spain, and entered into force on 1 July 2010. Of the 47 Member States of the Council of Europe, 42 have already signed, but until June 2011 only 12 ratified the Convention.<sup>5</sup>

The establishment of the Convention was preceded by other international legal instruments which regulate, though frag-

mentarily, different aspects regarding the protection of minors against behaviour linked to exploitation and abuse acts. To be mentioned are especially the Convention on Cybercrime (2001, ETS No. 185), the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS No. 197), the UN Convention on the Rights of the Child (1989) and its Optional Protocol on the sale of children, child prostitution and child pornography (2000), as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime (2000). Finally, in terms of European Union (EU) legislation, the Directive 2011/36/EU of the European Parliament and the Council on preventing and combating trafficking in human beings and protecting its victims (O.J. L 101/1, 15.4.2011), as well as the Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA), which is on the way to be replaced by an EU Directive,<sup>6</sup> particularly stand out.

Through the provisions of the Convention examined herewith, an additional effort from the side of the Council of Europe is made to cover the deficits in efficiency in the national legislations of the State Parties in regard to the protection of children against sexual exploitation and abuse and to the assistance of victims. This article examines the central norms of the Convention by providing briefly, due to its limited size, a systematic overview of its protection and assistance mechanisms (below I). It then focuses on those principles and rules reflecting the will of the Member States to combat the use of the modern information and communication technologies for criminal purposes and on the need to enhance the protection of (potential) victims of sexual-related crime through information and technology means (below II). The article closes with a reference to the respective legal basis in Greece before and after the implementation of the Convention and its efficiency in addressing the above issues (below III).

## I. Overview of the Convention's Protective System

The Convention's main goal is to provide the national law of the State Parties with a sufficient legal basis for the effective protection of minors and child victims against sexual exploitation and abuse or their results.<sup>7</sup> In this context, "child" refers to any person under the age of 18 years and "victim" to any child subject to sexual exploitation or abuse.<sup>8</sup> However, for (consensual) sexual activities between a minor and an adult to be treated as the criminal offence of sexual abuse, the minor has to be below the age set by the national law as the legal age for sexual activities.<sup>9</sup>

In general, the exact content of "sexual exploitation and sexual abuse" is to be determined by the domestic law<sup>10</sup>; in any case, the Parties should ensure that the intentional behaviour and the minimum standards described in Arts. 18-23 constitute nationally recognized offences. The core substantive criminal law of the Convention focuses on various forms of sexual abuse and corruption of children, on sexual-related offences concerning child prostitution, child pornography and the participation of a child in pornographic performances, and on the *sui generis* offence of solicitation of children for sexual purposes through information and communication technologies.<sup>11</sup> In the same context, guidelines regarding the establishment of effective and proportionate sanctions, of aggravating circumstances and of the (criminal, civil or administrative) liability of a legal person for sexual offences committed for its benefit by a natural person are also included in the text of the Convention.<sup>12</sup> Basic aim of these provisions is the harmonization of the domestic law of the states.<sup>13</sup>

Additionally, in the interest of combating behaviour related to sexual exploitation and abuse of children through the means of substantive criminal law, the Convention includes provisions on law of application (such as the territoriality, nationality and *aut dedere aut judicare* principles and the abolition of the dual criminality rule), regulating in that respect the cases in which a State Party should have jurisdiction over offences established in accordance to the Convention. These are primarily meant to relate to the efforts made for combating the so-called "sex tourism".<sup>14</sup>

Turning to the question of the necessary preventive and protective measures to be taken in the national legislations, the Convention provides for the recruitment, training and awareness-raising of persons working in contact with children, the sexual education for children, the establishment of preventive intervention programmes and general public information measures, the participation of the private sector, the media and civil society in preventive policies, the designation of independent institutions, and the coordination between the authorities competent for the promotion and protection of the rights of the child (Arts. 5-10). As regards the protection and support of child victims, the Convention relies on the promotion of measures such as the setting up of "helplines", the physical and psycho-social recovery assistance of victims and the cooperation of each state with non-governmental and other organizations engaging in the assistance to victims (Arts. 11-14).

Finally, in relation to the status of minors as sex victims, the procedural principles and rules prescribed in Arts. 30-36 of the Convention focus on the respect of the interests and rights of the child, on the exclusion of further victimization possibilities and on the effectiveness of the investigations in sexual abuse

cases. These norms include provisions about the information, legal aid and participation rights of child victims and witnesses in criminal proceedings, their protection from public dissemination, intimidation, retaliation and repeat victimization, the special training of the investigative authorities, and the protective and secure (through means of technology) way the interviews and in court examinations of child victims should take place. Before further addressing the special relation between sexual offences, child victims and modern technology tools, it should already be noted that, notwithstanding the obvious sensitive or burdensome nature of investigations and procedures involving minors as victims, in criminal proceedings all defence and fair trial rights as provided by national and international law must be guaranteed in the same extend as the victim's rights.<sup>15</sup>

## II. Sexual-related Crimes and Child Victims in the Society of Technology

### 1. Online victimization

It is a common assumption that the modern information and communication technologies, like the Internet, can provide potential perpetrators of crimes related to child sexual abuse and exploitation or even criminal organizations with the applicable (anonymous and speedy) tools for facilitating their criminal activities.<sup>16</sup> The hazards arising especially from “computer-related crime and cybercrime”<sup>17</sup> are accordingly not to be left out of the legislator's care. On the other hand, the use of technology itself could be helpful for the prevention or combat of sexual-related crimes and for the protection and assistance of child victims.

The Convention deals with the question of online sexual-related criminality and victimization mainly at the level of the substantive criminal law provisions which should become part of the national law of all State Parties.<sup>18</sup> Art. 20(1f) classifies, for the first time, the intentional conduct, when committed without right, of knowingly obtaining access, through information and communication technologies, to child pornography, as a crime.<sup>19</sup> The Parties are expected to criminalize the conduct of “obtaining access”, i.e. the sole (intentional) viewing of child images online by (knowingly, not inadvertently) accessing child pornography sites without downloading any material with sexual content.<sup>20</sup> This provision shall ensure the punishment of behaviour which technically is not part of the chain from the production to the possession of pornographic material.<sup>21</sup> This chain includes the acts of making child pornography available online, transmitting, procuring by downloading or possessing in a computer system of child pornography and is separately covered by the offences listed in Art. 20(1a-1e).

Furthermore, the Convention intends to reinforce the combat against direct forms of victimization caused by the use of online services by focusing on the criminalization of solicitation through information and communication technologies (such as online chat rooms) for the purpose of engaging in sexual activities with a child under legal age or for producing child pornography (Art. 23). Necessary precondition thereof is that the intentional proposal of an adult to meet a child below the legal age for sexual engagements has been followed by material acts (e.g. the arrival of the perpetrator at the meeting place) leading to an actual meeting.<sup>22</sup>

Overall, the Council of Europe equips through the aforementioned substantive criminal law provisions the protective system of the Convention with adequate measures against the misuse of the Internet and other modern technologies. However, it must be noted that, with respect to the question of effectively combating sexual-related cyber-offences, the Convention does not include any specific provisions on the definition of the “place of the crime”, although – due exactly to the technically complex and global nature of trans-border crime committed through virtual networks – this directly relates to issues of aiding or abetting and attempt (Art. 24) as well as to issues of international cooperation, jurisdiction and the law of application.<sup>23</sup>

### 2. Technology and the fight against sex crime

It can be observed that the Convention addresses the possibilities of the use of modern technology in the fight against sexual-related crimes and the protection of child victims in various ways;<sup>24</sup> hence, preventive measures to be taken are the promotion of the participation of the information and communication technology sector (e.g. Internet service providers, mobile phone network operators and search engines) in preventive programmes as well as the participation of the media sector in actions of informative nature (Art. 9(2-3)). The states shall further set up mechanisms for data collection or focal points for the purpose of observing and evaluating the phenomenon of sexual exploitation and the abuse of children (Art. 10(2b)).

Moreover, with respect to the necessity of assisting child victims of sex crimes, Art. 13 promotes the establishment of information services, such as telephone or Internet “helplines”. Finally, with reference to child victim rights, the Convention includes procedural provisions concerning the function of special units responsible for the identification of victims by lawfully analysing child pornography material, as well as rules for the electronic recordings of interviews for evidentiary purposes and the hearing of child victim during court proceedings from distance and through the use of appropriate communication technologies.<sup>25</sup>



Especially regarding the issue of evidence given by a victim of sexual abuse, it has to be noted that the State Parties shall be rather reluctant when applying norms which permit the physical absence of the child during the court proceedings. Protective measures such as securing the absence or even preserving the anonymity of the victim are justified by the heavy impact the proceedings or a new confrontation with the perpetrator could have on the private life, the psycho-social development and the health of the child.<sup>26</sup> However, they contradict the right of the defence for a fair and adversarial trial as prescribed in Art. 6 (1, 3d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and implemented by the European Court of Human Rights. This right, although not absolute, is sufficiently guaranteed only if the person charged with a sexual offence or his defence lawyer is able to examine the main prosecution witness (i.e. to challenge and question the merits of the testimony as well as the personal credibility of the witness) at least once at any point during the criminal process. If such an adequate and proper opportunity to confrontation is not given to the defence at all, the conviction is not allowed to be based either solely or to a decisive extent on the testimony of a non-confronted child victim.<sup>27</sup> Consequently, by considering the criminal proceedings as a whole, it can be argued that the use of the modern technologies (such as recordings of preliminary interviews on the presence of at least the defence lawyer or the use of two-way closed circuit television) could result in equally taking into account the rights of both victim and defendant while achieving a more fair evidentiary outcome. The necessity of such measures will become apparent in the analysis of fair trial deficits in the Greek legal system.

### III. Implementation of the Convention in Greece

The 19th Chapter of the Greek Penal Code (hereinafter: PC), entitled “Crimes against the sexual freedom and crimes against the financial exploitation of sexual life”,<sup>28</sup> includes the criminal law provisions for the protection of minors against sexual abuse and exploitation. Over the last decade, the chapter has undergone a series of radical changes, adapting to the modern perceptions on sexual self-determination, freedom and dignity. This modernization comprises two main characteristics based on the recent legislative activity at international and European level<sup>29</sup> regarding the rights and the stand of crime victims in the proceedings as well as on the developments of the information and communication technologies and the risks inherent in their use. On the one hand, emphasis is given to the child as a potential victim of sex crimes, whereas childhood constitutes a separate legal interest additionally protected by the provisions of the aforementioned chapter of the Penal Code.<sup>30</sup> On the other hand, the recent criminalization trends resulted in

the establishment of new sexual (related) offences connected particularly to the use of online technologies or in the increase of sanctions for traditional sex crimes.

In this context, the Council of Europe Convention has played a major role in the anti-victimization policies of the Greek State. The Convention was signed by Greece on 25 October 2007, ratified by Law 3727/2008<sup>31</sup> and entered into force on 1 July 2010, becoming an integral part of the domestic law with supra-statutory force in accordance to Art. 28(1) of the Greek Constitution. The implementation of the Convention into the Greek Legal Order resulted in a number of changes not only within the context of criminal law, but at the level of the prevention of victimization and the protection of victims as well.<sup>32</sup>

Regarding the substantive criminal law issues, “minor” is, according to Greek law<sup>33</sup> and in compliance with the Convention, every person under the age of 18 years, while the legal age in order for consensual or certain other sexual related activities (such as the solicitation of Art. 348B PC) not to constitute a crime is 15 years of age (Art. 339 (1) PC). However, despite the right to sexual self-determination granted to minors older than 15, there are certain sexual related situations, in which the participation of a minor, regardless of his age, always constitutes a crime (e.g. in all offences related to the child pornography chain (Art. 348A PC)).

Of the new forms of criminal conduct established as a result of the implementation of the Convention and directly connected to the “trptych” sexual misconduct-child victim-new technologies, the solicitation (grooming) has been enshrined in Art. 348B PC. This provision is in principle aligned with the minimum terms of Art. 23 of the Convention. However, in relation to child pornography, “obtaining access” (viewing without downloading) to child pornographic material through information and communication technologies is, contrary to Art. 20(1f) of the Convention, not expressly criminalized in the Greek Penal Code. Also, the meaning of “possession” (physical and knowing control over an object with the power to further distribution) of child pornography by means of computer use or online services, already constituting a criminal act according to the existing provision on child pornography (Art. 348A PC),<sup>34</sup> cannot be extended to include the act of online viewing, in which both literature and jurisprudence agree.<sup>35</sup> Finally, the Greek legislator, under the influence of the Convention, strengthened with Art. 337(3-4) PC the protection of minors from modern forms of offences against the sexual dignity which may occur through the use of information technologies without necessarily presupposing a physical contact or intercourse (e.g., indecent proposals via the Internet).<sup>36</sup>

As far as the use of technology to help and support minors is concerned, Art. 2 of implementing Law 3727/2008 provides for the setting up of telephone or Internet “helplines” to assist children in danger or child victims. It also includes the establishment of data and information units for monitoring the phenomenon of sexual exploitation and abuse.<sup>37</sup> Furthermore, Art. 226A(3) CCP, which preceded the implementation of the Convention, foresees that the pre-trial witness testimony of a child victim is to be videotaped, if possible, for the purpose of further replacing the physical presence of the minor during the proceedings by the electronic projection of the interview. The provisions of Art. 226A(2-5) clearly violate the principles of the ECHR to a fair and adversarial trial since neither the defendant nor his lawyer are allowed to be present during the child interview (preliminary, main or complementary) and their only possibility to “examine” the witness during trial is through predetermined questions asked by an investigating officer out of court. The introduction of videoconferencing, one of the measures proposed by the Convention, in the Greek proceedings could serve as a counterbalance to the conflict between the rights of the victim and those of the defendant.<sup>38</sup>

#### IV. Conclusion

The Council of Europe Convention, the first international legal instrument to specifically target child victimization through sexual-related crimes, sets the ground rules for the prevention of and the combat against sexual exploitation and abuse of minors as well as for the protection of the rights of child victims. It therefore represents “a major advance in protecting

children that is remarkable for its comprehensiveness, innovation, and humanity”.<sup>39</sup> However, its long-term effectiveness in a modern society of communications and technology remains to be proved. The desired harmonization of the national legal orders demands a greater number of ratifications, while the sometimes abstract and non-rigid character of the Convention impedes this process. This becomes apparent, among others, in the absence of a single norm regulating the legal age for sexual activities, in the possibilities of the states not to criminalize specific conduct (by means of reservation), e.g. the “obtaining access to child pornography”, in the use of vague terms (e.g. “possessing” and “obtaining access” to child pornography online), and finally in the lack of specification regarding more precise rules of penal jurisdiction and coordination in internet crime.

As far as Greece is concerned, even though the respective national provisions are not exhaustive and in some points do not fully comply with the Convention, there has been significant progress in the areas of prevention, protection and law enforcement. On the other hand, the reinforced legal position of the victim in criminal proceedings, in which the Convention resulted, exposed the necessity for further amendments in the Greek criminal procedure in order to refrain from unequal restrictions of the defendant’s rights or from jeopardising the traditional goal of the criminal trial (finding substantive truth through due process). Nonetheless, the Convention itself provides, especially by promoting the protective use of technology in criminal proceedings, a minimum solution to the problem. Hence, taking full advantage of its provisions seems to be the right way to go.

\* The authors would like to thank V. Chalkiadaki, LL.M. (Freiburg), for her valuable comments on an earlier draft of this paper.

2 See among others H. Reeves, Children as Victims of Crime, in: P.C. Friday/G.F. Kirchoff (Eds.), *Victimology at the Transition From the 20th to the 21st Century – Essays in Honor of Hans Joachim Schneider*, Aachen 2000, pp. 259-260, 264-267.

3 See European Commission COM(2010)94 final, pp. 2, 8.

4 See also the Preamble of the Convention as well §§ 1-32 of the Explanatory Report (hereinafter: ER) in <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>.

5 For more information and updates see <http://conventions.coe.int/>.

6 Proposal for a Directive of the European Parliament and of the Council on Combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography, repealing Framework Decision 2004/68/JHA (hereinafter: Proposal for an EU Directive (COM(2010)94 final)). For references to further legal acts see the Preamble of the Convention.

7 Another goal is the promotion of the international cooperation, see Art. 38.

8 Art. 3(a, c). According to § 51 ER, the facts of the sexual exploitation or abuse do not have to be established before a child is to be considered a victim.

9 Art. 18(1a, 2, 3); also Art. 23 (solicitation).

10 Possessing or viewing of child pornography images constitutes for example not a direct abuse or even exploitation act in the strict sense. It is however in many ways closely (even causally) linked to the growing phenomenon of child abuse, which national policies are called upon to urgently address. See also M. Taylor/E. Quayle, *Child Pornography: An Internet Crime*, Hove-New York 2003, pp. 7-10,

21-26; on the relation between sexual exploitation and the criminalization of child pornography and sexual grooming on the basis of the harm principle, S. Ost, *Child Pornography and Sexual Grooming*, Cambridge et. al. 2009, pp. 103-147.

11 See §§ 117-160 ER; further below II.

12 Arts. 26-29; §§ 177-202 ER.

13 See § 112 ER; on the need and functions of law approximation in that field see European Commission COM(2010)94 final, p. 8; also Y. Akdeniz, *Internet child pornography and the law*, Hampshire, 2008, pp. 163-164.

14 Arts. 25, 32; also §§ 171-174 ER.

15 See Art. 30(4) of the Convention and further below II; also Council of Europe Recommendation Rec (2001)16 on the protection of children against sexual exploitation.

16 See among others Y. Akdeniz, *Internet child pornography and the law*, Hampshire 2008, pp.1-3, 5-8; P. Csonka, *The Council of Europe’s Convention on Cyber-Crime and other European Initiatives*, in: *International Review of Penal Law* 2006, pp. 487-488; U. Sieber, *The threat of cybercrime*, in: Council of Europe (Ed.), *Organised crime in Europe – Situation report 2004*, Council of Europe Strasbourg, 2005, pp. 83-85, 135-137; M. Taylor/E. Quayle, *Child Pornography: An Internet Crime*, Hove-New York 2003, pp. 9-10, 14-17; also Preamble (2, 13) of the Proposal for an EU Directive (COM(2010)94 final); see also J. Davidson/P. Gottschalk, Introduction, in: J. Davidson/P. Gottschalk (Eds.), *Internet Child Abuse*, Abingdon 2011, pp. 1-3; P. Gottschalk, *Characteristics of the Internet and child abuse*, in: J. Davidson/P. Gottschalk (Eds.), *Internet Child Abuse*, Abingdon 2011, pp. 27-42;

M. Ferraro/E. Casey, Investigating Child Exploitation and Pornography, Burlington et. al. 2005, pp. 21-40.

17 For a definition see U. Sieber, The threat of cybercrime, in: Council of Europe (Ed.), Organised crime in Europe – Situation report 2004, Council of Europe Strasbourg, 2005, p. 86; on the risks for children using the Internet J. Davidson, Legislation and policy, in: J. Davidson/P. Gottschalk (Eds.), Internet Child Abuse, Abingdon 2011, pp. 8-9.

18 See also Art. 9 of the Convention on Cybercrime.

19 For the definition of “child pornography” see Art. 20.

20 “The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment”, see § 140 ER; further on the concept of possession and accession in Internet see M. Ferraro/E. Casey, Investigating Child Exploitation and Pornography, Burlington et. al. 2005, pp. 246-249; E. Howard, Don’t Cache Out Your Case, in: Berkeley Technology Law Journal 2004, pp. 1229-1231, 1232-1236, 1255 fn. 160.

21 Reservations regarding the application of Art. 20(1f) are though under Art. 20(4) permissible.

22 See §§ 155-160 ER; also Art. 5(3) of the Proposal for an EU Directive (COM(2010)94 final); more on the online sexual grooming see in S. Ost, Child Pornography and Sexual Grooming, Cambridge et. al. 2009, pp. 32-39, 48-53; J. Davidson, Legislation and policy, in: J. Davidson/P. Gottschalk (Eds.), Internet Child Abuse, Abingdon 2011, pp. 9-12; also the surveys “Online Victimization: A Report on the Nation’s Youth”, 2000 (<http://www.unh.edu/ccrc/pdf/jvq/CV38.pdf>) and “Online Victimization of Youth: Five Years Later”, 2006 (<http://www.unh.edu/ccrc/pdf/CV138.pdf>).

23 See on that direction Preamble (9, 13) and Art. 16(2) of the Proposal for an EU Directive (COM(2010)94 final). On the relation between the global nature of cyber-crime and issues of jurisdiction and applicability see among others U. Sieber, Internationales Strafrecht im Internet, in: NJW 1999, pp. 2065-2073 and J.R. Reidenberg, Technology and Internet Jurisdiction, in: University of Pennsylvania Law Review 2005, pp. 1953-1974; also P. Csonka, The Council of Europe’s Convention on Cyber-Crime and other European Initiatives, in: International Review of Penal Law 2006, pp. 475-482 and L. Ferola, The Council of Europe’s Convention on Cybercrime, in: Essays in Honour of C. D. Spinellis, Athens-Komotini 2010, pp. 159-161.

24 See the ways the new technologies could support the international fight against online sexual crimes in J. Carr/Z. Hilton, Combating child abuse images on the Internet, in: J. Davidson/P. Gottschalk(Eds.), Internet Child Abuse, Abingdon 2011, pp. 61-73.

25 Arts. 30(5), 31(1e), 35(2), 36(2b); see also Art. 19(4-5) of the Proposal for an EU Directive (COM(2010)94 final).

26 See also the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), O.J. L 82, 22.3.2001, p. 1 and Arts. 17-23 of the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (COM(2011) 275 final, 18.5.2011).

27 On the principles arising from the right of Art. 6(3d) ECHR see the case-law of the ECtHR (<http://echr.coe.int/echr/en/hudoc>), among others *Al-khawaja u. Tahery/UK* (J. of 20.1.2009 - 26766/05, §§27, 34-38 with further references. With regard to child sexual victims and the use of video or video-link technology: *S.N./Sweden* (J. of 2.7.2002 - 34209/96, §§46-52); *W./Finland* (J. of 24.4.2007 - 14151/02, §§45-48); *A.H./Finland* (J. of 10.5.2007 - 46602/99, §42); *W.S./Poland* (J. of 19.6.2007 - 21508/02, §§55-63); *A.L./Finland* (J. of 27.1.2009 - 23220/04, §§36-45).

28 Arts. 336 – 353 PC.

29 See e.g. the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (O.J. L 261, 6.8.2004, p. 15) implemented by Law 3811/2009 (Government Gazette A 231/18.12.2009); the Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA); the Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (O.J. L 101, 15.04.2011, p. 1); the EU Agenda for the Rights of the Child - COM(2011) 60, 15.2.2011; and the provisions of the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final (see European Union News in this issue of eucrim); also Council of Europe Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims; and annual report 2007-2008 of the network “Victim Support Europe” (<http://www.victimsupporteurope.eu/>).

30 See M. Margariti, Criminal Code, Interpretation-Implementation, 2nd ed., Athens, 2009, p. 318 (in Greek).

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31 Government Gazette A 257/18.12.2008.

32 See the new phrasing of Arts. 337-339, 342, 348A-349 PC implementing Arts. 18-23, 27-28 of the Convention. Aiding or abetting and attempt matters are sufficiently addressed by the existing provisions of the general part of the penal law (Art. 42-49 PC), while in regard to matters of jurisdiction Art. 8 PC additionally establishes for crimes such as sex tourism and child pornography the principle of universal jurisdiction. On the (administrative) liability of a legal person for sexual offences committed for its benefit by a natural person see already Art. 4 of the Law 3625/2007 (Government Gazette A 290/24.12.2007) implementing the Optional Protocol to the Convention on the Rights of the Child. See also Arts. 1-2, 5-8 Law 3727/2008 for the adjustment of the Greek law to Arts. 4-17, 30-37 of the Convention. In the context of coordination of state institutions, non-governmental and other organizations engaged in assisting (potential) victims, the “Central Scientific Council for Prevention of and Combat against Minor Victimization and Juvenile Delinquency” ([www.kesathea.org](http://www.kesathea.org)) was founded only recently by Law 3860/2010 (Government Gazette A 111/12.7.2010) and is responsible for monitoring and coordinating the activities of every local “Minor Protection Institution”, conducting awareness raising campaigns etc.; see also the establishment by Law 3961/2011 (Government Gazette A 97/29.4.2011) of the National Child Protection Register, the National Child Protection Line and the Network for the protection of children in danger and of juvenile offenders.

33 Art. 127 of the Greek Civil Code and Art. 121 PC.

34 The provision was added in the PC with Law 3064/2002 (Government Gazette A 248/15.10.2002), and was amended by Laws 3625/2007 and 3727/2008.

35 See G. Bourmas, Attempts to Define the Meaning of Possession of Child Pornography in Electronic Data Format, in: Poinikos Dikaosini 2009, pp. 322-327; D. Kioupi, Child Pornography, Interpretative Approaches of Art. 348 A PC, in: Poinikos Logos 2008, pp. 14-17 (both in Greek); see also the decisions of the Supreme Court *Areios Pagos* 810/2007 and 465/2008.

36 See the Explanatory Report of Law 3727/2008 ([www.hellenicparliament.gr](http://www.hellenicparliament.gr)).

37 See also the “Hellenic Association for the Prevention of Sexual Abuse” ([www.obrela.gr](http://www.obrela.gr)), which currently conducts under the e-NACSO auspice (European NGO Alliance for Child Safety Online, [www.enacso.eu](http://www.enacso.eu)) a project on online safety of children in Greece. On the issue of recording and storing (DNA) data of already convicted sexual offenders, Greece designated with its declaration from 23 June 2010 the Forensic Science Division of the Hellenic Police Headquarters as the National Authority referred to in Art. 37 of the Convention.

38 See A. Charalampakis, The New Law 3625/2007 on Child Trafficking, Child Prostitution and Child Pornography, in: Poinikos Logos 2007, p. 829; G. Papadimitrakis, The Treatment of Minor Victims in the English Criminal Procedure, in: Poinikos Dikaosini 2009, pp. 1013-1014 (both in Greek).

39 S.H. Bitensky, Introductory Note to Council of Europe Convention on the Protection of children against Sexual Exploitation and Sexual Abuse, in: International Legal Materials 2010, p. 1663.

# Rights of Victims in Slovenian Criminal Law According to the EU Framework Decision on the Standing of Victims in Criminal Proceedings

Sabina Zgaga

This article focuses on the rights of victims in Slovenian criminal law. The main questions here are whether Slovenia has fully implemented the EU Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, whether our legislation on victims poses any problems from the viewpoint of this Framework Decision, and whether Slovenian law offers any additional protection and rights to the victims.

Since the Republic of Slovenia became an independent state in 1991, there have been many changes to our criminal law. The Criminal Procedure Act (CPA)<sup>1</sup> and Criminal Code (CC)<sup>2</sup> first entered into force on 1st January 1995. Both have seen some amendments, and the entire criminal law (both substantive and procedural) was extensively altered after 2005 when numerous special acts were adopted (including the Witness Protection Act<sup>3</sup> and the Act on Compensation of Victims of Violent Criminal Acts<sup>4</sup>) and a new Criminal Code-1 (CC-1) put in place in 2008.

## I. Slovenian Implementation of the Framework Decision

### 1. Definition

A basic precondition for the analysis of the victim's position in Slovenian law is the definition of a victim. According to the EU Framework Decision, a victim is a natural person who has suffered harm, including physical or mental injury, emotional distress, or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.<sup>5</sup> According to the Slovenian CPA, the injured party (the legal term for a victim from the viewpoint of criminal procedure) is the person whose personal or property rights have been violated or jeopardised.<sup>6</sup> According to the linguistic interpretation, this includes natural as well as legal persons who are directly damaged by crime. In cases involving a minor or the contractual incapacity of the victim, his rights are turned over to a statutory representative. Slovenian criminal law provisions are even broader than EU legislation with regard to the definition of a victim; however, some problems still exist. For instance, such a definition is still too narrow and excludes cases in

which the victim of a crime is not a natural or legal person, but, for example, the environment. In such cases, representative or general NGOs or other associations representing certain areas of interest should be able to enforce a victim's rights, e.g., the right to subsidiary criminal prosecution or to compensation. In my opinion, a victim should therefore be defined in a more abstract and broader way.

In Slovenia, a victim can cooperate in criminal procedure as a victim as such (injured party), as a private prosecutor<sup>7</sup> for crimes, for which only private and not state prosecution is defined in the CC-1,<sup>8</sup> or as a subsidiary prosecutor, for cases in which the state prosecutor decides not to prosecute a certain crime or decides to suspend prosecution during the criminal procedure. In these cases, the injured party can step in as a subsidiary prosecutor and consequently has all the rights that the state prosecutor does, except for those that he has as a state authority.<sup>9</sup>

The EU Framework Decision requires Member States to ensure that particularly vulnerable victims receive specific treatment.<sup>10</sup> This demand has also been recognised in Slovenian law, especially with regard to children and/or victims of sexual crimes. Their specific position can be seen in criminal procedure as well as in substantive criminal law. In substantive criminal law, the statute of limitation becomes relevant in this regard. Normally, the statute of limitation starts to run from the point in time that a crime is committed. However, in cases involving crimes against sexual inviolability and crimes against marriage, family, or youth, or committed against a minor, it begins when the injured person becomes an adult (that is, when he turns 18 years old).<sup>11</sup> From the viewpoint of criminal procedure, the special position of a child and/or victims of sexual crimes can be seen especially in their strengthened right to legal representation and special protection measures during their questioning in judicial investigation and also in trial. Normally, every injured party is entitled to legal representation but should cover the costs himself.<sup>12</sup>

However, when we are dealing with a minor who is a victim of crimes against sexual inviolability, neglect, or maltreatment of a child (Art. 192 of CC-1) or trafficking in human beings



(Art. 113 of CC-1), the minor victim is required to have legal representation from the beginning of the criminal procedure (in Slovenian law, that usually means from the beginning of judicial investigation or from filing direct indictment in standard criminal proceedings). The legal representative protects the victim's integrity during judicial questioning and takes care of the victim's right to compensation. If a minor does not have such representation, the court appoints one to him from a list of attorneys. In criminal procedure, as well as during the phase of police investigation already, a minor who is an injured party also has a right to the presence of the person that he trusts most. Such a person can also be present for injured parties or victims of violent crimes who are not minors.<sup>13</sup>

When a minor is questioned, especially if he is the victim of a crime, he should be treated with special consideration in order to prevent negative effects of questioning on his psychological well-being. If necessary, the questioning of any minor should be performed with a help of a trained professional. When questioning a minor under 14 years of age, a person that he trusts can be also present.<sup>14</sup> Similar provisions apply to the trial phase. If a minor is present at trial as an injured party (or also as a witness), he should be removed from the court as soon as his presence is no longer necessary. Also, direct questioning of minors under 15, victims of crimes against sexual inviolability, neglect, or maltreatment of a child (Art. 192 of CC-1) or trafficking in human beings (Art. 113 of CC-1) is not allowed in trial. The court should instead read official records from questioning in judicial investigation. Parties to the criminal procedure are allowed to pose indirect questions. The court can decide to demand that the investigating judge perform certain investigative acts to clear the facts of the case, including questioning a minor who is an injured party. This is performed according to the rules of questioning in judicial investigation.<sup>15</sup>

## 2. Procedural rights

The Member State should also safeguard the possibility for victims to be heard during proceedings and to supply evidence. Victims do have such rights in Slovenian law. During judicial investigation, the injured party as such has a right to call attention to all facts and to offer evidence relevant to establishing the commission of a crime, the perpetrator, and the compensation claims. At the trial, an injured party is also entitled to produce evidence, to pose questions to the witnesses and experts, to comment on and clarify their depositions, and to make other statements and motions. The injured party is also entitled to inspect the case file and the material evidence. However, he may be denied the right to inspect the case file up to the point at which he is questioned as a witness. The inves-

tigating and presiding judges are obliged to inform the injured party of these rights<sup>16</sup> as an injured party as such, as a private prosecutor or also as subsidiary prosecutor.

In order to be able to perform these rights, the injured party is allowed to be present during investigative acts in the phase of judicial investigation. Specifically, he is allowed to be present at inspection of the crime scene, the questioning of an expert witness and the questioning of a witness, but only if it is expected that the witness will not come to the trial. The investigating judge is obliged to inform the injured party of investigative acts in an appropriate manner.<sup>17</sup> The injured party is also allowed to propose certain investigative acts to the investigating judge or to the police and even to pose questions if the investigating judge allows.<sup>18</sup>

The EU Framework Decision also requires the Member State to ensure that victims have access to a wide range of information of relevance for the protection of their interests.<sup>19</sup> According to the Slovenian CPA, the investigating and presiding judges have a duty to inform the injured party of his procedural rights,<sup>20</sup> and they need to ask him, when questioned as a witness, whether he would claim compensation or not.<sup>21</sup>

Also, the Act on Compensation of Victims of Violent Criminal Acts states that the police provide information on victims' rights and their relevant relatives (right to compensation, paid directly by the State).<sup>22</sup> The Act on Free Legal Aid defines initial legal advice as being an explanation to the applicant about his legal position and as brief advice on mediation, rights, and duties in the relevant proceedings, the authorities of the court, rules of procedure, costs, and forms of legal aid. However, this first legal advice is already considered part of free legal aid, and only those applicants (in our case, victims) are entitled to it who fulfil certain (especially financial) conditions.<sup>23</sup>

The next regulated right of a victim is the right to protection. With this, the Slovenian CPA enables the court to exclude the public from the trial or from part of it at any time *ex officio* or upon the motion of the parties. This is always after it has heard the parties, if required in the interest of protecting secrets, maintaining law and order, due to moral considerations, protection of the personal or family life of the defendant or the injured party, the protection of the interests of minors, and if, in the opinion of the panel, a public trial would be prejudicial to the interests of justice. The exclusion of the public does not apply to parties, the injured person, their representatives, and counsel. However, the presiding judge must warn those attending a trial closed to the public of their obligation to keep secret all information that comes to their knowledge at the trial, and he must inform them that disclosure of any secrets is a crime.<sup>24</sup>



In addition, the protection of victims is regulated in the CPA in the same way as the protection of witnesses, since the injured party is usually also a witness to the crime. If the body or life of a witness, his close relative, or other defined person is in danger due to disclosure of his personal data or his whole identity, the court is allowed to enforce protective measures, e.g., erasure of certain data from the court file, tagging of these data as officially confidential, an injunction to keep these data secret, using a fictitious name for the victim, questioning with a help of technical measures (safe wall, deformation of voice, separate rooms, etc.).<sup>25</sup> Such protective measures may be proposed by a state prosecutor, witness, injured party, a defendant, or their legal representatives. They can also be enforced *ex officio* by the court.<sup>26</sup> The court can also decide to completely withhold the identity of a witness from the defendant and his legal representative under certain strict conditions.<sup>27</sup>

Of relevance in this regard are also provisions on the questioning of a witness by means of videoconference in judicial investigation or also in trial.<sup>28</sup> This covers the Framework Decision's requirement of protection of victims when testifying in a manner that will enable the protection of a victim by any appropriate means compatible with basic legal principles.<sup>29</sup>

The Witness Protection Act is, of course, also relevant. It regulates conditions and procedures for witness protection and for the protection of other persons who are endangered due to their cooperation in criminal proceedings.<sup>30</sup> In this aspect, the Slovenian act is broader than the EU Framework Decision, which regulates only victim protection, whereas the Slovenian act also protects others.<sup>31</sup> The decision to include a person in a witness protection programme or to terminate it is made by the Commission for witness protection upon the proposal of a supreme state prosecutor. The Commission has four members: a Supreme Court judge, a supreme state prosecutor, a representative of the Ministry of Interior, and a representative of the Ministry of Justice. The Act precisely defines measures for witness protection, including psychological, social, and legal assistance, which is emphasised within this framework. This Act ensures stronger protection than that offered by the CPA, which guarantees protection only in judicial investigations and during trial.

The Framework Decision also requires a State to ensure that contact between victims and offenders within court premises be avoided, unless criminal proceedings require such contact.<sup>32</sup> Of special relevance are provisions on the questioning of witnesses in judicial investigations and later during trial, where rules of judicial investigation for the questioning of witnesses are applied.<sup>33</sup> The state prosecutor, the accused, and his defence counsel may usually attend the examination of a witness. The investigating judge, however, may order the accused

to be removed from questioning if a witness is unwilling to testify in the presence of the accused or if circumstances indicate that the witness will fail to tell the truth in the presence of the accused or even in instances where a recognizance will be required after hearing the witness. The accused may not be present during the questioning of witnesses younger than 15 who are victims of any of the crimes referred to in the third paragraph of Art. 65 of the CPA.<sup>34</sup>

### 3. Right to compensation

According to the Framework Decision, a victim also has a right to compensation in the course of criminal proceedings if this is possible within reasonable time. In Slovenian law, this is ensured in many different forms. First, the injured party is already allowed to claim compensation during the criminal proceedings.<sup>35</sup> This is called adhesion procedure.

Claims for compensation arising from the commission of a crime should be dealt with in criminal proceedings upon a motion by rightful claimants, provided that the determination of the claims does not significantly protract the procedure. A claim for compensation may consist of a demand for compensation for damage, the recovery of property, or the cancellation of a legal transaction.<sup>36</sup> Such a motion can be filed by the person entitled to assert such a claim in a civil action.<sup>37</sup> The motion should be filed before the end of the trial at a court of first instance.<sup>38</sup>

The court must examine the circumstances of concern for the determination of the compensation claim. If the inquiry into the compensation claim would cause an undue delay in criminal proceedings, the court limits itself to collecting the data that would be impossible or very difficult to determine at a later stage.<sup>39</sup> The court must decide on this claim in its judgement. It may, in returning a verdict of guilty, grant the compensation claim of the injured party in full or only in part and direct the injured party to sue for the remainder in civil proceedings. If the data collected in criminal proceedings do not provide a reliable basis to award either full or partial compensation, the court instructs the injured party that he may seek full satisfaction in civil proceedings. If the court passes a judgement by which the accused is acquitted of charges or the charges are rejected, or if it renders a ruling by which criminal proceedings are discontinued or the indictment is dismissed, the court instructs the injured party that he may seek to satisfy his compensation claim in a civil action.<sup>40</sup> In most cases, the court advises the victim to start the civil procedure and does not decide on the compensation claim itself, except in simple cases of recovery of property or compensation of damages.

The CPA provisions on compensation mean that the victim claims compensation directly from the defendant. In certain cases, however, the Act on Compensation of Victims of Violent Criminal Acts puts the victim in a better position. It in fact enables him to claim compensation from the State and the State later reclaims the costs from the defendant. In this way, the victim is in a much better position and is able to receive compensation more quickly than by claiming it directly from the defendant. A victim is entitled to compensation under formal and substantive conditions. According to formal conditions, the applicant should be a citizen of Slovenia or another EU State.<sup>41</sup> The substantive conditions are numerous: probable cause that a violent crime has been committed towards the applicant, if the crime in question was committed on the territory of Slovenia (including its ship or aircraft), if relevant authorities have been informed of this incident as being a crime, if no such circumstances exist for the applicant (according to which he would not be entitled to compensation according to the Civil Code<sup>42</sup>), if the applicant suffered bodily harm, damage to health, or psychological pain due to this crime, if the applicant suffered harm (acknowledged by the Act on Compensation of Victims of Violent Criminal Acts and probability that the perpetrator would not be able to compensate the damages<sup>43</sup>). If a crime results in death of a victim, rights to compensation are automatically transferred to the next of kin.<sup>44</sup>

It is assumed that the perpetrator would not be able to compensate the damages if he still remains unknown three months after the notification of a crime to authorities and if it is still unknown at the time of the commission's decision on compensation whether the applicant is a child, a disabled person, a victim of domestic violence, or whether the crime was committed on the territory of Slovenia but the applicant is a citizen of another EU country.<sup>45</sup>

The applicant is obliged to claim compensation in a criminal or civil procedure according to Slovenian law, except in cases in which it can be assumed that the perpetrator is unable to pay. If a victim starts civil or criminal proceedings, he is later still able to claim compensation from the State according to this Act, if the execution in civil or criminal proceedings is not successful.<sup>46</sup> This Act acknowledges compensation for bodily pain or damage to health, psychological pain, the loss of alimony, the costs of medical treatment, funeral costs, costs for damaged medical equipment, and costs for enforcing the compensation.<sup>47</sup> A victim can also file a civil suit separately from criminal proceedings under the Act on Civil Procedure and Civil Code.

Each State should also take appropriate measures to encourage the offender to provide adequate compensation to victims.<sup>48</sup> In my opinion, provisions from the CPA on settlement procedure

and conditional suspension of criminal procedure should be taken into consideration here. Indeed, according to the provision on mediation, the public prosecutor may transfer the report on or the summary indictment for certain crimes into the settlement procedure. Settlement may only be implemented with the consent of the suspect and the injured party. The settlement agent strives to ensure that the contents of the agreement are proportionate to the seriousness and consequences of the crime. Upon receiving notification of the fulfilment of the agreement, the state prosecutor dismisses the report.<sup>49</sup>

Furthermore, the state prosecutor may, upon consent of the injured party, suspend prosecution of certain crimes if the suspect commits himself to acting as instructed by the state prosecutor and to performing certain actions to allay or remove the harmful consequences of the crime. These actions may also be elimination of or compensation for damage, payment of a contribution to a public institution, charity, or fund as compensation for damage to victims of crimes, the performance of community service, or the fulfilment of an alimony obligation.<sup>50</sup> In this way, the perpetrator is encouraged to compensate the damages. A similar approach can be found in the regulation for suspension of sentence.<sup>51</sup> The court can condition the suspension of sentence with the restitution of property gained through commission of the crime, the compensation for damages caused by the crime, or the performance of other obligations prescribed under CC-1.<sup>52</sup> However, the suspension of sentence can be revoked if the perpetrator does not fulfil these obligations.<sup>53</sup>

According to the Framework Decision, a Member State should also return without delay the recoverable property belonging to victims that was seized in the course of criminal proceedings.<sup>54</sup> In Slovenian law on criminal procedure, this measure is defined as a temporary confiscation of objects and later, after conviction, as a safety measure concerning confiscation of property.<sup>55</sup> Consequently, the judge must return the objects after the criminal proceedings are over, unless he has authorisation based on the CPA or the CC-1 to keep them. Therefore, when the perpetrator is convicted, the objects used, intended to be used, or gained through the commission of a crime may be confiscated if they belong to the perpetrator. Such objects can be confiscated even though they do not belong to the perpetrator (and instead to the victim) if this is required for reasons of general security or morality and if the rights of other persons to claim damages from the perpetrator are not thereby affected.<sup>56</sup> However, the CPA states that objects that are pursuant to criminal law may or must be seized and should be seized even when criminal proceedings do not end in a guilty verdict – if there is a danger that they might be used for to commit a crime or where it is required in the interest of public safety or due to moral considerations. A special ruling thereon should be is-

sued by the authority before which the proceedings were conducted at the time they ended or were discontinued.<sup>57</sup> In my opinion, this regulation enables the return of non-dangerous objects to the victim, but not prior to the issue of judgement, if they are needed as a proof.

## II. Conclusion

I believe that the Framework Decision on the Standing of Victims in Criminal Proceedings has been thoroughly implemented into Slovenian law, at least from the core criminal law point of view. Victims have numerous rights and possibilities in criminal procedure – as a victim, as a witness,

and even *moreso* as a (subsidiary or private) prosecutor. Many of these rights were implemented into Slovenian legislation long before the above-mentioned EU Framework Decision was enforced. Due to EU legislation, however, a major amendment of witness protection legislation has taken place, which also includes the protection of victims as witnesses. In particular, witness protection is one of the main areas of Slovenian legislation on criminal procedure where EU legislation has resulted in major amendments (besides extradition, other international cooperation, and joint investigation teams). What remains unfinished, in my opinion, is the definition of a victim, but not from the perspective of EU legislation, since EU legislation is even narrower than Slovenian law in this respect.



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- 1 Official Gazette of Republic of Slovenia, 63/1994 ff.
- 2 Official Gazette of Republic of Slovenia, 63/1994 ff.
- 3 Official Gazette of Republic of Slovenia, 133/2005 ff.
- 4 Official Gazette of Republic of Slovenia, 101/2005 ff.
- 5 Art. 1, par. a of Framework Decision.
- 6 Art. 144 CPA.
- 7 According to the CC-1, certain crimes can only be prosecuted by the victim himself (private prosecutor). However, the victim can step in as a prosecutor, even with the prosecution of other crimes, when the state prosecutor decides that he would not start or continue with the prosecution himself (the subsidiary prosecutor). In most cases the state prosecutor, as a representative of the State, prosecutes crimes.
- 8 For example, certain crimes against honour and reputation.
- 9 See Art. 60 CPA.
- 10 Art. 2, par. 1 and Art. 2, par. 2 of Framework Decision.
- 11 Art. 90, par. 3 CC-1.
- 12 Art. 97, par. I CPA.
- 13 Ibid., Art. 65.
- 14 Ibid., Art. 240, par. 4.
- 15 Ibid., Arts. 331 and 338.
- 16 Ibid., Art. 59.
- 17 Ibid., Art. 178.
- 18 Ibid., Arts. 177 and 178.
- 19 Art. 4 of Framework Decision.
- 20 Art. 59, par. 4 CPA.
- 21 Ibid., Art. 241, par. 4.
- 22 Arts. 25 and 26 of the Act on Compensation of Victims of Violent Criminal Acts.
- 23 Art. 25 of Act on Free Legal Aid.

24 Arts. 295 and 296 CPA.

25 Ibid., Art. 240a, par. 1.

26 Ibid., Art. 240a, par. 2.

27 Ibid., Art. 240a, par. 4.

28 Ibid., Art. 244a.

29 Art. 4 of Framework Decision.

30 According to the introductory articles of the Framework Decision, the witness should be assisted not only during criminal proceedings, but also before and after.

31 Art. 4 of the Witness Protection Act: "The Act is also used for suspects and accused persons, whose punishment can be mitigated and who are endangered because they prevented crime or revealed information, relevant for investigation and prosecution of the committed acts. The act is used also for persons who are endangered because of their relation to suspects and accused persons."

32 Art. 8 of Framework Decision.

33 Art. 331, par. 1 CPA.

34 Ibid., Art. 178, par. 4.

35 Ibid., Art. 100.

36 Ibid., Art. 100.

37 Ibid., Art. 101.

38 Ibid., Art. 102, par. 2.

39 Ibid., Art. 104.

40 Ibid., Art. 105.

41 Art. 5 of the Act on Compensation of Victims of Violent Criminal Acts.

42 Official Gazette of Republic of Slovenia, 83/2001, ff.

43 Art. 6, par. 1 of the Act on Compensation of Victims of Violent Criminal Acts.

44 Ibid., Art. 6, par. 2.

45 Ibid., Art. 7.

46 Ibid., Art. 7a.

47 Ibid., Art. 8.

48 Ibid., Art. 9, par. 2.

49 Art. 161a CPA.

50 Ibid., Art. 162.

51 Art. 57 CC-1.

52 Ibid., Art. 57, par. 3.

53 Ibid., Art. 61.

54 Art. 9, par. 3 of Framework Decision.

55 Art. 69 of CC-1.

56 Ibid., Art. 73.

57 Art. 498 CPA.

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