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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



## **Focus: Judicial Control in the EU**

**Dossier particulier: Contrôle judiciaire en l'UE**

**Schwerpunktthema: Justizielle Kontrolle in der EU**

Guest Editorial

Prof. Dr. *John Vervaele*

Judicial Control of the Prosecutors' Activities in the Light of the ECHR

Dr. *Celina Nowak*

Extradition and the European Arrest Warrant in the Netherlands

mr. dr. *Jaap van der Hulst*

Great Expectations from the Court of Justice

Dr. *Els De Busser*

The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations' presidents are organised to achieve this aim.

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\* 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/euocrim/search.php](http://www.mpicc.de/euocrim/search.php) and then entering the ID-number of the link in the search form.

# Guest Editorial

Dear Readers,

The enforcement of EU law is traditionally based on indirect enforcement; this means that, for the achievement of policy goals, the EU relies on the institutional and procedural design in the jurisdictions of the Member States. This traditional approach has mainly been interpreted as procedural autonomy of the Member States. Those who read this procedural autonomy as a part of the national order that is reserved to the sovereignty of the nation states are on the wrong track. In fact, from the very beginning, the European Court of Justice has made clear that this procedural autonomy of the Member States is conditional upon the dual requirement of equivalence and effectiveness.<sup>1</sup>

This dual requirement applies in all areas of national procedure, including criminal procedure, when the criminal procedure deals with the enforcement of EU policies and EU laws. The requirement also applies when there are no relevant Union provisions on the subject, in our case on the specific enforcement design. It can be considered to be the minimum threshold, and some scholars deny even the existence of the autonomy as such.<sup>2</sup> Moreover, equivalence and effectiveness can affect enforcement obligations and rights and remedies in the enforcement area. This means that it can affect the right to an effective remedy for suspects, victims, and third parties as well as related legal guarantees and human rights under the ECHR and the EU Charter of Fundamental Rights (EUCFR).

The ECJ has been respectful of the Member States' autonomy when it comes to the choice of enforcement regime (civil, administrative, penal), but it has imposed in its case law on equal treatment and on the protection of the EU's financial interests, for instance, quality standards for the law in the books and the law in action: the national enforcement regimes may not discriminate between similar national and EU interests and must be deterrent, effective, and proportionate. This might result in indirect harmonization of national criminal law and criminal procedure in order to meet the required standards. A Member State might be obliged to opt for criminal enforcement in order to meet the standards in its jurisdiction. These obligations are not limited to substantive criminal law but also include criminal procedure and judicial control in the criminal procedure when it comes to ex-ante authorization of judicial investigations of ex-post judicial remedies.

Direct harmonization of national criminal procedure is a very recent feature. The gradual replacement of Mutual Legal Assistance (MLA) by new EU instruments based on Mutual Recognition (MR) has substantially affected national criminal procedure, especially when one compares the way in which judges were involved in decisions concerning incoming and outgoing MLA requests to the MR design. The rich debate found in scholarly work and in case law on the European Arrest Warrant shows to which extent this instrument has affected effectiveness, legal safeguards, constitutional standards, and human rights standards of national criminal procedure. The simple fact that the role of judges in the executing state has been limited to a formal test of the requirements and that the remedies must be used exclusively in the jurisdiction of the ordering judicial authority has completely reshuffled the judicial control of MR in the European legal order. Mutual recognition based on mutual trust, relying semi-blindly on the equivalence of Member States' criminal procedural regimes, has not always strengthened previously built-up trust and sometimes even weakened it. The disproportional use of the EAW by the judicial authorities of some Member States (for de facto petty offences or for gathering evidence) has also resulted in further distrust. This is the reason why the Union has tried to rebalance the effectiveness and the fairness of the MR regime, by attempting to impose the harmonization of certain legal guarantees in the Member States' criminal procedure. The first draft for a framework decision in this sense<sup>3</sup> had, however, resulted in a political compromise that could not meet the minimum standards of the European Courts of Human Rights case law.

Thanks to the draft EU Constitutional Treaty and the Lisbon Treaty (Art. 82 TFEU), there is now a specific legal basis for harmonization of criminal procedure. Although the necessity is linked to MR, this does not mean that the harmonization is limited solely to MR cases. In the meantime, different direc-



John Vervaele

tives on legal guarantees in criminal proceedings have come into force, dealing with the rights of suspects as well as the rights and protection of victims. The negotiations have not always been very easy, for instance concerning the right to have a lawyer present and to assist during the first police interrogation of a suspect. The implementation in some Member States will also be complex. This shows that the previously established trust on compliance with minimum standards of the ECHR was far from realistic in practice. Although the EU is developing with new directives in the field (e.g., on the presumption of innocence and the right to remain silent<sup>4</sup>), as it stands, it is clear that the EU will not come up with proposals dealing with the gathering of evidence (harmonization of investigative measures) and dealing with judicial control thereof (ex-ante/ex-post). It is also doubtful whether and to which extent there is a legal basis for it under Art. 82 TFEU. However, the admissibility of evidence in criminal matters and the issue of conflicts of jurisdiction, which are explicitly mentioned in Art. 82 TFEU, are different. Both are matters that substantially affect the role and function of judicial control in criminal matters. As it stands, the EU has given no indication of upcoming proposals related to these two topics.

The impact on criminal procedure through EU law is, however, not limited to (in)direct harmonization of criminal procedure and MLA/MR. Since the Treaty of Maastricht, the EU has been setting up enforcement agencies, which are increasingly becoming supranational EU enforcement agencies: Europol, Eurojust, etc. Other agencies, like OLAF, are active in the administrative enforcement field, but are de facto and de iure gathering evidence that is for criminal enforcement; this means that a lot of OLAF evidence also ends up in national criminal proceedings. In July 2013, the EU submitted a Reform Proposal for Eurojust and a Proposal for the setting up of a European Public Prosecutor's Office (EPPO). Although the powers of Europol remain limited to the building up and analysis of information positions and to participation in joint investigation teams, it is clear that some of its activities might affect data protection and personal dignity. The question can be raised as to whether data protection boards are sufficient and whether or not, under specific circumstances, judicial con-

trol would not be a better option to guarantee the rule of law. The same can be said for the proposed Eurojust reform proposal. From the moment Eurojust were to receive operational powers, be it at the central level or through its national members, acting as Eurojust, questions arise on (1) which powers Eurojust would need an a priori authorization for and by whom (type of court, national or European?) and (2) against which decision are there remedies available (type of court, national or European?). The issue becomes crystal clear in the EPPO proposal. Both the authorization of coercive measures (ex-ante) and remedies against certain judicial decisions, including the choice of jurisdiction, are at the hard core of the debate on the EPPO. A choice for judicial control in the Member States' national regimes (the option of the proposal) will certainly give rise to shortcomings in the appropriate protection of citizens' rights, as can be evidenced in the fragmentation of the national provisions. The risk of forum shopping and forum competition is also prevalent. A choice for judicial control at the European level is, however, not fully provided for by the Lisbon Treaties. The question thus emerges as to how the requirements of equivalence and effectiveness can be applied in relation to judicial control and the right to an effective remedy in an integrated legal order, which is composed of EU law, ECHR law, and national law – thus, by definition, a multi-level jurisdictional system in the EU.<sup>5</sup>

This issue of eucrim approaches the topic of judicial control from the three above-mentioned perspectives: direct enforcement by the EU (EPPO), horizontal mutual recognition, and national application and enforcement of EU rights (data protection and data retention). The three perspectives are part of the composite integrated legal order of the EU. Whatever the composition is, it is clear that judicial control has a substantial function related to the rule of law as well as the effective right to a remedy, most certainly in punitive proceedings.

Prof. Dr. John Vervaele

President AIDP-IAPL

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1 Case 33/76, *Rewe-Zentralfinanz EG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976]

ECR 1989, para. 5

2 For further reading, see M. Bobek, Why there is no principle of "procedural autonomy" of the Member States, in: Bruno de Witte and Hans Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States*, Antwerp, Intersentia 2011

3 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM/2004/0328 final

4 Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821 final

5 For further reading, see A. Meij, Some explorations into the EPPO's administrative structure and judicial review, in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* The Hague, T.M.C. Asser Press 2014 (forthcoming), Chapter 7 and K. Ligeti, *Toward a Prosecutor for the European Union* Volume, Hart, Vol. II, 2014.



## European Union\*

Reported by Dr. Els De Busser, Cornelia Riehle and Alexia Machado Faria

### Foundations

#### The Stockholm Programme

##### New JHA Guidelines to Follow Up the Stockholm Programme

On 5-6 June 2014, the JHA Council held a final debate on the future development of the area of freedom, security and justice. This debate provided input for the Council in drawing up the strategic guidelines for legislative and operational planning in this field. In chapter I of the conclusions presented on 26-27 June 2014, the Council lists the policy measures that need to be taken to further build an area of freedom, security and justice without internal frontiers and with full respect for fundamental rights.

The Council states that building on the past programmes, the overall priority is to consistently transpose, effectively implement, and consolidate the legal instruments and policy measures already in place. Further, it is deemed crucial to ensure the protection and pro-

motion of fundamental rights, including data protection, whilst addressing security concerns, also in relations with third countries, and to adopt a strong EU General Data Protection framework by 2015. Genuine security should be ensured by operational police cooperation and by preventing and combating serious and organised crime, including human trafficking and smuggling as well as corruption. Additionally, an effective EU counter-terrorism policy is needed, whereby all relevant actors work closely together, integrating the internal and external aspects of the fight against terrorism. In this respect, the role of the EU counter-terrorism coordinator has been reaffirmed, and the coordination role for Eurojust and Europol should be reinforced.

Other priorities include:

- Fighting fraudulent behaviour and damages to the EU budget, including the advancement of negotiations on the European Public Prosecutor's Office;
- Building an efficient and well-managed migration, asylum, and borders policy, guided by the Treaty principles of solidarity and fair sharing of responsibility;

- Fully transposing and effectively implementing the Common European Asylum System (CEAS).

The Council appeals to the EU institutions and the Member States to ensure the appropriate legislative and operational follow-up to these guidelines. A mid-term review is planned in 2017. (EDB)

► eucrim ID=1402001

### Enlargement of the European Union

#### Further Progress Needed in Albania and Bosnia and Herzegovina

On 12 May 2014, the Stabilisation and Association Council between Albania and the EU held its sixth meeting. The Council highlighted the importance of further concrete results under the key priorities identified for the opening of accession negotiations, with particular attention to the rule of law, including the reform of the judiciary and the fight against corruption and organised crime. An independent, impartial, transparent, efficient, and accountable judiciary is deemed a key element towards ensuring respect for the rule of law. Albania has ratified a number of international conventions in the field of human rights. The Council thus encouraged further efforts to reinforce the protection of human rights and anti-discrimination policies, including in the area of minorities.

In its conclusions of 14 April 2014, the Foreign Affairs Council expressed concern that progress by Bosnia and Herzegovina towards EU accession has stalled. Immediate legislative initiatives are needed with regard to strengthening the rule of law, anti-corruption, financial

\* If not stated otherwise, the news reported in the following sections cover the period April–August 2014.

accountability measures, and the protection of human rights. Implementation of the Sejdic-Finci judgment of the ECtHR also remains to be addressed. (EDB)

►eucrim ID=1402002

## Legislation

### Commission Publishes 4th Report on EU Charter Application

On 14 April 2014, the Commission presented its 4th Report on the Application of the EU Charter of Fundamental Rights, showing that the importance of the Charter continues to increase.

Besides the ECJ increasingly referring to the Charter in its rulings, the Commission also makes an effort to make every legislative proposal “fundamental-rights proof” and to defend the rights laid down in the Charter.

The report also gives examples of cases in which fundamental rights played a role in infringement proceedings launched by the Commission against Member States. (EDB)

►eucrim ID=1402003

## Institutions

### Court of Auditors Wants to Improve Institutional Relations

On 5 May 2014, the Court of Auditors appointed Finnish Member Mr. Ville Itälä to the new position of Member responsible for institutional relations. The Court took this step in line with its 2013-2017 Strategy. It aims to strengthen partnerships with some of its key stakeholders, such as the various specialised EP committees and the Council. (EDB)

►eucrim ID=1402004

## OLAF

### OLAF Annual Report 2013 Published

On 29 April 2014, OLAF presented its Annual Report for 2013 showing excellent results. At 1294 items, the amount of information received from citizens and institutions was higher than ever before. Despite this increase, OLAF managed to reduce the duration of the selection phase (whether to pursue a case or

not) by over 70% over the last two years.

In the course of 2013, 253 investigations were opened and 293 were completed. The latter is also the largest number ever achieved. Since 2009, the duration of an investigation decreased to 21.8 months on average, showing OLAF’s improved efficiency in conducting investigations.

No less than 353 recommendations for financial, judicial, administrative, or disciplinary action on a national level were made in 2013, and € 402.8 million was recovered.

For OLAF, 2013 was also marked by its assistance to the Commission in the development of anti-fraud policies and legislation, including substantial technical input for the legislative proposal on the establishment of an EPPO in July.

A brief outlook on the future in the last chapter of the annual report highlights the dialogue with other EU institutions and the continuing legislative process regarding the establishment of the EPPO, including the special relationship between OLAF and the EPPO. (EDB)

►eucrim ID=1402005

## Annual Conference on EU Criminal Justice 2014

*Looking Beyond the Stockholm Programme...*

ERA, Trier, 16-17 October, 2014

With the Stockholm Programme drawing to a close in 2014, the European Council will set up “strategic guidelines” to provide orientation and define objectives for EU criminal justice (Art. 68 of the Treaty on the Functioning of the European Union). At this conference, high-ranking representatives from EU Institutions, stakeholders, and academics will discuss these guidelines and debate key priorities for legislative and operational planning within the Area of Freedom, Security and Justice for the years 2015–2020.

Key topics are:

- Updating current and forthcoming developments (including the post-2014 perspective for the Court of Justice of the EU in criminal justice);
- The way ahead for the rights of the defence;
- Reinforcing Eurojust and creating the European Public Prosecutor’s Office (EPPO);
- New horizons for EU criminal justice in 2015-2020: looking beyond the Stockholm Programme.

Who should attend? Judges, prosecutors, lawyers in private practice, civil servants, and policymakers active in the field of EU criminal law.

The conference will be held in English.

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

### Proposed Regulation on Controller of Procedural Guarantees

On 11 June 2014, the Commission presented a new proposal amending Regulation No. 883/2013 on investigations by OLAF. This proposal aims to strengthen the procedural guarantees in place for all persons under investigation by OLAF. The special way in which members of EU institutions were elected or appointed is considered. Their special responsibilities, which may justify specific provisions aimed at ensuring the proper functioning of the institutions to which they belong, are also taken into account.

For these reasons, a controller of procedural guarantees should be established. This controller would be responsible for reviewing complaints lodged by persons under investigation by OLAF with regard to their procedural guarantees. He or she would also have the competence to authorize OLAF to



conduct certain investigative measures with respect to members of EU institutions. (EDB)

► eucrim ID=1402006

### Large Cigarette Seizure in Greece Based on OLAF Information

After receiving information from OLAF, the Financial and Economic Crime Unit (SDOE), together with the customs authorities of Greece, succeeded in seizing nine million contraband cigarettes on 6 May 2014. Unpaid duties and taxes in this case amount to nearly € 1.6 million.

Two other similar cases and seizures carried out in March 2014 by OLAF and the Greek authorities, bringing the total in prevented loss to more than € 8 million. (EDB)

► eucrim ID=1402007

## Europol

### New Europol Regulation – State of Play

On 19 March 2014, during a debate with national parliamentarians and MEPs in the context of current negotiations on the future of Europol and the proposed new Europol regulation (see eucrim 2/2013, pp. 36-37), Director of Europol, Rob Wainwright, called for “a fair deal from legislators in giving national and international police authorities the right tools to confront dangerous new forms of organised crime appearing online.” According to Mr. Wainwright, the police today risks falling behind in its capability to keep pace with significant new criminal phenomena because it has not been given the same powers in the virtual world as it has in the real world.

On 28 May 2014, a general approach was reached on the proposed Europol regulation. This proposal is aimed at “lisbonising” the existing Europol Decision. It includes provisions on parliamentary oversight and adapts Europol’s external relations to the new Treaty rules. Further, the proposal introduces the European Data Protection Supervi-

sor as the data protection supervisory body for Europol and provides Europol with a flexible and modern data management regime aligning Europol’s governance with the general guidelines applicable to agencies.

This text is the basis on which negotiations with the EP will be held in order to agree on a final text. (CR)

► eucrim ID=1402008

### Warning about New Synthetic Drugs

On 7 March 2014, Europol and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) issued early-warning notifications about two synthetic drugs, namely 4,4’-DMAR as well as ecstasy tablets with high levels of MDMA, which have recently been linked to serious harm in the EU.

4,4’-DMAR is associated with 18 deaths in the United Kingdom and eight in Hungary in 2013. It is currently not controlled by drug legislation in EU Member States.

The new ecstasy tablets contain between 150 and 200 mg of MDMA as opposed to the typical amount of 60 and 100 mg of MDMA. Deaths in the Netherlands and the UK have already been associated with these tablets. (CR)

► eucrim ID=1402009

### Cooperation with AMERIPOL

On 21 March 2014, the President of AMERIPOL (the Police Community of the Americas), Juan José Andrade Morales, visited Europol to enhance their relationship through several measures:

- Capacity-building in the American countries to mitigate security threats to/originating from the region;
- Fostering cooperation among the American countries as well as with European/Schengen countries in the area of internal security;
- Supporting capacity building for cooperation and information exchange among the law enforcement authorities of the AMERIPOL countries and the European/Schengen countries. (CR)

► eucrim ID=1402010

### EU Conference on ATM Physical Attacks

On 7-8 April 2014, the first EU Conference on ATM Physical Attacks took place at Europol’s headquarters in The Hague. The conference focused on the use of explosives and explosive mixtures to attack ATM machines. The conference brought together over 100 specialists, including bomb technicians, police investigators, banking security experts, and representatives from security companies. An overview of the modus operandi used by criminals in the EU and worldwide, ongoing initiatives to defeat this phenomenon, and counter measures available to reduce the likelihood and impact of such attacks were the main elements of the agenda. (CR)

► eucrim ID=1402011

### Cooperation with the US Navy and Marine Corps

On 3 April 2014, the U.S. Secretary of Navy (SECNAV) responsible for US Navy and Marine Corps, Mr. Ray Mabus, and Europol Director Rob Wainwright met at Europol to exchange their views on the threats posed by maritime piracy to the global economy. They also discussed the need to adopt a cohesive strategy grounded on a close collaboration between the military and law enforcement. Seeing maritime piracy, in particular in the Gulf of Aden and off the Somali Coast, linked to internationally organised crime networks, Secretary Mabus and Director Wainwright agreed on the need to enhance the operational coordination between tactical maritime forces in charge of deterring piracy acts and those in charge of criminal investigations and prosecutions. Furthermore, they discussed the productive cooperation between Europol and the NCIS on countering narcotics trafficking.

Via its member countries, Europol works closely with the Naval Criminal Investigative Service of the U.S. Navy (NCIS) as well as with INTERPOL and the EU NAVFOR maritime mission. By sharing criminal intelligence, Europol

contributes to the identification and disruption of criminal enterprises associated with maritime piracy. (CR)

► [eucrim ID=1402012](#)

### **Europol Director Visits Washington D.C.**

From 29 April to 1 May 2014, Europol Director, Rob Wainwright, visited Washington D.C. to meet with senior law enforcement and government officials.

During the visit, Director Wainwright met with Secretary of Homeland Security Jeh Johnson, Deputy Attorney General James Cole, FBI Director James Comey, US Secret Service (USSS) Director Julia Pierson, and Senior Advisor to the DHS Secretary, John Cohen. The visit also included a meeting at the White House with President Obama's Senior Advisor, Rand Beers and with Michael Daniel, Special Assistant to the President and Cybersecurity Coordinator.

Points of discussion included the threat posed by foreign fighters travelling to Syria and the growing threat of cybercrime. Wainwright discussed the potential participation of cyber investigators from the FBI, the USSS, and from United States Immigration and Customs Enforcement (ICE) in the new Joint Cybercrime Action Taskforce (J-CAT). The J-CAT was established by Europol's EC3 and will focus on cross-border cybercrime investigations against botnets, banking Trojans, and underground marketplaces. (CR)

► [eucrim ID=1402013](#)

## **Eurojust**

### **EDPS Opinion on Proposed Eurojust Regulation Published**

On 5 March 2014, the EDPS published its opinion on the package of legislative measures reforming Eurojust and setting up the European Public Prosecutor's Office (see [eucrim 2/2013](#), pp. 41-42), focusing on the most relevant changes to data protection.

In general, the EDPS welcomes the provisions for data protection in the pro-

posals and supports the choice to use Regulation (EC) No 45/2001 as a point of reference. In his opinion, this provides for a consistent and homogeneous application of the data protection rules to all EU bodies whilst taking into account the specificities of police and judicial cooperation in criminal law.

Regarding supervision, the EDPS underlines the importance of having an independent supervisory authority of the EU and consequently welcomes the proposal that he should carry out this role, subject to review by the ECJ. To also guarantee supervision at the national level, national data protection authorities should be actively involved and cooperate closely with the EDPS.

Furthermore, the EDPS' opinion sets out a number of recommendations to further improve the provisions. (CR)

► [eucrim ID=1402014](#)

### **JIT on Boiler Room Fraud**

Between December 2012 and March 2014, a Joint Investigation Team (JIT RICO) involving national authorities in Spain, the UK, and Romania, as well as several agencies (e.g. the City of London Police, the Crown Prosecution Service of England and Wales, the Spanish National Police, the Spanish National Court and the Prosecution Office of the National Court, and the Romanian Directorate for Investigating Organised Crime and Terrorism as well as Eurojust) was conducted. It tackled boiler room fraud causing an estimated 1000 investors to lose millions of pounds after having been targeted over the telephone by unscrupulous investment fraudsters selling bogus shares in carbon credits, gold, renewable energy, forestry, eco projects, wine, and land. JIT RICO resulted in the closure of 17 boiler rooms, 110 arrests, and the seizure of luxury automobiles, designer clothing, watches, and £ 500.000 in cash.

JIT RICO received financial support from Eurojust for travel, accommodation, interpretation, and translation. (CR)

► [eucrim ID=1402015](#)

### **Eurojust Annual Report 2013 Published**

On 4 April 2014, Eurojust published its 2013 Annual Report. The report presents Eurojust's mission and vision; its administration, tasks, and the competences of its national desks, College, and Liaison Prosecutors; and its cooperation with other networks, organisations, and third States. Furthermore, it presents its work in coordination meetings, coordination centres, and JITS as well as its information exchange and operational work. The 2013 focus of the report is focused on the evaluation of JITS. The report's annex includes Eurojust's case statistics, the number of requests for public access to Eurojust's documents, and the follow-up to Council conclusions.

Compared to 2012, the number of cases dealt with at Eurojust increased by 2.8%, from 1533 cases to 1576 cases in 2013. Furthermore, Eurojust's involvement in the setting up of JITS rose to 102, with 42 new JITS and 60 JITS from previous years. Eurojust provided financial support to 34 JITS. According to the report, problems encountered with the use of JITS include, for instance, different formal requirements for the signing of a JIT agreement, different rules on the gathering and admissibility of evidence, and conflicts of jurisdiction. The year 2013 also saw the implementation of a project on JIT evaluation. The evaluation aims to assist practitioners in evaluating the performance of the JIT in terms of results achieved and in enhancing the JIT's knowledge by facilitating the identification of the main legal and practical challenges experienced and solutions found.

In 2013, the use of the coordination meeting tool increased slightly, with 206 meetings held in 2013 compared to 194 in 2012, mainly targeting (mobile) organised criminal groups, swindling and fraud, drug trafficking, money laundering, and trafficking in human beings (THB). The number of coordination centres used remained constant at seven centres in 2013. Types of crime investigated included illegal immigration,



drug trafficking and THB, motor vehicle crime, counterfeit goods, money laundering, and fraud.

217 cases concerning the execution of EAWs were registered at Eurojust compared to 259 in 2012. The greatest number of requests for help in relation to the execution of an EAW was made by the Polish desk, followed by the Austrian, Belgian, and Bulgarian desks. The largest number of requests for the execution of EAWs was received by the Italian desk, followed by the Spanish and UK desks.

Looking at Eurojust's activities in crime priority areas, the report states that the number of terrorism cases registered dropped to 17 compared to 32 cases in 2012. A tactical meeting on Kurdistan Workers' Party (PKK) terrorism was held on 31 January 2013. Strategic and tactical meetings on terrorism addressing the added value of Council Framework Decision 2008/919/JHA as well as the topic of fighters travelling to Syria were held in June 2013. Eurojust also conducted feasibility studies in light of its potential association with two Focal Points within Europol's Analytical Work File on counter-terrorism.

In the field of drug trafficking, the numbers of cases and coordination meetings in 2013 decreased to 239 cases and 56 coordination meetings, while the number of JITs doubled to 26 compared to 2012. Furthermore, Eurojust contributed to all projects of the European Multidisciplinary Platform against Criminal Threats (EMPACT) concerning drug trafficking. Negotiations for a Memorandum of Understanding between Eurojust and the EMCDDA also continued in 2013.

Regarding illegal migration, in 2013, the numbers of cases and coordination meetings decreased to 25 cases and 5 coordination meetings, while the number of JITs rose to 7 compared to 2012.

For trafficking in human beings, the number of registered cases increased to 84 compared to 60 in 2012. The number of JITs more than doubled from 6 to 15.

The number of registered fraud cases

increased considerably to 449 cases in 2013, but cases of corruption, money laundering, and crimes affecting the EU's financial interests registered at Eurojust also increased compared to the previous year.

Notably, the number of cybercrime cases dropped from 42 in 2012 to 29 cases in 2013. However, the number of coordination meetings and JITs increased from 5 meetings in 2012 to 10 in 2013 and from 2 JITs in 2012 to 9 in 2013.

In 2013, Eurojust appointed a National Member to the Programme Board and temporarily assigned a staff member to Europol's EC3.

The number of cases registered in the field of (mobile) organised criminal groups increased from 231 in 2012 to 257 in 2013, while the number of registered cases concerning environmental crime remained low but nevertheless increased from 3 in 2012 to 8 cases in 2013. The cases were registered by Bulgaria, Hungary, the Netherlands, Portugal, Sweden, and Slovenia.

In 2013, the assistance of third States requested by Eurojust was required on 249 occasions, mostly concerning Switzerland, Norway, the USA, Croatia, Serbia, and Turkey. Georgia and Taiwan were added to Eurojust's network of contact points in third States.

Looking at Eurojust's institutional relations and relations with other agencies, a Memorandum of Understanding was signed with Interpol in July 2013 and with Frontex in December 2013. On 7 June 2013, a cooperation agreement was signed with the Principality of Liechtenstein. Europol participated in 53 cases and 75 coordination meetings in 2013. Furthermore, Eurojust and OLAF worked jointly on four cases in 2013.

Regarding Eurojust's future, on 17 July 2013, the commission published proposals for a Eurojust regulation and on the establishment of an EPPO. In order to discuss the proposals with practitioners, national representatives of the Member States, representatives of EU institutions, and academics, a ma-

major seminar was held in The Hague on 14 and 15 October 2013. (CR)

► [eucrim ID=1402016](#)

### Governance and Data Protection under the New Eurojust Regulation

In the context of the current negotiations regarding the proposed new Regulation on Eurojust (see [eucrim 2/2013](#), pp. 41-42), the Greek Presidency, on 16 April 2014, opened a strategic discussion on the rules regulating the structure and governance of Eurojust and its data protection system.

With regard to Eurojust's governance, the Presidency invites CATS to consider Eurojust's suggestion and – unlike the Commission's proposal – to institutionalise the existing working practices at Eurojust, such as the Presidency Team. Alternatively, a model bridging the gap between the Commission's proposal and other views that were expressed could be developed. A third solution would be to adopt a model similar to that of Europol, i.e., with an Executive Director and external management board comprised of representatives from each Member State, taking into account the existing Collegial model at Eurojust.

Looking at data protection rules, the Presidency asked CATS to consider whether Regulation (EC) No. 45/2001 should apply to operational personal data processed by Eurojust. If the request is denied, the Presidency asks whether a complete set of data protection rules should be introduced into the draft Eurojust Regulation in order to take account of the specificity of Eurojust's mission. With regard to the proposed new model of supervision, i.e., responsibility of the European Data Protection Supervisor (EDPS) for the monitoring of all personal data processing, the Presidency invites CATS to consider whether this model could be made more appropriate for Eurojust. According to the Presidency, the regulation could, for instance, introduce an improved cooperation mechanism between the EDPS and national supervisory authorities,

drawing inspiration from the latest draft of the Europol Regulation. (CR)

►eucrim ID=1402017

### National Member for Bulgaria Appointed

On 16 April 2014, Mr. Kamen Mihov was appointed National Member for Bulgaria at Eurojust.

Before joining Eurojust, Mr. Mihov was the Head of the International Department at the Supreme Cassation Prosecutor's Office of Bulgaria.

In addition to his position as National Member for Bulgaria at Eurojust, Mr. Mihov is currently the Deputy Prosecutor General of Bulgaria to the Supreme Administrative Prosecutor's Office. Furthermore, he is the contact point for Bulgaria at the European Judicial Network. (CR)

►eucrim ID=1402018

### New Liaison Officer for the USA Appointed

Michael C. Olmsted was appointed Liaison Prosecutor for the USA at Eurojust on 24 February 2014.

Before joining Eurojust, Mr. Olmsted was Senior Counsel for the EU and International Criminal Matters at the United States Mission to the EU. His previous career milestones included positions as Special Representative to the United Nations, Director at Interpol, and Assistant US Attorney in New York. He is an expert in the investigation of complex white collar and corruption cases with an international focus as well as on national security and terrorism matters.

The former Liaison Prosecutor for the USA at Eurojust, Stewart Robinson, returned to Washington at the end of 2013. (CR)

►eucrim ID=1402019

## Frontex

### Annual Risk Analysis Published

On 14 May 2014, Frontex published its Annual Risk Analysis (ARA) for the year 2013. The report presents the latest

situation before the external borders, at the external borders, and after the external borders of the EU.

Regarding the situation before the border was established, the report only offers data for short-term uniform visas issued in 2012. At 14,250,595 visas, the number was 13% higher than in 2011. According to the ARA, 59% of these visas were issued in the Russian Federation, the Ukraine, and China.

Looking at the situation at the border, Eurostat counted 460 million intra-EU arrivals and 125 million extra-EU arrivals. Furthermore, it is assumed that more passengers crossed the land border than the air border. Refusals of entry at the external EU borders rose to 128,902 - an increase of 11% compared to 2012. Migrants using document fraud to illegally enter the EU were detected 9800 times. The report observes that the use of fraudulent (instead of forged) documents has become the modus operandi. Consequently, also the detection of fraudulently obtained passports doubled in 2013 compared to 2012. Illegal border-crossing at the EU's external borders in 2013 increased by 48% to 107,000 detections compared to the previous year. In 2013, especially the number of Syrians trying to illegally cross the border rose considerably. Furthermore, there was a steady flow of migrants departing from North Africa via the Mediterranean Sea as well as a sharp increase in illegal border-crossings at the Hungarian land border with Serbia. 52% of all people detected were Syrians, Eritreans, Afghans, and Albanians. However, the report also notes that detections on the Eastern Mediterranean route were at the lowest level reported since 2009. Nevertheless, the route accounted for nearly a quarter of all detections of illegal border-crossings into the EU. Detections in the Central Mediterranean area increased to a total of 40,304 cases over the year 2013. A strong increase in detections was also noted on the Western Balkan route at 19,500 detections in 2013 compared to 6400 in 2012. Detections in the

Western Mediterranean area and on the Western African route remained stable at 6800 detections and 300 cases in 2013. Finally, at 1300 cases in 2013, detections at the Eastern land border remained at a relatively low level.

Looking at the situation after establishment of the border, the report finds 345,000 detections of illegal stays in the EU in 2013, which is in line with the trend of the past five years. However, the number of asylum applications submitted in the EU continued to increase at 353,991 applications in 2013. Syrians formed the most frequent nationality to submit applications, two thirds of them submitted in Sweden, Germany, and Bulgaria. Detections of facilitators decreased by 11%, which can be explained by the shift towards the abuse of legal channels and using document fraud to enter the EU that allows facilitators to operate remotely and inconspicuously. About 159,000 third-country nationals were ultimately returned to third countries, continuing the trend of the past years.

Looking at the future, the report sees an increased workload for border control authorities as of October 2014, when all Schengen Member States will be required to be able to carry out VIS fingerprint verifications at all border-crossing points and also to issue VIS visas with biometrics at the border when necessary. Furthermore, the report anticipates an increased number of illegal border-crossings and migrants in the southern section of the external border, on the Eastern Mediterranean and the Central Mediterranean routes. Furthermore, the ARA fears a continued use of document fraud, shifting from passports to ID cards and residence permits as well as an increased abuse of legal channels. (CR)

►eucrim ID=1402020

### Regulation on External Sea Border Surveillance Adopted

After its approval by the European Parliament on 16 April 2014, the Council, on 13 May 2014, adopted a Regulation

establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (see eucrim 1/2014, pp. 8-9). The regulation applies to border surveillance operations carried out by Member States at their sea external borders.

The regulation will enter into force on the twentieth day following its publication in the Official Journal. (CR)

►eucrim ID=1402021

## Agency for Fundamental Rights (FRA)

### FRA Cooperation with Council of Europe

A meeting between FRA Director Morten Kjaerum, the senior FRA staff, and more than 15 Council of Europe Permanent Representatives took place on 5 May 2014. They convened with the aim of exchanging views on recent FRA activities, achievements, and cooperation with the Council of Europe. Important discussions were held in regard to the guarantee of fundamental rights in the EU.

Issues, such as the way in which the FRA survey on violence against woman could be used in the context of the ratification of the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which entered into force on 1 August 2014, were closely examined. Additionally the challenges faced by European countries pertaining to the spread of hate crime, racism, xenophobia, and extremism were considered. Due to the publication of the recent report by the CoE Secretary General on the state of democracy, human rights, and the rule of law in Europe, the rising threats against lesbian, gay, bisexual, and transgender and Roma communities were also broadly debated.

The meeting's conclusions were directed towards the need to further increase exchange output and expertise, especially FRA's methodologies, so that fundamental rights guarantees in the EU

can be improved. In this regard, the FRA Director informed participants about how the agency is intensifying its work on the development of fundamental rights indicators.

The bilateral meeting took place at FRA's offices and its discussions meet the EU priorities for cooperation with the CoE in 2014-2015, whose program was launched on November 2013. (AF)

►eucrim ID=1402022

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Directive on Protection of EU Financial Interests by Criminal Law – State of Play

On 16 April 2014, the proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law, also called the PIF Directive, was adopted by the EP after some amendments had been made.

MEPs introduced a broader definition of the legal notion of the Union's financial interests, covering all its financial operations, including borrowing and lending activities. Corruption in procurement is now explicitly mentioned and the notion of misappropriation has been introduced, consisting of an act by a public official to commit or disburse funds, or appropriate or use assets, contrary to the purpose for which they were intended, and causing damage to the Union's financial interests.

The EP lowered the threshold for imposing sanctions other than criminal penalties and for offences that call for imprisonment. Further, a new article was introduced stipulating that Member States should apply the *ne bis in idem* rule in their national criminal law. With regard to the cooperation between the Member States and OLAF, the EP highlighted that this should also encompass

the cooperation between the Member States themselves. (EDB)

►eucrim ID=1402023

### European Public Prosecutor's Office – Orientation Debate

During the JHA Council held on 5-6 June 2014, Ministers were briefed by the Presidency on the state of play and the orientation debate held on the proposed regulation on the establishment of the EPPO (see eucrim 1/20144, pp. 9-10).

Discussions held in March, April, and May 2014 in the Council's committees resulted in broad agreement on the text. The two following issues, however, remain open:

The first issue is the supervision of the operational work for the EPPO carried out by the European Delegated Prosecutors in the Member States. The Presidency proposed a system based on the European Prosecutors supervising investigations and prosecutions in their Member States of origin. In addition, Permanent Chambers of at least three European Prosecutors will direct and monitor investigations and prosecutions and may give direct instructions in the said investigations and prosecutions. In order to ensure the independence of the decision-making, key decisions, such as the closing of a case, will always be taken by a Permanent Chamber.

The second issue is the question of concurrent competence between the national prosecution authorities and the EPPO. The proposal of the Presidency involves competence for both investigating and prosecuting offences affecting the financial interests of the Union. Nevertheless, the EPPO should keep a priority right in accordance with Article 19 of the proposal as well as a right of evocation of investigations already started by national prosecution authorities. Minor cases should be exclusively handled at the national level.

The Council confirmed, as the basis for further discussion, the principles of a collegial organisation of the EPPO as well as the principle that the EPPO has

a priority competence to investigate and prosecute offences affecting the Union's financial interests. (EDB)

► eucrim ID=1402024

## Corruption

### Commission's Anti-Corruption Report – Council Conclusions and Court of Auditors' Reaction

The first EU Anti-Corruption Report, launched by the Commission on 3 February 2014 (see eucrim 1/2014, p. 11), was recently the subject of feedback from the Council of the European Union and the Court of Auditors.

On 10 April 2014 the Court of Auditor's reaction to the report was presented, its main criticism based on the lack of substantive findings on enhancing the anti-fraud and anti-corruption policy. According to the ECA view, the report is a good initiative for identifying a number of anti-corruption measures. However, its findings are not far-reaching, since the report is overly descriptive and based on the perception of citizens and companies, which may not reflect reality. Moreover, the ECA criticized the lack of connection of the report to OLAF findings and called for further developments regarding the actual risk areas, reasons why corruption occurs, and anti-corruption measures.

Similar conclusions were drawn up by the Council on 5 and 6 June 2014, during the Justice and Home Affairs Meeting in Luxemburg. Although the Council recognizes the report as a valuable tool in promoting high anti-corruption standards across the EU, it also pointed out some challenges that must be faced in order to improve the report's quality for 2015.

Concerning the methodology used in the report, the Council calls for a review focused on the involvement of Member States, not only during the fact-finding stages of the procedure but also in the formulation of recommendations by the Commission, which should be achieved

## Report

### New Challenges for Anti-Corruption Measures and for the Protection of EU Financial Interests

On 15 and 16 May 2014, an international conference on "New Challenges for Anti-Corruption Measures and for the Protection of EU Financial Interests," co-organized by the Austrian Association for European Criminal Law, the International Anti-Corruption Academy (IACA), the University of Vienna, and the Vienna University of Economics and Business took place in Laxenburg and in Vienna. The conference was funded by OLAF within the framework of Hercule II.

The first day started with an overview of recent developments regarding corruption. After the lunch break, the afternoon continued with the second part of the conference entitled "Measures against obstacles impeding anti-corruption" that dealt with the challenges of substantive law from a comparative perspective and with the protection of informants versus the protection of information. The general topic of the second day was "Future perspectives," in particular, approaches towards solving tensions between individual rights and prosecution interests in national and transnational cases.

Key outcomes of this conference are:

Although sufficient conventions criminalizing corruption have already been established, the principle of certainty should be kept in mind, which demands inter alia clear definitions of corruption offences. Additionally, monitoring procedures should be simplified and effective enforcement – such as a specialized enforcement body or the freezing of assets – should be ensured. Furthermore, it is important to strengthen cooperation of law enforcement authorities in international corruption cases. Simplifying proceedings – for instance, the transfer of information – would be a step towards a more effective prosecution. Regarding whistleblowing, which is based on insider information, safeguards – e.g., considering the credibility of information – are needed. Even if a number of questions is still not clarified, the establishment of a European Public Prosecutor's Office would constitute progress in the fight against corruption in transnational cases, because it could guarantee a more precise and coherent investigation.

To sum up, the conference was a successful event, which provided all participants with new knowledge and fresh ideas for the future.

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by means of a dialogue between the specific Member State and the Commission.

As well as the Court of Auditors, the Council also highlights the need to put emphasis on an evidential basis and on operationally relevant information in the report's conclusions, which would contribute much more to the effectiveness of targeted anti-corruption measures than the results of corruption perception polls. Furthermore, the necessity of including in the report a review of the integrity policies put into place in the EU institutions was thoroughly emphasized. Therefore, the EU should fully accede to GRECO, and the EU institutions should be analysed under GRECO's evaluation mechanism, the effects of which the Commission must quickly prepare itself for.

The above-mentioned conclusions were broadly welcomed by the NGO Transparency International (TI), especially the inclusion of EU's institutions own integrity policies in the report, which had been the object of TI's analysis released in April 2014. Reactions inside EU Member States like Croatia and Italy were also observed, especially in regard to the national highlights.

In an overall feedback, the report was seen as a positive start, but its inaccurate data and conclusions led to a limitation of its possible reach, which can only be overcome by putting forward a comprehensive EU anti-corruption strategy that addresses internal security, internal governance, and internal market dimensions. (AF)

► eucrim ID=1402025



## Counterfeiting & Piracy

### Finance Ministers Endorse Directive on Euro Counterfeiting

On 6 May 2014, the EU Finance Ministers gave green light to the Directive on the protection of the euro and other currencies against counterfeiting by criminal law, replacing Council Framework Decision 2000/383/JHA (see eucrim 1/2014, p. 11). The text was formally adopted on 15 May and published in the Official Journal of 21 May 2014.

The directive sets a lower limit for maximum penalties, namely at least eight years imprisonment for production and at least five years for distribution of fake notes and coins. The new directive also aims at improving cross-border investigation by ensuring that investigative tools for organised crime or serious cases provided for in national law can also be used in cases of counterfeiting. It will also be possible to analyse seized forgeries earlier during judicial proceedings, thus improving detection of counterfeit euros and preventing their circulation.

Member States need to implement this new legal instrument by 23 May 2016. (EDB)

►eucrim ID=1402026

## Organised Crime

### Communication on Use of CBRN-E Materials for Terrorist Purposes

On 5 May 2014, the Commission published a communication on preventing chemical, biological, radiological, and nuclear materials and explosives (CBRN-E) from ending up in the hands of terrorists. With this first step, the Commission aims at taking concrete action regarding:

- More effectively detecting and testing CBRN-E detection equipment through practical trials;
- Improving research, testing, and validation;
- Promoting awareness building, training, and exercises;

- Supporting efforts made by third states.

The Commission will now start implementing the initiatives proposed in this communication, which forms the first element of the so-called new CBRN-E Agenda. (EDB)

►eucrim ID=1402027

## Cybercrime

### Unprecedented Action on Online Fraud and Illegal Immigration Coordinated by Europol

On 8 and 9 April 2014, an extraordinary operation involving law enforcement, air carriers, and credit card companies, and supported by the Europol Cybercrime Centre (EC3) resulted in the arrest of 70 persons worldwide. The goal was to identify those responsible for airline ticket transactions via the Internet resulting from the use of fake or stolen credit cards.

The action involved 68 airports in 32 countries worldwide, including 24 EU Member States, Iceland, Norway, Switzerland, the US, Colombia, Brazil, Peru, and Ukraine. In addition, representatives from 35 airlines and major credit card companies (Visa Europe, MasterCard and American Express) worked with staff from Europol's EC3, law enforcement officers from across the EU, the US Secret Service, US Immigration and Customs Enforcement, and the Colombian national police. Further support was given by the EU border control agency, Frontex, and Eurojust. Europol played a central role by deploying specialists as well as equipment to locations across Europe. A dedicated team of analysts working from the Europol operational centre provided live access to centralised criminal intelligence databases, whilst Interpol assisted in the rapid identification of wanted persons and stolen travel documents.

During the operation, 265 suspicious transactions were reported. 113 individuals were detained and 70 were arrested

in Austria, Bulgaria, Colombia, Cyprus, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, the UK, and the US. (EDB)

►eucrim ID=1402028

## Procedural Criminal Law

### Procedural Safeguards

#### Commission Proposal on Strengthening Presumption of Innocence

On 17 March 2014, Renate Weber, EP Rapporteur for the LIBE Committee, published the report on the Commission proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. The rapporteur sees room for improvement of the text regarding the issue of compulsion, the burden of proof, and the standard on admissibility of evidence.

The Committee on Legal Affairs endorsed the proposal on 7 April 2014. After the vote by the LIBE Committee, the EP will vote on the proposal in plenary. (EDB)

►eucrim ID=1402029

## Data Protection

### Partial General Approach for Data Protection Regulation and Progress for the Directive

During the JHA Council of 5-6 June 2014, the Council was informed of the progress made in reforming the data protection legal framework, including a proposed regulation on general data protection and a proposed directive on data protection in criminal matters.

With regard to the proposed general data protection regulation, the partial general approach includes the territorial scope, the text concerning the respective definitions of "binding corporate



rules” and “international organisations,” and the transfer of personal data to third countries or international organisations. The Council also held a policy debate on the “one stop shop” mechanism based on a compromise text drafted by the presidency. This text provides for the possibility for a data protection authority to act as lead authority in cases of processing by a controller or processor established in one Member State but affecting data subjects in other Member States. It also covers processing in the context of the activities of an establishment on the territory of different Member States when this concerns an establishment of the same controller or processor. The two points discussed by the presidency concern whether it is necessary to ensure the proximity of the decision-making process to the data subject and the role of the local supervisory authorities, on the one hand, and the powers of the lead authority, on the other. The Italian presidency will continue to work on the “one stop shop” mechanism based on this paper.

With regard to the proposed Directive on data protection in criminal matters, the Greek presidency held a discussion mainly on the scope of the directive. This discussion addressed whether to expand the scope to private and public entities or bodies under the cumulative conditions that they perform public duties or exercise public powers for the purposes of the draft directive as their “sole/pre-dominant” task and that they have been entrusted by law for this task. This refers, for example, to data processing by airport security or forensic experts in the context of the material scope of the draft directive. Some Member States either opposed this expansion or raised concern on the wording. A second point of discussion was whether or not to replace “maintenance of public order” with “for these purposes safeguarding public security.” Here, Member States also raised concerns regarding the exact meaning of this legal notion.

The Italian presidency has made progress on the reform of the data protec-

tion legal framework one of its priorities for the second half of 2014. (EDB)

► eucrim ID=1402030

### Court of Justice and the Right to Be Forgotten

On 13 May 2014, the ECJ ruled on the heavily discussed right to be forgotten. Case C-131/12 concerned a Spanish citizen, Mr. Costeja Gonzalez, and his complaint against Google. In the past, Gonzalez had incurred social security debts, which resulted in a real estate auction. In order to give this auction maximum publicity and attract more bidders, the Spanish Ministry of Labour and Social Affairs ordered the newspaper La Vanguardia to publish an announcement. Years later, Gonzalez experienced the negative effects of his name having appeared in this announcement, which was traceable via the Internet search engine Google providing a link to the website of La Vanguardia.

Gonzalez’ complaint against the newspaper was rejected, but the complaint against Google was brought before the Audiencia Nacional (National High Court) by the Spanish data protection agency. This Court requested a preliminary ruling from the ECJ in this case.

In contradiction to the opinion drafted by its Advocate General Jääskinen, the ECJ ruled that the activity of a search engine – consisting in finding information published or placed on the Internet by third parties, indexing it automatically, storing it temporarily and, ultimately, making it available to Internet users according to a particular order of preference in the list of results - must be classified as processing of personal data. Further, the operator of the search engine must be regarded as the “controller” in respect of that processing, within the meaning of Directive 95/46/EC. The ECJ held that the links and information in the list of results must be erased if it is found following a request by the data subject that the inclusion of certain links in the list of results is, at this point in time, incompatible with Directive 95/46/

EC. Google thus had to remove the links referring to Gonzalez’ past. (EDB)

► eucrim ID=1402031

## Cooperation

### Police Cooperation

#### Annulment of Directive 2011/82/EU on Road Safety

With its judgment of 6 May 2014, the Court of Justice of the EU annulled Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences (see eucrim 1/2011, pp. 17-18).

The directive was challenged by the European Commission, which argued that it had been adopted on an incorrect legal basis, namely the EU’s competence in the field of police cooperation. In its judgment, the Court points out that neither the aim of the directive nor its content justifies its adoption in the area of police cooperation. According to the Court, the main or predominant aim of the directive is to improve road safety, while the system for the cross-border exchange of information on road safety related traffic offences set up by the directive only provides the means of pursuing the objective of improving road safety.

Given that measures to improve road safety fall within transport policy, the Court concludes that the directive should have been adopted on that basis and must therefore be annulled. The effects of the directive are nevertheless valid for a maximum one-year period until the entry into force of a new directive on the correct legal basis. (CR)

► eucrim ID=1402032

#### Europol and CEPOL Unification Declined

At its meeting of 3 March 2014, the JHA Council discussed the future of Europol and CEPOL and the Regulation on the

European Agency for Cooperation and Training for Law Enforcement (see eucrim 2/2013, pp. 36-37). The meeting showed that most Member States remain of the opinion that Europol and CEPOL should continue to provide two separate services. Hence, the Council invited the Commission to present a legislative proposal on a new legal basis for CEPOL as soon as possible. (CR)

➤ eucrim ID=1402033

### Cepol moves to Budapest

On 6 May 2014, the Council adopted a Regulation allowing CEPOL to move its seat from Bramshill (United Kingdom) to Budapest (Hungary) as from September 2014.

Due to the UK's decision to no longer host CEPOL at its current premises in Bramshill, a new host country had to be found. Seven Member States (Ireland, Greece, Spain, Italy, Hungary, the Netherlands, and Finland) submitted applications. (CR)

➤ eucrim ID=1402034

### Enhanced Police Cooperation between Germany and the Netherlands

On 29 April 2014, the German Federal Minister of Justice, Thomas de Maizière, and the Dutch Minister for Security and Justice, Ivo Opstelten, met to discuss closer police cooperation between their countries. The meeting focused on combatting cross-border drug trafficking and mobile gangs. Measures discussed include the increased use of Joint Investigation Teams and the deployment of German police officers to the Netherlands, improved information sharing on mobile gangs, and intensified cross-border controls. (CR)

➤ eucrim ID=1402035

### German-Polish Cooperation Agreement between Police, Border, and Custom Authorities

On 15 May 2014, the German Federal Minister of Justice, Thomas de Maizière, and Poland's Minister of Interior, Bartłomiej Sienkiewicz, signed a

new agreement on cooperation between the police, border control, and customs authorities. The agreement:

- Aims at increasing options for taking action on each other's territory, such as conducting joint patrols;
- Contains rules on taking preventive action, e.g., by allowing officers to cross the border to prevent imminent danger to life or health;
- Provides for mutual assistance in major events through the temporary assignment of each other's officers to their own operational units;
- Foresees a stronger inclusion of customs authorities.

In order to come into force, the agreement still needs to be approved by the German and Polish parliaments. (CR)

➤ eucrim ID=1402036



## Council of Europe\*

*Reported by Dr. András Csúri*

### Reform of the European Court of Human Rights

#### HUDOC Case Law: Database Available in Russian

On 14 April 2014, the Russian version of the Court's case law database was launched, including translations of many of the Court's judgments and publications. The President of the Court highlighted that the translations aim to contribute to better implementation of the European Convention on Human Rights at the national level. The Court had previously commissioned translations into

## European Arrest Warrant

### Statistics on the EAW for 2013

On 15 May 2014, the General Secretariat of the Council presented an overview of Member States' replies to a questionnaire asking for quantitative information on the practical operation of the European Arrest Warrant. The responses received refer to the year 2013. Member States' authorities answered questions regarding how many EAWs were issued, how they were transmitted, and how many led to the surrender of the person concerned. Annex I gives an overview of replies to the question as to what the grounds for refusal were per Member State. In Annex II, four Member States provided additional information on the application of the EAW. (EDB)

➤ eucrim ID=1402037

Bulgarian, Greek, Hungarian, Turkish, and Spanish.

➤ eucrim ID=1402038

## Specific Areas of Crime

### Corruption

#### GRECO: Fourth Round Evaluation Report on the Former Yugoslav Republic of Macedonia

On 17 March 2014, GRECO published its Fourth Round Evaluation Report on the Former Yugoslav Republic of Macedonia and made a total of 19 recommen-

dations to the country. The fourth and latest evaluation round was launched in 2012 in order to assess how states address issues, such as conflicts of interest or declarations of assets, with regard to Members of Parliament (MPs), judges, and prosecutors (for further reports, see eucrim 1/2014, p. 16.).

The report notes that relevant rules are in place for all three professions but expresses concerns on the effectiveness of implementation and enforcement of the legal framework and, as a consequence, on compliance with the rules and their monitoring.

The report encourages the development of a code of conduct for the MPs, which shall be easily accessible to the public. Additionally, the report recommends introducing rules on how MPs should engage with third parties seeking to influence the legislative process.

GRECO recommends strengthening the independence of the judiciary, inter alia by abolishing the ex officio membership of the Minister of Justice in the Judicial Council. Furthermore, the decisions of the Judicial Council shall be accompanied by a statement of reasons and be subject to judicial review for the sake of transparency.

The report suggests the establishment of a code of professional conduct, which shall apply to all prosecutors. Additionally, rules and guidance shall be developed on the acceptance of gifts, hospitality, and other advantages, which shall be monitored properly.

►eucrim ID=1402039

### GRECO: Fourth Round Evaluation Report on Denmark

On 16 April 2014, GRECO published its Fourth Round Evaluation Report on Denmark. The report notes that Denmark is traditionally considered one of the least corrupt countries in Europe and that the perceptions of corruption among the three professions subject to the

fourth round are relatively low. Danish measures to prevent corruption in this field appear to be effective in practice. There is room for improvement, however, especially with regard to conflicts of interest among parliamentarians.

Regarding MPs, the report recommends adopting a code of conduct including, inter alia, guidance on the prevention of conflicts of interest and how to deal with third parties seeking to obtain undue influence on MPs' work. The code shall be complemented by practical measures, such as dedicated training or counselling. Additionally, the report suggests introducing the requirement of ad hoc disclosure whenever a conflict emerges between the private interests of an MP and a matter under consideration in parliamentary proceedings. GRECO also recommends regular public registration of the occupations and financial interests of MPs on a mandatory basis, also including quantitative data and information on spouses and dependent family members.

With regard to judges and prosecutors, GRECO recommends adopting a set of clear ethical standards, backed up by specialized training.

►eucrim ID=1402040

### GRECO: 2013 Annual Report

On 19 June 2014, GRECO published its annual report for 2013. In 2013, GRECO visited ten countries to prepare fourth round evaluation reports, adopted nine reports, and 29 follow-up reports concerning this topic. With regard to transparency of political funding, GRECO expressed concern about the scant progress made by a significant number of MS in implementing GRECO's recommendations. The report attributes this situation mainly to the political sensitivity of party and campaign funding and to the fact that GRECO's monitoring in this field extended to areas beyond direct governmental control.

Additionally, the report refers to the possible accession of the EU as one of the major challenges of the future and

states that it is considering how to incorporate a gender perspective into its work.

►eucrim ID=1402041

### GRECO: Fourth Round Evaluation Report on Croatia

On 25 June 2014, GRECO published its Fourth Round Evaluation Report on Croatia. The report notes that, despite many encouraging steps that have been taken, the public's trust in their key institution, particularly with respect to the judiciary and politicians, remains low.

Regarding MPs, the report recommends adopting a code of conduct with the participation of the MPs themselves.

As to judges, GRECO suggests addressing – as a matter of priority – the general credibility gap of the judicial system. The public needs to be made aware of the concrete reforms introduced and aimed at bolstering its independence and efficiency. Specifically, the country should review the procedures of selection, appointment, and mandate renewal of the President of the Supreme Court in order to minimize the risks of improper political influence. Additionally, studies should be carried out to understand the reasons for the high level of public distrust in the judicial system. Finally, a communication policy with the press shall be developed for judges, with the aim of enhancing transparency and accountability.

Concerning prosecutors, the report recommends reviewing the procedures of selection, appointment, and mandate renewal of the Public Prosecutor General in order to increase transparency in this field as well.

►eucrim ID=1402042

### Money Laundering

#### MONEYVAL: Annual Report 2013

On 28 May 2014, MONEYVAL published its annual report of 2013. In 2013, 25 jurisdictions were subject to active monitoring by MONEYVAL. This included evaluations, special assessment

\* If not stated otherwise, the news reported in the following sections cover the period April–August 2014.

of the effectiveness of customer identification in the banking sector, and a comprehensive review of the progress made by the Holy See. The monitoring reports adopted by MONEYVAL indicate a consistent improvement in formal compliance of the MS with international standards, particularly on the preventive side. The practical implementation of the standards, however, remains challenging as regards the need to achieve serious autonomous ML convictions and deterrent confiscation orders to take the profit out of crime. As one of the biggest problems, the report highlights the identification of and the often inaccurate information on the ultimate beneficial owners of companies with complex ownership structures into which criminal proceeds have been introduced. This situation runs many major investigations into the ground. Therefore, MONEYVAL has called on its MS to step up their efforts to ensure that companies always know who owns and controls them and that this information is readily accessible to law enforcement.

►eucrim ID=1402043

#### **MONEYVAL: Fourth Round Evaluation Report on the Former Yugoslav Republic of Macedonia**

On 10 June 2014, MONEYVAL published its fourth evaluation report on the Former Yugoslav Republic of Macedonia. The report is not a full assessment of the country's levels of compliance with the FATF 40 Recommendations and 9 Special Recommendations but an update on major issues in the AML/CFT system. It also provides recommendations on how certain aspects of the system could be strengthened.

The report notes that an autonomous terrorist financing offence was introduced. The country took action to align its domestic money laundering legislation more closely with the international standards. The number of criminal investigations, prosecutions, convictions, and confiscations increased, and dissuasive and proportionate sanctions were

introduced. The competences of the FIU have been extended and are now in line with the MONEYVAL recommendations, with a steady increase in notifications by them to the law enforcement.

However, the report concluded that technical deficiencies and gaps in the legislation still hinder the country's compliance with international standards. There are gaps in the legislation that would prevent persons associated with criminals from obtaining management positions, requirements in relation to the identification of politically exposed persons remain incomplete, and there are definitional problems with the TF reporting obligations. Though sanctions are in place, they still have to be fully utilized. Finally, while the country actively cooperates with other jurisdictions at all levels; the application of dual criminality may hinder MLA due to the country's shortcomings in TF criminalization.

►eucrim ID=1402044

#### **MONEYVAL: Fourth Round Evaluation Report on the Principality of Monaco**

On 30 June 2014, MONEYVAL published its fourth evaluation report on the Principality of Monaco. The report acknowledges several improvements in Monaco's ML and TF framework. The

ML offence is broadly in line with international standards, and the sanctioning regime has been broadened since the previous evaluation. The FIU accomplishes its tasks with professionalism, while its powers in its role as supervisor have also been greatly reinforced. Nevertheless, the report stresses the need for more effective application of the legal framework. Despite the improvements, the number of investigations, prosecutions, convictions, and confiscations remains modest. The cases opened by the law enforcement authorities remain response-based as they originate solely from the notifications of the FIU. Additionally, the report raises concerns as to whether the FIU can fulfil its primary tasks adequately, due to limited resources and numerous other functions. Significant concerns were expressed with regard to the effective application of the AML and CTF measures by certain categories of non-financial professions, e.g., lawyers, jewelers, and real estate agents. There are shortcomings that hinder the proficiency of persons controlling financial institutions, and off-site as well as on-site supervision lacks consistency and fixed procedures. Ultimately, the report calls for more effective application of the relevant sanctions.

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#### **Common abbreviations**

|                |   |
|----------------|---|
| CEPOL          | European Police College   |
| CFT            | Combatting the Financing of Terrorism   |
| CJEU           | Court of Justice of the European Union  |
| COREPER        | Committee of Permanent Representatives  |
| ECJ            | European Court of Justice (one of the 3 courts of the CJEU)   |
| ECtHR          | European Court of Human Rights  |
| EDPS           | European Data Protection Supervisor   |
| EIO            | European Investigation Order  |
| (M)EP          | (Members of the) European Parliament  |
| EPPD           | European Public Prosecutor Office   |
| GRECO          | Group of States against Corruption  |
| JIT            | Joint Investigation Team  |
| JHA            | Justice and Home Affairs  |
| LIBE Committee | Committee on Civil Liberties, Justice and Home Affairs  |
| (A)ML          | Anti-Money Laundering   |
| MONEYVAL       | Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism |
| TFEU           | Treaty on the Functioning of the European Union   |



# Judicial Control of the Prosecutors' Activities in the Light of the ECHR

Dr. Celina Nowak

The judicial control of the activities of prosecutors within criminal proceedings constitutes an important issue in every legal system. It is particularly important at the pre-trial stage of proceedings, when the prosecutor is responsible for many actions, and of lesser importance at the judicial stage of the proceedings, when the court takes over. However, the issue of judicial control of prosecutors' actions may warrant special attention once the European Public Prosecutor's Office (hereinafter the "EPPO") is established.<sup>1</sup> When it comes to prosecutorial actions, the EPPO will be subjected to the control of the national courts.<sup>2</sup> Therefore, it will be necessary to define the framework of the judicial control of the EPPO's activities executed by national courts.<sup>3</sup>

It seems obvious that in every legal system, with its specificities and traditions,<sup>4</sup> the legal framework regarding the judicial control of prosecutors' actions within criminal proceedings may vary. For this reason, it becomes necessary to search for a common ground, rules that might be useful and applicable in every legal system. In Europe, it may be enlightening to examine the standards related to the judicial control of prosecutorial activities set forth by the European Court of Human Rights. It will be particularly informative to find answers to the following three questions that will be considered in this article – who controls prosecutors, what is controlled, and what should be the control.

## I. The Entity Performing Judicial Control

At the outset of the analysis, it should be noted that the nature of the judicial control of prosecutors' actions depends upon the position taken by the public prosecutors' office within the institutional framework in a given country and on the role they play within the criminal proceedings. In some EU Member States, the public prosecutors' office is an independent authority responsible for carrying out pre-trial proceedings and for prosecuting before the courts, and prosecutors enjoy a status of their own, e.g., in Poland. In contrast, in other Member States, prosecutors are a part of the corpus of magistrates, and their status is associated to the civil servants corps, but the most important decisions within the pre-trial proceedings are taken by other special magistrates or judges, not prosecutors, e.g., in France.

Therefore, the judicial control of prosecutors' actions may be performed within different legal regimes and at different levels. The first and most obvious level is the judicial control performed by a national judge. However, when the prosecutor enjoys a more independent status within the preliminary proceedings and is solely responsible for their outcome, national judicial control of his actions is more limited and takes place only incidentally with regard to specific actions, mainly the decision on pre-trial detention. In such an event, judicial control of the actions of the prosecutor may be performed by the European Court of Human Rights instead. Furthermore, however, within the framework of the ECHR, the ECtHR may also control the national courts controlling prosecutors, which adds another element to this already complex structure. From the point of view of the ECtHR, the judicial control executed by the national court may be called indirect, and the control exercised by the Court itself – direct.

Considering the direct level of control, i.e., the control carried out by the ECtHR itself, the Court has ruled on the subject on numerous occasions. For instance, it stated that the prosecutor's actions may violate Art. 6-1 ECHR when it declared a breach of the ECHR in a case when the actions of a prosecutor contributed to the prolongation of the proceedings up to the point of violating the reasonable time requirement.<sup>5</sup> The ECtHR also decided that a prosecutor may breach the principle of presumption of innocence, set forth in Art. 6-2 ECHR,<sup>6</sup> especially when formulating declarations as to the culpability of the accused in a context independent of the criminal proceedings themselves, i.e., by way of an interview to the national press.<sup>7</sup> However, the prosecutor has the right to take a position on the guilt of the accused within the framework of the proceedings themselves, for instance when issuing a ruling on the applicant's request to dismiss the charges at the stage of the pre-trial investigation, over which he has full procedural control,<sup>8</sup> or in the indictment bill.<sup>9</sup>

Considering the national level of judicial control, i.e., the control over prosecutors' actions carried out by national judges, it must be noted that the case law of the ECtHR on this matter is not plentiful. In my view, this is due to several factors. Firstly, within the framework of Art. 6 ECHR, referring to the right to a fair trial – one of the most frequently applied provisions



of the ECHR – the Court always emphasizes that it examines the fairness of the criminal proceedings in their entirety.<sup>10</sup> The “entirety of the proceedings” means that the pre-trial stage is taken under consideration by the Court too, but not exclusively. It is the judicial stage of proceedings that is more likely to bear on the assessment of the fairness of the proceedings. The course of the pre-trial stage of the proceedings is certainly evaluated and contributes to an assessment of the proceedings as a whole, but it rarely is subjected to a specific and separate evaluation by the Court.

Furthermore, the pre-trial stage of proceedings is covered by only some of the Convention’s provisions, so the scope of the control performed by the ECtHR itself is limited.

Finally, the control of the ECtHR depends on the nature and modalities of the national model of public prosecutors’ office and its role in the pre-trial stage of criminal proceedings. For instance, as mentioned above, in Poland, the preliminary proceedings (investigation and inquiry) is carried out or supervised by the prosecutor. The judicial authorities intervene only incidentally at the pre-trial stage of proceedings. The prosecutor in charge of the pre-trial proceedings is controlled by his superiors, and the actual judicial control of his actions at this stage of proceedings takes place only when the case is submitted to the court. For this reason, the ECtHR cannot control a judicial control which does not exist. It can, however, assess the prosecutor’s actions on its own. Conversely, when the pre-trial stage is supervised by a judge, the Court may obviously take a position with regard to how this judge controls the actions of a prosecutor.

Coming back to the issue of who performs the judicial control at the national level, one should take note that Art. 5-3 of the ECHR mentions “a judge or other officer authorised by law to exercise judicial power,” whereas Art. 5-4 refers to “a judge,” and Art. 6-1 ECHR to “the tribunal.” At the time of the adoption of the Convention, it was incontestable that the term “other officer authorised by law to exercise judicial power” covered prosecutors too.<sup>11</sup> Today, however, in the light of the more updated case law of the Court, it seems clear that a prosecutor may only be controlled by a judge, who enjoys independence towards both the parties to the proceedings and to the executive power and who is not a prosecuting party to the proceedings.<sup>12</sup>

## II. The Scope of Judicial Control

Concerning the scope of judicial control, it should be emphasized that it starts from the beginning of the proceedings at the pre-trial stage, that is “from the moment a ‘charge’ comes

into being, within the autonomous, substantive meaning to be given to that term.”<sup>13</sup>

It seems unquestionable that the judicial control extends to the entirety of the proceedings at the pre-trial stage, especially at their *ad personam* phase. However, the question emerges as to what is the scope of the control when the proceedings are concluded before the case goes to court, especially when a prosecutor takes a decision not to prosecute. This issue is of special interest from the point of view of the future EPPO and its possible interactions with the national judges.

The ECtHR examined this question in several Romanian cases, in which the decision to discontinue the proceedings was taken by a prosecutor and was only submitted to the control of his superiors within the public prosecutors’ office. It should be noted that the problem of judicial control was not in itself subjected to the control of the Court; it was one of the issues considered when evaluating proceedings carried out with regard to one particular individual.

At that time in Romanian law, a prosecutor could have decided to discontinue the criminal proceedings and instead inflict an administrative fine on the person. The ECtHR ruled that “the decision taken by the public prosecutors’ office (...) deprived the applicant of the guarantees that he would have enjoyed had his case been submitted to the court.”<sup>14</sup> One may therefore conclude that the ECtHR is favorable to judicial control of the decisions on discontinuing the proceedings as well.

Concerning the actions with regard to evidence, it should be noted that, in general, the ECtHR refrains from examining proof as such, as this obligation bears on the national authorities. The Court emphasizes that it finds itself responsible only for considering whether the proceedings in their entirety, the issues related to evidence included, were fair in the sense of Art. 6-1 ECHR. As stated in *Barberà, Messegué and Jabardo v. Spain* the Court said: “As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (...). The Court must, however, determine (...) whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 para. 1.”<sup>15</sup>

In more recent judgments, however, the ECtHR does take a position on some types of evidence, in particular evidence collected in violation of Arts. 2 and 3 ECHR. The issue will be analyzed below.

Additionally, it should be emphasized that judicial control of the Court over the actions of a prosecutor may be based on

conventional provisions that are not traditionally associated to the criminal proceedings. In doing so, within the framework of Art. 8 ECHR, the ECtHR insists on the necessity of judicial control of the surveillance. It might be too farfetched to call this requirement a standard yet; however, it seems that the Court deems it desirable. This position was taken in the case *Klass and others v. Germany* and confirmed in the case law that followed.<sup>16</sup>

### III. The Efficacy of Judicial Control

The question of how to control – what should be the control of activities of prosecutors in the pre-trial stage of the proceedings – seems of particular importance, both from the point of view of internal practice and the interactions between the national judge and the EPPO. The answer to this question given by the ECtHR is, in my view, simple: control effectively.

The need for effective judicial control of the actions carried out by prosecutors is not expressly stated by the Court in its case law, or at least the Court does not call it this. However, I am of the opinion that this condition is indirectly implied in everything that the ECtHR has to say on the judicial control of prosecutors' actions. This requirement may, for instance, be observed in the judgments referring to Art. 5–3 and 5–4 of the ECHR.

It seems undisputable that the decision on placing a person in detention or on prolonging the detention must be taken by the judiciary, that is by the court. However, the prosecutor plays an important part in this process. Firstly, it is often the prosecutor who makes a request for detention or prolongation thereof. In some countries, like in Poland, a prosecutor is also authorized to release the person from detention if he no longer deems the detention necessary. Furthermore, in many legal systems, the prosecutor carries out the investigation (or supervises investigation carried out by other institutions) and therefore it is his inactivity that may contribute to the prolongation of proceedings and, in consequence, to the prolongation of detention.

Considering the issue of detention within the framework of pre-trial proceedings, the ECtHR takes the position that the national courts should not extend the detention on the basis of “the needs of the investigation,” “risk of flight,” “risk of collusion,” or “possibility of repeating the offences.” In other words, the courts may not be satisfied with the arguments submitted by the prosecutor. They have to assure themselves that the prolongation of the detention is really necessary. All the reasons justifying the detention are valid only if the competent national authorities – including the prosecutor – “displayed ‘special diligence’ in the conduct of the proceedings.”<sup>17</sup> There-

fore, it is through the obligation of verification of diligence that the Court introduces the requirement of efficacy of judicial control into the framework of pre-trial proceedings.

One can find the very same requirement in judgments referring to the rejection of certain types of proof, in particular evidence collected in violation of Arts. 2 and 3 ECHR. The ECtHR has quashed the use of such evidence in a series of cases: *Örs and Others v. Turkey*,<sup>18</sup> *Levința v. Moldova*,<sup>19</sup> *Söylemez v. Turkey*,<sup>20</sup> *Harutyunyan v. Armenia* 28, June 2007;<sup>21</sup> and, more recently confirmed in a judgment of the Grand Chamber, in *Gräfen v. Germany*, 1 June 2010.<sup>22</sup> I believe that, for the ECtHR, the rejection of such evidence constitutes a means of encouragement for the national judicial authorities to control the conduct of the pre-trial proceedings in a more effective manner. For, if the judges refused to validate evidence collected in violation of Art. 3 ECHR, the prosecutors would not authorize it for fear of losing the trial. However, the rejection of such evidence is at the same time a means to directly control the prosecutors – or, more generally, the national authorities in this regard.

The requirement of efficacy is probably most evidently expressed by the ECtHR in judgments referring to the positive procedural obligations bearing on the states. The doctrine of positive obligations, according to which the states are obliged to investigate the violations of Arts. 2 and 3 ECHR, was first formulated by the ECtHR in *McCann and other v. the United Kingdom* in 1995, but has been since confirmed and taken further in many other judgments.<sup>23</sup> The Court says very clearly that “the obligation to protect the right to life under this provision (art. 2), (...) requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”<sup>24</sup> The requirement of efficiency simultaneously includes the efficiency of the control and the efficiency of the investigative actions.

In states like Poland, where judicial control of the prosecutor's actions at the pre-trial stage of proceedings is limited, the ECtHR itself requires such efficacy from the prosecutor and controls him as there is no national judicial control at this stage. In this context, it recognized a breach of Art. 2 ECHR in *Byrzykowski v. Poland* of 2006 when a prosecutor had failed to investigate a case of death in an efficient manner. It is, of course, an example of a direct control performed by the Court itself for lack of national judicial control. It stems from this case law that the ECtHR requires the states to establish a system of justice of which a truly effective judicial control – if provided for in the national law – is an essential element. But if such control is not foreseen at the national level, the ECtHR reserves its right to exercise it itself.

The issue of efficacy of judicial control of prosecutors' actions seems of particular importance in the context of the establishment of the EPPO. Pursuant to Art. 36 of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, for the purpose of judicial review, when adopting procedural measures in the performance of its functions, the EPPO shall be considered a national authority. It stems from this provision that the EPPO will be subjected to the control of the national courts, on a general basis like the national public prosecutors' services – if any are foreseen in the national law. The question is, however, what would be the modalities of direct judicial control over the EPPO, that is the

control performed by the ECtHR. It seems unquestionable that the ECtHR will be competent to control the EPPO after the EU's accession to the ECHR. However, before that happens, the question remains as to the direct control performed by the ECtHR. It might be questionable to argue that the EPPO would be subjected to the direct control of the ECtHR on the basis of Art. 36 of the proposed regulation. However, at the same time, it would put individuals in an unequal position should the EPPO not be subjected to the control of the Court unlike other prosecutors carrying out activities during the pre-trial stage of criminal proceedings. For this reason, one should advocate as rapid an accession of the EU to the ECHR as possible.

\* This article is a revised English version of a paper presented by the author at the conference "Le contrôle judiciaire du Parquet européen. Nécessité, modèles, enjeux," which took place in Paris on 9–10 April 2014.

1 See the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office of 2013, COM/2013/0534 final – 2013/0255 (APP).

2 Art. 36 of the proposal for a Council Regulation on the establishment of the EPPO.

3 See on this Z. Đurđević, "Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office", in K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Vol. 1. A Comparative Analysis*, Hart Publ. 2013, 986 ff.

4 See more in M. Delmas-Marty, J.R. Spencer (eds.) *European criminal procedures*, Cambridge University Press 2002; K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Vol. 1. A Comparative Analysis*, Hart Publ. 2013.

5 *Viezzier v. Italy*, No. 12598/86, 19 Feb 1991, § 17: "the investigation was undoubtedly of some complexity owing to the nature of the facts to be established, but the applicant did nothing to slow it down and the Court cannot regard as 'reasonable' in the instant case a lapse of time for the investigation stage alone which is already more than nine and a half years."

6 *Conf. Daktaras v. Lithuania*, 10 Oct. 2000, No 42095/98: "the principle of the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (...), including prosecutors." drawing on an older judgment in the case *Allenet de Ribemont v. France*, No. 15175/89, 10 Feb. 1995.

7 *Butkevicius v. Lithuania*, 26 March 2000, No. 48297/99, § 50: "The Court notes that in the present case the impugned statements were made by the Prosecutor General and the Chairman of the Seimas in a context independent of the criminal proceedings themselves, i.e. by way of an interview to the national press. The Court acknowledges that the fact that the applicant was an important political figure at the time of the alleged offence required the highest State officials, including the Prosecutor General and the Chairman of the Seimas, to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, it cannot agree with the Government's argument that this circumstance could justify any use of words chosen by the officials in their interviews with the press."

8 *Daktaras v. Lithuania*, 10 Oct. 2000, No 42095/98, § 42.

9 *Czajkowski v. Poland*, 16 Oct. 2007.

10 It is a line of the Court's case law on this issue. See, e.g., *Helmers v. Sweden*, No. 11826/85, 29 Oct. 1991, § 39; *Edwards v. the United Kingdom*, No. 13071/87, 16 Dec. 1992, § 34; *Dombo-Beheer B.V. v. the Netherlands*, 14448/88, 27 Oct. 1993, *Helle c. Finlande*, 19 Dec. 1997, 157/1996/776/977, § 53.

11 See *Schiesser v. Switzerland*, 7710/76, 4 Dec. 1979.

12 See *Huber v. Switzerland*, 23 Oct. 1990, more recent case law: *Niedbala v. Poland*, 27915/95, 4 June 2000; *Moulin v. France*, 37104/06, 23 Nov. 2010. In *Niedbala v. Poland*, the ECtHR stated: "Before an 'officer' can be said to exercise 'judicial power' within the meaning of this provision, he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty (...). Thus, the 'officer' must be independent of the executive and of the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the 'officer' may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality are capable of appearing open to

doubt (...). The 'officer' must hear the individual brought before him in person and review whether or not the detention is justified. If it is not justified, the 'officer' must have the power to make a binding order for the detainee's release" (§§ 48–49). It resulted in the change to the Polish law.

13 *Conf. Deweer v. Belgium*, 27 Feb. 1980, § 42; *Imbrioscia v. Switzerland*, 24 Nov. 1993, No. 13972/88, § 36.

14 "Cette ordonnance rendue par le parquet (...) a privé le requérant des garanties dont il aurait normalement joui s'il avait été renvoyé en jugement par un réquisitoire du parquet : la décision de non-lieu du procureur n'était susceptible, à l'époque, d'aucun contrôle par un organe juridictionnel indépendant et impartial (...)" (*affaire Grecu v. Romania*, 30 Nov 2006, No. 75101/01, § 56–58).

15 *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, 6 Dec 1988, § 68; confirmed in e.g. *Kraska v. Switzerland*, 19 April 1993, No. 13942/88, § 30.

16 The ECtHR stated as follows: "The Court considers that, in a field [of surveillance] where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge" – *Klass and other v. Germany*, No. 5029/71, 6 Sept. 1978, § 56.

17 *Letellier v. France*, 26 June 1991, No. 12369/86, § 35.

18 No. 46213/99, § 60, 20 June 2006.

19 No. 17332/03, §§ 101 and 104–05, 16 Dec. 2008.

20 No. 46661/99, §§ 107 and 122–24, 21 Sept. 2006.

21 "The Court observes, however, that different considerations apply to evidence recovered by a measure found to violate Article 3. (...) The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to 'afford brutality the cloak of law' – *Harutyunyan v. Armenia*, 28 June 2007, No. 36549/03, § 63.

22 *Gäfgen v. Germany*, No. 22978/05, 1 June 2010.

23 See, generally, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hard Publ. 2004; A. Ashworth, *Positive Obligations in Criminal Law*, Hart Publ. 2013, ch. 8.

24 *McCann and others v. the United Kingdom*, No. 18984/91, 27 Sept. 1995, § 161.

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# Extradition and the European Arrest Warrant in the Netherlands

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## I. Introduction

About ten years ago, the Netherlands changed its extradition procedure governing the relationship with other EU Member States. Since 11 May 2004, extradition with other EU Member States is regulated under the Surrender of Persons Act (*Overleveringswet*).<sup>1</sup> Since that date, requests for extradition by other EU Member States that have implemented the Framework Decision on the European Arrest Warrant<sup>2</sup> fall under a specific structure that is different from the classic structure laid down in the Dutch Extradition Act (*Uitleveringswet*).<sup>3</sup> Under this classic structure, a request for extradition is dealt with by the Dutch Minister of Safety and Justice. The request can only be granted if it refers to criminal acts that have been punished with a minimum of four months in the requesting state or that have given probable cause for criminal investigation, based on suspicion of criminal acts that may be punished with a minimum of twelve months according to the law in the requesting state as well as according to Dutch law (double criminality). In addition, the request may be denied if there are certain grounds for refusal such as an existing death penalty in the requesting state for the criminal acts referred to in the request, discrimination, *ne bis in idem*, or interference with an ongoing Dutch criminal investigation. These grounds for refusal are reviewed by the Court of Justice, in appeal by the High Court, then by the Minister of Safety and Justice, and possibly by the judge in interlocutory proceedings. This review in four instances reflects the protection of the legal rights of the requested person, but it is obvious that the extradition procedure as a whole can take many years.

This observation is also at the core of the introduction of the Framework Decision on the European Arrest Warrant.<sup>4</sup> The objective of this decision is to simplify and speed up the procedure by replacing complete political and administrative phases in the classic extradition procedure with a judicial mechanism. Within this mechanism, the European Arrest Warrant is the basic instrument requiring each executing national judicial authority to recognize – with a minimum of formalities – requests for the surrender of a person made by the judicial authority of another EU Member State. This executing national authority must take a final decision on execution of the European Arrest Warrant no later than 60 days after the arrest of the

person mentioned in the warrant. To ensure the implementation of this new method of extradition in the EU, the Dutch government has replaced the *Uitleveringswet* by the *Overleveringswet*. Since then, the *Uitleveringswet* is only applicable in extradition procedures with states outside the European Union. According to the *Overleveringswet*, the executing judicial authority is the Extradition Chamber of the Court of Justice in Amsterdam. Because of the 60-day time limit, the decision of this court is final and not subject to review. There is a possibility to appeal to the High Court in cases in which questions of law are at stake, but the decision of the High Court has no direct effect on the final decision of the Court of Justice Amsterdam. During the first ten years of the *Overleveringswet*, there have been many rulings on the implementation of the European Arrest Warrant in the Netherlands. In this contribution, the focus will be on the issues that have been dealt with in these rulings.

## II. Implementation under the *Overleveringswet*

Because the Framework Decision on the European Arrest Warrant is not self-executing, the extradition of persons by the Netherlands to other EU Member States is regulated by the *Overleveringswet*. And because the framework decision has replaced the European Convention on Extradition<sup>5</sup> and the Benelux Treaty on Extradition,<sup>6</sup> the extradition of persons by the Netherlands to other EU Member States is regulated exclusively by the *Overleveringswet*.<sup>7</sup> According to the *Overleveringswet*, the issued European Arrest Warrant is dealt with by the receiving Dutch public prosecutor. The person referred to in the warrant can agree with his immediate surrender to the issuing state. If he does not agree with this surrender, the public prosecutor requests his surrender before the Court of Justice Amsterdam within three days following the receipt of the warrant. There is no sanction if this period is exceeded, but the request for surrender may be inadmissible if a period of two years has passed since receipt of the warrant.<sup>8</sup> The court decides whether or not the surrender should take place within sixty days after the apprehension of the person referred to in the warrant (Arts. 39 par.1, 23 par. 2 and 22 par. 1 *Overleveringswet*). In its decision, the court is bound by the general objectives of the Framework Decision on the European Arrest



Warrant, which means that its decision should conform with these objectives as much as possible.<sup>9</sup> This means that each European Arrest Warrant that meets the required standards of the framework decision, does not give rise to any grounds for refusal (see hereafter IV.–VI. below), and leads to the surrender of the person referred to in the warrant. These required standards are such that the warrant contains the information on the identity of the person for whom surrender is requested, the identity of the issuing judicial authority, and the final decision that is at the core of the warrant, including the sanction, the qualification, and the circumstances of the criminal acts mentioned in the warrant (Art. 2 Overleveringswet). In short, the European Arrest Warrant is dealt with by the public prosecutor and by the Court of Justice Amsterdam in case the person does not agree with his immediate surrender to the issuing state.

Unlike the procedure under the Uitleveringswet, the Dutch Minister of Safety and Justice has no direct influence on the surrender of persons on the basis of a European Arrest Warrant. The public prosecutor also plays a central role in the reverse situation in which the Netherlands request the surrender of a person by means of a European Arrest Warrant. He is the judicial authority that issues a European Arrest Warrant, and he can request that the apprehension of the person referred to in the warrant involves the seizure of (his) goods, the interrogation of this person in his presence by the competent judicial authorities in the state dealing with the warrant, and the temporary transfer of this person to the Netherlands in order to give that person the opportunity to make statements. He may also request consent for the transit of the person referred to in the European Arrest Warrant to a third EU Member State (Arts. 44 and 55–58 Overleveringswet). After the apprehension of a person referred to in the European Arrest Warrant, the decision on pre-trial detention is taken by the executing judicial authority (Art. 12 of the Framework Decision on the European Arrest Warrant). Since it has been left open what is meant by “judicial authority,” it is up to the Member States to arrange which authority is in charge of this decision according to their own national law. As a consequence, the Dutch legislator has been entitled to arrange this decision to be taken by the public prosecutor who is not a part of the judiciary according to Dutch law.<sup>10</sup>

The public prosecutor may apprehend the person referred to in the European Arrest Warrant and order the pre-trial detention of this person for six days and for the period during which the trial proceedings are conducted at the Court of Justice Amsterdam. The public prosecutor can also order the seizure of goods of the apprehended person, preparation of the interrogation of this person by the officials that issued the European Arrest Warrant, and the temporary transfer of this person to the state that issued this warrant in order to give that person the oppor-

tunity to make statements. In addition, the public prosecutor can give his consent to the transit of a person referred to in the European Arrest Warrant on behalf of a third EU Member State (Arts. 17, 21 and 49–54 Overleveringswet). As the public prosecutor is the central judicial authority dealing with European Arrest Warrants, he is also the deciding official in cases in which warrants are issued by several Member States for the surrender of a certain person. The public prosecutor decides which warrant will be treated first on the basis of a fair administration of justice (Art. 26 par. 3 Overleveringswet).<sup>11</sup>

### III. The Criminal Acts in the Framework Decision

The surrender of the person referred to in the European Arrest Warrant can be granted if it involves a criminal act listed in Art. 2 of the Framework Decision on the European Arrest Warrant that may be sentenced with imprisonment of at least three years, according to the criminal law of the issuing state. This list constitutes a breach of the principle of double criminality that was/is significant for the classic extradition structure. The choice of the 32 criminal acts listed in Art. 2 of the decision is based on the principle of mutual recognition in combination with the high level of trust and solidarity between the Member States of the European Union. This justifies the abolition of the principle of double criminality for these listed acts.<sup>12</sup> Besides, looking at the contents of this list, it seems safe to assume that the criminal acts therein can be punished with at least three years imprisonment according to the criminal law provisions in all EU Member States. This means that the abolishment of the double criminality principle for these criminal acts can be seen as an obvious step because the use of this principle by the judicial authorities in the Member States dealing with a European arrest warrant would commonly lead to the conclusion that the criminal acts referred to in the warrant are in line with this principle. Apart from the listed acts, surrender of a person referred to in a European Arrest Warrant can be granted if the criminal act has already been sentenced in the issuing state with a minimum of four months imprisonment.

According to Art. 26 of the Framework Decision on the European Arrest Warrant the issuing state – after surrender of the person referred to in the warrant – has the obligation to lower the length of the sentence by any period spend in pre-trial detention because of the issuing of this warrant. Also, surrender can be granted if the warrant involves a criminal act that, according to the law of the issuing state as well as that of the Netherlands, may be sentenced with a period of twelve months or more (Arts. 2 par. 1 and 7 par. 1 Overleveringswet). For these criminal acts, the principle of double criminality still applies. Problems do arise, however, when the national criminal provision is not fully compatible with the terms and



qualification of a certain listed criminal act. If the facts of a certain case only refer to the possession of a vast amount of money and the person referred to in the European Arrest Warrant can give no indication of its origin, it is not clear that the criminal act constituted money laundering (number 9 on the list). According to the Court of Justice Amsterdam, money laundering includes the knowledge on the part of the perpetrator of the illegal origin of the money. On the basis of the warrant, this required knowledge was lacking and, as a consequence, the surrender of the person referred to in the warrant was denied because the warrant contained neither a listed criminal act nor any criminal act that was punishable according to Dutch criminal law.<sup>13</sup> Therefore, the court found it necessary that the warrant include the text of the relevant criminal provisions in the issuing state.<sup>14</sup> It seems, however, that the approach of the Court of Justice Amsterdam has changed in recent years.

The new approach of the court seems to be more Europhile in the sense that it no longer investigates in detail anymore the contents of a European Arrest Warrant. That means that the claim of the defense that the qualification of the criminal acts mentioned in the warrant are unjustified can only have success in extraordinary circumstances.<sup>15</sup> This new approach seems to be more in line with the relevant provisions of the Framework Decision on the European Arrest Warrant. The Court of Justice of the EU as well as the High Court have stressed that the *Overleveringswet* should be implemented in light of the meaning and objective of this framework decision.<sup>16</sup> Neither Art. 2 nor Art. 8 of this framework decision prescribe that the European Arrest Warrant should contain the contents of the relevant criminal provisions of the issuing state. This promotes the objective of the decision, which is the result of a high degree of trust between the Member States that surrender of a person referred to in the European Arrest Warrant should be possible without complications and loss of time. Therefore, the opinion that the warrant should contain the contents of the relevant legal provisions of the issuing state is unjustified.<sup>17</sup>

#### IV. Grounds for Refusal and the ECHR

As a general rule, the surrender of a person referred to in a European Arrest Warrant meeting the standards of the Framework Decision on the European Arrest Warrant is granted, except in cases where there are grounds for refusal. These grounds may involve a situation in which the criminal act has already been prosecuted in the Netherlands, if there is a case of *ne bis in idem*, if the criminal act mentioned in the warrant gives rise to immunity from prosecution through lapse of time,<sup>18</sup> if the person referred to in the European Arrest Warrant was younger than twelve years

of age at the time of the criminal act, if this person claims to be innocent of the criminal acts mentioned in the warrant and this claim is self-evident, or if surrender of this person would be a flagrant denial of justice under the European Convention on Human Rights (ECHR) (Arts. 9-11 and 28 par. 2 *Overleveringswet*). Since the implementation of the *Overleveringswet*, the last two grounds for refusal have been the subject of review several times. According to the European Court of Justice, Art. 6 par. 1 ECHR is not applicable to the surrender of a person referred to in a European Arrest Warrant because it is not a criminal charge as meant in Art. 6 ECHR. The implementation of this warrant has the objective of bringing the suspect or convicted person before the competent authorities of the issuing state. The judicial authority that receives the warrant only investigates if the warrant complies with its own relevant legislation and is only entitled to refuse the surrender on grounds laid down in this national legislation.<sup>19</sup>

Nevertheless, there are two situations in which Art. 6 par. 1 ECHR can be of relevance to the surrender of a person referred to in a European Arrest Warrant: first, the surrender carries the risk of a flagrant denial of justice of the right to a fair trial and, secondly, the surrender has the objective of implementing a sentence in the issuing state. In the latter case, it is necessary that the surrendered person has the right to a new trial in the issuing state.<sup>20</sup> In several cases under the *Overleveringswet*, the right to be tried within a reasonable time as guaranteed in Art. 6 par. 1 ECHR has been at stake. According to the Court of Justice Amsterdam, this right is not applicable if the offender referred to in the European Arrest Warrant has already been sentenced in the issuing state with a minimum of four months imprisonment and the issuing state has not implemented this sentence for a period of four years. Also, the right to a fair and public hearing according to Art. 6 par. 1 ECHR does not include the right of implementation of a sentence within a certain limited time. As long as the lack of implementation of the sentence does not give rise to immunity through lapse of time, the surrender of the person referred to in the warrant should be granted.<sup>21</sup> If, however, the issuing state did not undertake any investigative or prosecutorial action for a period of more than seven years, the surrender of the person referred to in the European Arrest Warrant is contrary to the right to be tried within a reasonable time as guaranteed in Art. 6 par. 1 ECHR.<sup>22</sup> The same applies for the issuing state where there is not an “effective remedy” against the claim of the defense that, after surrender, the right to be tried within a reasonable time will be frustrated.<sup>23</sup>

It appears that this approach has been reviewed recently by the Court of Justice Amsterdam itself. On the basis of rulings of the European Court of Justice, the Court of Justice Amsterdam bears in mind the fact that the issuing state is a member to the

ECHR and that this fact should have implications for the judgment of the threat of a flagrant denial of justice. This means that the postponement of prosecution in the issuing state as such is not contrary to the right to a fair trial in the issuing state. And if the person referred to in the European Arrest Warrant claims otherwise, he is entitled to bring his claim before the competent authorities of the issuing state and ultimately the European Court of Justice.<sup>24</sup>

## V. Claim of Innocence

As underlined by the Framework Decision on the European Arrest Warrant, the principle of trust between the Member States means that the person referred to in the European Arrest Warrant is suspected of the criminal acts mentioned in the warrant and that this suspicion is justified. This principle rules out the need for an evaluation of this suspicion. Nevertheless, the *Overleveringswet* recognizes the grounds for refusal of the surrender of the person referred to in the European Arrest Warrant if this person claims to be innocent of these acts and this claim is self-evident. This ground for refusal of the surrender seems questionable as it is not foreseen in the framework decision and therefore it can be argued – as has been done by the European Commission – that this ground for refusal is contrary to the framework decision, since it requires an examination of the substantive case, and it is also contrary to the principle of trust between the Member States.<sup>25</sup>

This argument is also supported in the Netherlands itself because, basically, this ground for refusal is contrary to the idea of mutual trust and mutual recognition of judicial decisions in the European Union.<sup>26</sup> However, it should be stressed that this ground for refusal is designed for cases in which there is an obvious alibi. The case law makes clear that this ground for refusal can only be relevant if the physical absence at the scene of the crime(s) of the person referred to in the European Arrest Warrant is obvious. Simply denying the criminal acts referred to in the warrant is not sufficient; there can only be a convincing alibi if the person was hospitalized or in pre-trial detention during these acts and this can be immediately proven beyond any doubt.<sup>27</sup> This claim of innocence should be put forth during trial proceedings before the Court of Justice Amsterdam (Art. 26 par. 4 *Overleveringswet*). If this claim is convincing, there can be reason for further investigation or refusal of the surrender of the person referred to in the warrant.<sup>28</sup> Within the framework of this claim, however, there is no room to request the issuing state for further information on the criminal acts mentioned in the European Arrest Warrant.<sup>29</sup> Furthermore, Art. 26 par. 4 *Overleveringswet* is not in conflict with Art. 6 ECHR because it does not involve a criminal charge.<sup>30</sup>

## VI. Optional Grounds for Refusal

In addition, the European Arrest Warrant may be refused if the warrant involves the implementation of a sentence in the issuing state and the person referred to in the warrant has not been able to exercise his defense rights during trial proceedings in the issuing state (Art. 12 *Overleveringswet*). This ground for refusal is denied if the person referred to in the European Arrest Warrant has been informed about the date and place of trial proceedings in the issuing state and this person has not appeared during these proceedings.<sup>31</sup> Also, refusal is possible if the criminal act has been committed within the jurisdiction of the Netherlands or outside the jurisdiction of the issuing state if, in a similar case, the Netherlands would not have jurisdiction. If the public prosecutor decides not to claim the surrender of this person, the Court of Justice Amsterdam reviews whether this decision has been taken on reasonable grounds (Art. 13 *Overleveringswet*). At first, the Court of Justice Amsterdam took the stance that the public prosecutor takes this decision without any underlying criminal policy, which meant that the court could only review this decision if the public prosecutor is expected to have an aggravated duty to explain why he has decided to give up this ground for refusal.<sup>32</sup> And in this review, grounds of humanity could lead to the refusal of the surrender of the person referred to in the European Arrest Warrant. However, this approach of the Court of Justice Amsterdam has been waived by the High Court on several occasions. The High Court has made it clear that the Court of Justice Amsterdam, when reviewing the decision of the public prosecutor under Art. 13 *Overleveringswet*, is only entitled to a test of reasonableness of this decision.

This means that the surrender of the person referred to in the European Arrest Warrant cannot be judged on the basis of aggravated duty in order for the public prosecutor to explain why he has claimed to give up this ground for refusal, and it cannot be refused on humanitarian grounds.<sup>33</sup> Besides, the Court of Justice Amsterdam has taken the position that the surrender of a person referred to in the European Arrest Warrant must be postponed awaiting the decision of the Court of Justice on a notice of objection from this person against the decision of the public prosecutor not to prosecute the criminal act mentioned in the warrant.<sup>34</sup> This approach seems questionable. The procedure after the notice of objection regarding the decision of whether or not to surrender lacks any legal basis in the *Overleveringswet* and is contrary to the sixty-day limitation of the Framework Decision on the European Arrest Warrant and the choice of the Dutch legislator for judicial review of a claim to surrender a person at one instance only.<sup>35</sup>

## VII. Conditions for Surrender and Detention

The surrender of the person referred to in the European Arrest Warrant takes place under the condition that this person will only be prosecuted or punished for criminal actions mentioned in the warrant. If this person is a Dutch national or a foreigner with permanent resident status in the Netherlands, the surrender will only be for the benefit of criminal investigations and the subsequent trial in the issuing state. The surrender of this person is granted under the condition that, if this trial leads to the implementation of a sentence involving imprisonment, this person will be re-surrendered to the Netherlands in order to serve this prison sentence (Arts. 6 and 14 Overleveringswet). If the court has decided that the person referred to in the warrant can be surrendered, this person can be held in detention for ten days until the actual surrender takes place. This period can be prolonged each time by a period of 30 days (Arts. 34 and 35 Overleveringswet). This detention cannot be suspended unless there is a breach of the rights to freedom as guaranteed in Art. 5 ECHR. Such a breach exists if the issuing state is not able to point out when trial proceedings in the issuing state will start and if this person had already been undergoing detention before surrender for a period of eleven to even twenty months.<sup>36</sup> If the surrender of the person referred to in the European Arrest

Warrant is refused and he has undergone detention because of this warrant, he can claim for damages at the Court of Justice Amsterdam (Art. 67 par. 1 Overleveringswet). This claim does not include the situation in which detention has been exercised and the issuing state has withdrawn the warrant.<sup>37</sup>

## VIII. Conclusion

Several issues have been reviewed since the implementation of the Overleveringswet. Much can be learned from these reviews because they show how the judiciary in the Netherlands has interpreted provisions of the Overleveringswet that needed further clarification. Also, in the rulings of the Court of Justice Amsterdam, a development can be seen in the review of certain issues concerning double criminality, the claim that surrender would be a flagrant denial of justice under the ECHR, and the decision of the public prosecutor under Art. 13 Overleveringswet. In the early years of implementation of the Overleveringswet, there seemed to be a tendency to stress the national Dutch approach towards these issues. In more recent years, the reviews of these issues appear to have become more Europhile, following the approaches of both European judges and the High Court.



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1 Law of 29 April, Stb. 2004, 195.  
2 High Court 9 June 2009, NBStraf 2009, 214, ECLI: BH9946.  
3 Law of 9 March 1967, Stb. 1967, 139.  
4 Framework Decision 2002/584/JBZ (PbEG 2002, L 190).  
5 Paris 13 December 1957.  
6 Brussels 27 June 1962.  
7 Court of Justice Amsterdam 13 September 2005, LJN: AU2813.  
8 Court of Justice Amsterdam 17 October 2006, NBStraf 2007, 311, LJN: BD2936.  
9 Court of Justice EG 16 June 2005, C-105/03 (Pupino-case).  
10 Court of Justice Amsterdam 3 September 2004, NJ (Dutch Jurisprudence) 2005, 156, LJN: AS3861.  
11 Court of Justice Amsterdam 14 January 2005, NJ 2005, 157, LJN: AS2613.  
12 Court of Justice EG 3 May 2007, C-303/05, NJ 2007, 619, LJN: BA8983.  
13 Court of Justice Amsterdam 1 March 2005, NJ 2005, 220, LJN: AS8842.  
14 Court of Justice Amsterdam 4 March 2005, NJ 2005, 475, LJN: AU0467.  
15 Court of Justice Amsterdam 19 November 2011, ECLI: BU2954.  
16 Court of Justice EG 16 June 2005, Case-105/03, NJ 2006, 500, LJN: AU2335.

17 High Court 8 July 2008, NJ 2008, 594, ECLI: BD2447.

18 This lapse of time may be interrupted but only if it involves the interruption of the prosecution according to the law of the issuing state and not – by transformation – the law of the Netherlands: Court of Justice Amsterdam 24 October 2006, NBStraf 2006, 433.

19 European Court of Justice 7 October 2008, NJ 2009, 523, LJN: BI4795.

20 European Court of Justice 4 October 2007, appl. No. 12049/06, par. 2.

21 Court of Justice Amsterdam 16 July 2004, NJ 2004, 563, LJN: AQ6071.

22 Court of Justice Amsterdam 1 July 2005, NJ 2005, 341, LJN: AT8580.

23 Court of Justice Amsterdam 4 January 2006, NJFS 2006, 55, LJN: AU9280 and 12 September 2006, LJN: AY8670.

24 Court of Justice Amsterdam 19 October 2011, ECLI: BU2954.

25 Brussels 23 February 2005, COM(2005)63 final, p. 8.

26 Hanneke Sanders, *Het Europees aanhoudingsbevel*, Antwerpen: Intersentia 2007, p. 97.

27 Court of Justice Amsterdam 10 February 2006, LJN: AV3966 and 24 April 2009, LJN: BJ0726.

28 Court of Justice Amsterdam 6 April 2007, NBStraf 2007, 268.

29 Court of Justice Amsterdam 20 January 2006, NJFS 2006, 71, LJN: AV0496.

30 Court of Justice Amsterdam 25 October 2005, NJFS 2006, 41, LJN: AU4909.

31 Court of Justice Amsterdam 16 July 2004, NJ 2004, 563, LJN: AQ6071.

32 Court of Justice Amsterdam 1 April 2005, NJ 2005, 278, LJN: AT3380.

33 High Court 28 November 2006, NJ 2007, 487, NJ 2007, 488 and 2007, 489.

34 Court of Justice Amsterdam 18 August 2006, NBStraf 2006, 348.

35 Andre Klip, Explanatory note under High Court 28 November 2006, NJ 2007, 489.

36 Court of Justice Amsterdam 14 June 2012, NJFS 2012, 190, LJN: BX7057 and 29 August 2011, NJFS 2011, 235, LJN: BR7056.

37 Court of Justice Amsterdam 7 November 2012, ECLI: BY3282, BY 3290 and BY4702.

# Great Expectations from the Court of Justice

## How the Judgments on Google and Data Retention Raised More Questions than They Answered

Dr. Els De Busser

In spring of 2014, the Court of Justice published two rulings that are remarkable for different reasons and share one common trait: both judgments fall short of expectations. One of the tasks of the Court of Justice is interpretation of EU legal acts by means of preliminary rulings. National judges may request the Court to clarify provisions of EU law or even the validity of an EU legal instrument. In the past decades, this has led to several landmark rulings that have shaped EU law.<sup>1</sup> Through its jurisprudence, the Court has established a number of fundamental principles by giving elaborate explanations that the Member States' courts could rely on as guidelines for interpreting and applying the disputed legal provisions. Throughout the years, the Court has become a reliable guide offering indications to national judges – and indirectly also to policy makers – on how to apply principles such as the *ne bis in idem* rule, dual criminality, and non-discrimination. The two rulings of spring 2014 however fall short of such guidance.

Even though both cases are inherently different, the Luxembourg judges missed the chance to take a clear stand in two ongoing debates. First, the reform of the data protection legal framework triggers many additional questions on how to deal with data protection related issues in a new virtual reality. The storing of telecommunication data for longer periods of time as well as the responsibility of online search engines both fit into this debate. Yet the Court did not give satisfying indications on how these questions should be answered or dealt with on a national level. This would have been not only appropriate but also necessary in the context of the second ongoing debate that has Member States' trust as its focal point. Arguments on the lack of mutual trust between the Member States have been voiced before, particularly in the context of the European Arrest Warrant. What is new is that this trust deficit seems to be accompanied by a lack of trust in the EU institutions themselves – as demonstrated by difficulties in executing mutual recognition instruments on a national level, by Member States' reactions to the establishment of the European Public Prosecutor's Office, and by the recent European elections showing a growing support for so-called Eurosceptic narratives.

It is not clear what the root cause of this fading trust is and more thorough research is necessary than can be accomplished within the scope of this paper. It is obvious, however, that

confusion exists on the level of the Member States, which is why all eyes are on the Court of Justice for guidance. The two 2014 decisions highlighted in this contribution were preceded by several significant cases in 2013 in which the Court did not consider national constitutional guarantees where citizens' protection is concerned. In an area of law that has such a strong link to fundamental rights as criminal procedure law, it is remarkable that the Court makes an unmistakable choice for the fundamental rights in the EU Charter over citizens' safeguards encompassed in the Member States' laws and constitutions when these offer stronger protection.<sup>2</sup> This is also an alarming development from the point of view of national sovereignty and limited EU legislative competence.

### I. Background

The most recent European elections were held against a background of not only growing Eurosceptic political parties but also growing dissatisfaction with the functioning of the EU on several levels, going from the yellow card procedure against the legislative proposal establishing the EPPO to a legal problem as regards the newly adopted European Investigation Order. What has been going on much longer is the lack of mutual trust among Member States that should endorse mutual recognition of legal instruments such as the European Arrest Warrant. The latter has been the subject of national procedures with respect for fundamental rights at the heart of the discussion.<sup>3</sup> Increased attention to the Charter of Fundamental Rights and Freedoms would, at first glance, be a good thing, in particular when backed up by the Court of Justice. However, the Court is treading on thin ice by placing the Charter over national constitutional guarantees where citizens' protection is concerned.

As former third pillar matters, legislative proposals on judicial and police cooperation in criminal matters were originally debated and adopted in an intergovernmental decision-making procedure. For an area that is as sensitive and closely connected with the identity of a country as criminal law, supranational decision-making power was unthinkable. In the post-Lisbon era, the co-decision legislative procedure reins over all former pillars with "limited" competence for the Commission



to submit legislative proposals on aspects of substantive and procedural criminal law. In addition, mechanisms were introduced to protect Member States when a proposal would affect fundamental aspects of its criminal justice system.<sup>4</sup> The yellow card procedure was used when 14 national parliaments submitted reasoned opinions claiming that the legislative proposal for establishing the EPPO was in breach of the subsidiarity principle. In general, participating Member States argued that the Commission had not adequately considered the option of strengthening existing agencies (e.g., Eurojust or OLAF) or alternative mechanisms, that it had failed to substantiate the need and the added value of a EPPO, and that the protection of EU financial interests could be better achieved by strengthening and intensifying existing mechanisms of cross-border cooperation between criminal justice authorities.<sup>5</sup> With reference *inter alia* to OLAF's annual statistics indicating that national criminal proceedings are not effective and with reference to the limited competences of Eurojust and Europol, the Commission responded to Member States' concern that EU competence went too far in the proposed text on the establishment of the EPPO. The Commission decided to maintain the proposal.<sup>6</sup>

The European Arrest Warrant is another legal instrument that has caused concern in the Member States on the level of protecting the citizen against whom an EAW is issued. Several court procedures are known in which citizen's safeguards were tested before national judges.<sup>7</sup> In the 2013 Melloni case, such a test was submitted to the Court of Justice.<sup>8</sup> The Court ruled that the Framework Decision on the European Arrest Warrant precludes the executing judicial authorities from making the execution of a European Arrest Warrant conditional upon the conviction rendered *in absentia* being open to review in the Member State that issued the arrest warrant. Provided that the level of protection provided for by the Charter (as interpreted by the Court) and the primacy, unity, and effectiveness of EU law are not thereby compromised, national authorities and courts remain free to apply national standards of protection of fundamental rights whenever an EU legal instrument calls for national implementing measures.

The 2013 Fransson judgment<sup>9</sup> introduced the idea that the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law. With reference to the Melloni case,<sup>10</sup> the Court then stated that, when a national court is called upon to review whether fundamental rights are being complied with by means of a national provision or measure implementing EU law, in a situation where action of the Member States is not entirely determined by EU law, national authorities and courts remain free to apply national standards of protection of fundamental rights. However, the level of protection provided for by the

Charter (as interpreted by the Court) and the primacy, unity, and effectiveness of EU law should thereby not be compromised. The Court thus draws a line between national legislation falling within the scope of EU law on the one hand and national legislation that is not entirely determined by EU law but implements EU law on the other. This is a very fine line and difficult to apply in practice, which is why more indications on the part of the Court would be helpful for Member States' authorities.

## II. Annulment of the Data Retention Directive

On 8 April 2014, the Court of Justice declared Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks invalid.<sup>12</sup> This ruling did not come as a big surprise, considering the criticism the Directive had received since its adoption. Obliging telecommunication providers to collect and store the traffic data of Internet users for periods of time between six months and two years for possible future use in criminal investigations and prosecutions could not be justified by the necessity and the proportionality principles. Storing personal data for longer than is necessary for the purposes they were collected for is in accordance with the applicable data protection standards only allowed when this is legal and necessary to preserve a legitimate interest. The lack of nexus between the data subject to blanket retention on the one hand and a specific criminal investigation on the other, gave rise to procedures on a national level declaring the national implementation legislation of the Directive unconstitutional.<sup>11</sup> Some Member States did not have such proceedings but still did not transpose the Directive into national law. Many data protection experts and academics also reacted with criticism, mostly focused on the lack of necessity and proportionality of this blanket data retention measure.<sup>13</sup>

When the reform of the data protection legal framework was started in the EU, the Data Retention Directive was not part of the reform package. Only the two basic legal instruments governing data protection in the EU – the 95/46/EC Directive and the 2008 Framework Decision – were to be revised in a first stage. After this was finalized, the Data Retention Directive was also to be reformed, but this is no longer necessary.

The reasons for the annulment by the Court are rightfully centered on the necessity and proportionality requirements and the lack of objective criteria in the Directive on the time periods for retention. Moreover, according to the Court, the Directive should also offer criteria for maintaining the data on servers located on EU territory.



Member States have reacted quite differently, with Swedish telecom operators immediately terminating all data retention.<sup>14</sup> In contrast, the UK Home Office insisted that retention of communications data is absolutely fundamental to law enforcement, and telecom operators should continue to observe their obligations in accordance with national data retention laws.<sup>15</sup>

### III. Google and the Right to Delete

The “right to be forgotten” was introduced as a catchphrase in 2012, when the data protection legal framework reform was launched. Two mistakes were made here. First, the phrase itself is essentially misleading. There has never been a right to be forgotten and there never will be. Regardless of whether one refers to individual memory or the collective memory of a society, forcing people to forget – leaving any medical manipulation aside – is impossible. What can be done, however, is to erase, correct, or update personal data that are inaccurate. The right to be forgotten was confused with the right to accurate personal data. Second, the right to be forgotten was introduced as something new. This is also not the case. In the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Council of Europe introduced data protection standards, including the rule that personal data should be correct, up to date, adequate, relevant, and not excessive in relation to the purpose they are collected or processed for. This standard still exists today and has not been amended in the reform.

A preliminary question regarding the right to be forgotten was brought before the Court of Justice by the Spanish National High Court.<sup>16</sup> The Court ruled on 13 May 2014 that the world’s most popular online search engine Google is responsible for removing links to personal data that are no longer relevant to the purpose they were processed for. The data subject in the case was Mario Costeja González, a Spanish citizen who had social security debts in the late nineties. A real-estate auction was organized to recover the debts. In accordance with an order by the Ministry of Labour and Social Affairs, the auction was announced in a national newspaper with a view to giving it maximum publicity and to attract bidders. In 1998, however, most newspapers only existed in printed form. In the meantime, one would be hard-pressed to find a paper that does not have an online version. Many countries have legal provisions on the publication of certain announcements or judgments that entered into force before the Internet and Google became household names. In the meantime, the concept of publication itself has evolved. It now also includes online publication, making newspapers available on a wider scale and for a possibly indefinite period of time.

The newspaper that published the auction announcement, including the name of Costeja González, was made available online as well as its archive. It is this archive that is searchable by using Google. By typing his name into the search engine, Mario Costeja González discovered that the old announcement would come up. Since he had been negatively affected by these personal data still being available online, he filed a complaint against the newspaper and against Google with the Spanish data protection authority. Since the newspaper publication was legally justified by the Ministry of Labour and Social Affairs, the complaint was rejected. The complaint against Google and the request that Google remove the links to the published personal data was brought before a national judge, who sent a request for a preliminary ruling to the Court of Justice. The Court considered Google a data controller for the activity, which consisted in finding information published or placed on the Internet by third parties, indexing it automatically, storing it temporarily, and, ultimately, making it available to Internet users according to a particular order of preference. Secondly, the Court also considered the search engine responsible for removing the links making the personal data regarding Costeja González available on the Internet.

This case should not be misunderstood. The personal data identifying Mario Costeja González were not contested because they are not incorrect. What was contested is the current relevance of personal data in an announcement for a real-estate auction held in 1998. In accordance with the data protection standards of 1981, personal data should be relevant for the purpose they were processed for and should not be stored in a database longer than is necessary for that purpose. The Court of Justice confirmed this and thus far the Court’s ruling is acceptable. Nonetheless, holding Google responsible for the fact that the personal data and the announcement are still available today is focusing on the wrong target. What Google does is to make information that already exists searchable and to create an index of search results. The company did not create the data nor was it the source of the data. From a data protection point of view, making Google responsible for removing the links to these data is not the correct approach. Even after removal of the link, the information is still available on the website of the Spanish newspaper, and other search engines can be used to find it besides the newspaper’s own search function. The contested issue here is the fact that personal data identifying an individual are still publicly available two decades after it was legally necessary to publish them. The correct target therefore is the national Spanish law and its data retention provisions, not search engine Google. The Court of Justice was limited by the scope of the request for a preliminary ruling, but ruling that Google is responsible for removing the links in question is not a correct conclusion.

Also, making a private company with a commercial interest responsible for deciding on the relevance of certain personal data is a risky development. Search engines such as Google make their profits not by making personal data searchable and available but by connecting these searches to specific advertisements. Such companies do not have a mandate to decide which personal data should be made available, and they should not be given such a mandate as their interest is not protecting the rights of the data subject. This is a task for a data protection authority, not a private company.

Since the Court's ruling was published, Google has reportedly received over 120,000 requests from individuals wishing to have links to – embarrassing – information on them removed.<sup>17</sup> Media reports include examples of business competitors trying to abuse removals processes to reduce each other's web presence or a medical doctor trying to hide negative patient reviews. Overwhelmed with these requests and confused on whether certain personal data are relevant or not, Google has even reinstalled links to newspaper articles from the Guardian after the British newspaper protested their removal.<sup>18</sup> This shows how difficult it is for a private company to be in the position of deciding on the relevance of (links to) personal data.

#### IV. Guidance for Legislators on Adapting Their Provisions to Today's Internet Society

A fairly new virtual reality calls for answers to new questions. Law and jurisprudence are traditionally slow mechanisms in reacting to new developments in reality. Nevertheless, an institution such as the Court of Justice is in the appropriate position to give the necessary guidance to Member States' authorities as well as to the EU legislator to answer these questions. As the Court's task is to interpret EU law, it could have offered more precise indications in the judgment on the Data Retention Directive on how to organize proportionate retention that has appropriate time limits or on how to develop objective criteria with regard to cloud computing and the data being stored on EU servers. The ruling on Google and the right to be forgotten could firstly have taken a better turn if the Court had followed the elaborate opinion of its Advocate General. Secondly, even though one cannot expect the Court to give guidelines to private companies on how to deal with the right to delete irrelevant data by means of a preliminary ruling, the Court could assist legislators in dealing with this new challenge. When the Charter of Fundamental Rights and Freedoms<sup>19</sup> is indeed above national constitutional guarantees, the Court should also assist national authorities in implementing it as such.



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1 For example Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 5 February 1963 and Case 6/64, *Flaminio Costa v. ENEL*, 15 July 1964.

2 See J. Vogel, "Radu – Melloni – Åkerberg Fransson: »Staatsstreik« in Luxemburg?", *Strafverteidiger*, 5/2013, 1.

3 See *inter alia* A. Tinsley, "Note on the Reference in Case C-399/11 Melloni", *NJECL* 1/2012, 19–30; C. Heard and D. Mansell, "The European Arrest Warrant: The Role Of Judges When Human Rights Are At Risk", *NJECL* 2/2011, 133–147 and G. Vermeulen and T. Vander Beken, "Uitlevering Basken aan Spanje: Juridische Bedenkingen bij een Politieke Zaak", *Rec. Cass.* 1995, 221–230.

4 Arts. 82 and 83 TFEU. See also E. Herllin-Karnell, "The Lisbon Treaty. A Critical Analysis of Its Impact on EU Criminal Law", *eu crim* 2/2010, 61–64.

5 Council, Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (EPPO) – "Yellow card", 16624/13, 28 November 2013.

6 COM(2013) 815 final.

7 *Idem*.

8 Case C-399/11, *Stefan Melloni v. Ministerio Fiscal*, 26 February 2013.

9 Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013.

10 See for an elaborate overview: M. Borowsky, "Artikel 53 Schutzniveau", in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, Nomos, 2014, 4th ed., 813–825.

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13 European Data Protection Supervisor, Opinion of 31 May 2011 on the Evaluation report from the Commission to the Council and the European Parliament on the Data Retention Directive (Directive 2006/24/EC), O.J. C 279/01, 23 September 2011, 1; E. De Busser, *Data Protection in EU and US Criminal Cooperation*, Maklu, 2009, 160–168; K. De Vries; R. Bellanova; P. De Hert and S. Gutwirth, "The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance, Doesn't It?", in S. Gutwirth, Y. Poullet, P. De Hert and R. Leenes (eds.), *Privacy and data protection: an element of choice*, Springer, 2011, 3–24.

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16 Case C- 131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González, 13 May 2014.

17 S. Schechner and D. Roman, "Google Seeks Views in Europe on Right to be Forgotten", *Wall Street Journal*, 9 September 2014 and S. Gibbs, "France requests most 'right to be forgotten' removals from Google", *The Guardian*, 1 August 2014.

18 D. Lee, "Google reinstates 'forgotten' links after pressure", *BBC News*, 4 July 2014.

19 For a full and thorough analysis of the EU Charter of Fundamental Rights and Freedoms, see J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, Nomos, 2014, 4th ed.

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