



### **Focus: Procedural Rights and Cooperation – New Tendencies**

**Dossier particulier: Droits procéduraux et coopération – nouvelles tendances**

**Schwerpunktthema: Verfahrensgarantien und Zusammenarbeit – neue Tendenzen**

The Directive on the Presumption of Innocence and the Right to Be Present at Trial  
*Steven Cras and Anže Erbežnik*

The Directive on the Presumption of Innocence. A Missed Opportunity for Legal Persons?  
*Stijn Lamberigts*

*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU  
*Prof. Dr. Stefano Ruggeri*

Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud  
*Emilia Porebska*

Können die Regelungen über die Zusammenarbeit der EU-Mitgliedstaaten  
bei der Strafverfolgung kurzerhand aufgehoben werden?  
*Ulrich Schulz*

Vollstreckungshilfe zwischen Deutschland und Taiwan auf neuer Grundlage  
*Dr. Ralf Riegel and Dr. Franca Fülle*

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.

## Contents

### News\*

#### European Union

##### Foundations

- 2 Fundamental Rights
- 2 Area of Freedom, Security and Justice
- 3 Schengen

##### Institutions

- 4 Council
- 5 European Court of Justice (ECJ)
- 5 OLAF
- 6 Europol
- 7 Eurojust
- 7 European Judicial Network (EJN)
- 8 Frontex

##### Specific Areas of Crime / Substantive Criminal Law

- 9 Protection of Financial Interests
- 10 Corruption
- 11 Money Laundering
- 12 Organised Crime
- 12 Cybercrime
- 12 Trafficking in Human Beings

##### Procedural Criminal Law

- 13 Procedural Safeguards
- 13 Data Protection
- 15 Ne bis in idem

##### Cooperation

- 16 European Arrest Warrant
- 18 Criminal Records
- 18 Law Enforcement Cooperation

#### Council of Europe

##### Foundations

- 19 Reform of the European Court of Human Rights
- 19 Other Human Rights Issues

##### Specific Areas of Crime

- 20 Corruption
- 22 Money Laundering

### Articles

#### Procedural Rights and Cooperation – New Tendencies

- 25 The Directive on the Presumption of Innocence and the Right to Be Present at Trial. Genesis and Description of the New EU-Measure  
*Steven Cras and Anže Erbežnik*
- 36 The Directive on the Presumption of Innocence. A Missed Opportunity for Legal Persons?  
*Stijn Lamberigts*
- 42 *Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU. Responses of the European Courts and New Perspectives of EU Law  
*Prof. Dr. Stefano Ruggeri*
- 52 Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud. An Introduction to Regulation (EU) 2015/1525  
*Emilia Porebska*
- 55 Können die Regelungen über die Zusammenarbeit der EU-Mitgliedstaaten bei der Strafverfolgung kurzerhand aufgehoben werden?  
*Ulrich Schulz*
- 61 Vollstreckungshilfe zwischen Deutschland und Taiwan auf neuer Grundlage  
*Dr. Ralf Riegel / Dr. Franca Fülle*

### Imprint

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

# Editorial: 10 Years of eucrim

Dear Readers,

In early 2016, eucrim celebrated its 10th anniversary. I would like to thank everyone who has contributed to this endeavor over the years. Special thanks go to all our readers, authors, the Max Planck team, and the Commission. Without you, the longstanding achievements of eucrim would not have been possible!

When we look back on the development of eucrim, it has been an overall success. From the very beginning, eucrim went beyond the original idea of being merely a newsletter on European criminal law. During the past ten years, it has also evolved into a well-known journal for academics, practitioners, and policy-makers by providing a platform for renowned authors. Thus, the overall value of eucrim is the provision of sound information that enables us to understand developments in European criminal law and the protection of the EU's financial interests.

However, in the 10th year of eucrim, we are also facing worrisome changes. The EU is coping with several crises. The migration crisis shows the lack of European solidarity and an erosion of the "Schengen ideal." At the national level, we are witnessing euroscepticism caused by egotism, right-wing demagoguery, and, in some Member States, a substantial loss of freedom. People are losing trust in the EU, as illustrated by the Dutch referendum on the EU-Ukraine association agreement and the opinion polls on a possible "Brexit." Similar tendencies can be observed in the field of European criminal law. Although research studies and OLAF's reports have clearly shown the need for a genuine European Public Prosecutor's Office with strong supranational elements, many national governments are eyeing the EPPO with suspicion and hesitating to go ahead with it.

We have to pay attention to and counteract these negative trends. This means maintaining our critical attitude with respect to possibly misguided developments at the European and national levels and advocating for a better balance between security and liberty as well as between national sovereignty and Europeanisation. Delicate decisions with respect to these conflicting aims should be made rationally, with due regard for constitutional values, human rights standards, and the principle of subsidiarity, and they should be based on empirical and normative research instead of on populist rhetoric. Indeed, a strong alliance between researchers and practitioners is es-

sential and will help improve the often poorly conceived political compromises on the national and supranational levels.

Above all, due to the rising euroscepticism and populist demagoguery on the national level, we must uphold our vision of a strong Europe and defend it rationally. We should focus on what Europe has already achieved. Lawyers too, must shed more light on the costly threat of a non-Europe. According to a new study, losses to the European economy from corruption cause significant damages in GDP if EU-wide action is lacking (see also, p. 10). Moreover, the benefits of the EU cannot be measured solely in terms of GDP and a more effective use of public resources but the substantial values of freedom, security, justice and peace must also be included in the equation.

For this reason, the next issue of eucrim (2/2016) will focus on the "Costs of Non-Europe" in the fields of criminal law and the protection of the EU's financial interests. I kindly invite you to contribute to this issue by sending us articles or short notes on this topic. The submission of articles, including those that are based on sound research and practical experience on the development of policy guidelines and legal measures, is particularly welcome.

During the next ten years, eucrim aspires to be a forum for defending our values and ideals of a strong Europe supported by rational arguments, objective research, and the invaluable knowledge of experienced practitioners!

Prof. Dr. Dr. h.c. mult. Ulrich Sieber  
Editor in Chief of eucrim, Director Max Planck Institute  
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Ulrich Sieber



## European Union\*

Reported by Thomas Wahl (TW) and Cornelia Riehle (CR)

### Foundations

#### Fundamental Rights

##### Study Looks into Applicability of CFR

The EP's Committee on Petitions published a study in February 2016 that deals with the application of the Charter of Fundamental Rights (CFR) to national measures. The interpretation of Art. 51 CFR in this context is currently one of the most controversially discussed issues regarding the EU's fundamental rights scheme.

The study – authored by Prof. Eleanor Spaventa from Durham University (UK) – examines the way the CJEU has been interpreting fundamental rights in relation to such measures before and after the Lisbon Treaty and the constitutionalisation of the CFR entailed. The study found that the CJEU's case law follows a varied interpretation of Art. 51 CFR. It is noted that the CJEU also considers fundamental rights a tool to ensure the supremacy and effectiveness of EU law. It is further remarked that the Court applies fundamental rights to measures adopted by Member States

when a stronger interest of the EU is at stake, such as the internal market or EU integration. When the Member State acts on the basis of EU coordination measures, the CFR is applied only in exceptional cases.

The study also included a case study regarding petitions tabled by citizens to the EP. The study found that – in the light of the CJEU's case law – the approach taken by the Commission to these petitions is principally justifiable, with the exception of bailout agreements on the right to collective action in Greece.

The study further stated that the interpretation of the CFR by the CJEU is dangerously restrictive and not warranted by Art. 51. Union citizenship, the European Arrest Warrant, and asylum cases are listed as examples in this context, where the CJEU has weakened the protection afforded by the Charter so as not to undermine the *effet utile* of the European instruments. The author calls for a more courageous use of the CFR for national measures falling within the scope of EU law. Furthermore, she concludes that EU fundamental rights should not be seen as instrumental to achieving the effectiveness and supremacy of EU

law but instead as a tool that supports integration in certain areas. As a consequence, the CJEU should clarify that EU rules might become inapplicable or invalid if an alleged common standard of fundamental rights protection does not exist in practice.

For fundamental rights issues in relation to the EAW, see also the section "Cooperation – European Arrest Warrant" in this issue. (TW)

► eucrim ID=1601001

### Area of Freedom, Security and Justice

#### Report on EU's Activities in 2015

On 9 March 2016, the European Commission published a General Report on the activities of the EU in 2015. The report follows the ten political guidelines that were announced by Jean-Claude Juncker, President of the European Commission, in November 2014 when he started his mandate. Chapter 7 of the report deals with the "area of justice and fundamental rights based on mutual trust". Among other points, it covers the following:

- The European Agenda on Security (presented by the Commission in April 2015);
- The EU's response to defeating terrorism, following the terrorist attacks in Paris in January and November 2015;
- The EU data protection reform;
- The EU-US data protection umbrella agreement;

\* If not stated otherwise, the news reported in the following sections cover the period December 2015–March 2016..

■ The progress made towards the establishment of the European Public Prosecutor's Office.

The report and a short summary are directed not only at those who are familiar with EU affairs but also at the general public. The publication of the General Report is a Treaty obligation, set out in Art. 249(2) TFEU. (TW)

➤ [eucrim ID=1601002](#)

### Impact of Migration Crisis on European Criminal Law

The migration crisis is also impacting judicial cooperation and the fight against xenophobia. After having agreed on matters of priority, the EU institutions and Member States took several actions to tackle challenges in relation to the migration crisis. The measures include:

- Stronger involvement of Eurojust as to the facilitation of investigations and the prosecution of illegal immigrant smuggling;
- Supporting hotspots in Italy and Greece;
- Closer cooperation with third countries, in particular countries in the Middle East and the Northern Africa region.

Moreover, efforts were made to improve the fight against hate speech, hate crime, and xenophobia.

The Luxembourg Presidency published a progress report on the various measures of judicial cooperation and the fight against xenophobia in December 2015. (TW)

➤ [eucrim ID=1601003](#)

### Human Rights: What is Meant by "Coherence" and "Consistency"?

On 24 February 2016, the Dutch Presidency tabled a paper that aims at intensifying the discussion on coherence and consistency between internal and external human rights policy. While the EU and its Member States guarantee high standards of human rights protection internally, the EU is also explicitly committed to promoting human rights in all its external activities and policies towards third countries. Coherence and

consistency are of great importance in this regard. The Presidency would like to reflect more on:

- Concrete examples of perceived incoherence and inconsistency between EU internal and external human rights policies, both from the internal and the external perspective;
- Developing the understanding of coherence and consistency underlying this perception as well as the defining elements of optimal "coherence" and "consistency" in each of these areas.

The discussion paper is based on previous reflections in the two Council working parties: FREMP and COHOM. FREMP (the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons) deals with issues related to the Charter of Fundamental Rights of the European Union and the promotion of fundamental rights in the European Union. COHOM (the Working Party on Human Rights) deals with human rights aspects of the external relations of the EU and supports the Council's decision-making process in this area. The discussion paper is intended to strengthen the dialogue between FREMP and COHEM and to provide better guidance for their work. (TW)

➤ [eucrim ID=1601004](#)

### Better Circulation of Public Documents

The JHA Council and the European Parliament approved a compromise package on a regulation for simplifying the presentation of certain public documents in the European Union, thus amending Regulation (EU) No. 1024/2012. The new legal framework was initially presented by the Commission in 2013 and aims at a better cross-border acceptance of certain public documents. The public documents primarily refer to civil status matters, such as births, deaths, marriage, divorce, registered partnerships, and parenthood. Public documents are also covered, that are issued for a national by his/her Member State in order to attest that he/she does not have a criminal record.

The new legislative framework provides that the public documents referred to in the regulation are exempted from all forms of legalization and similar formality. The regulation foresees further simplifications of other formalities, such as certified translations and certified copies.

In addition, multilingual standard forms are being established in order to overcome language barriers. The purpose of the forms is to eliminate, to the best extent possible, the need for translation of the public documents concerned, e.g., those relating to a criminal record.

The regulation deals with the authenticity of a public document presented in another EU country but not with recognition of its content or its legal effects in another EU country. (TW)

➤ [eucrim ID=1601005](#)

## Schengen

### Council Agrees on Systematic Checks at Schengen's External Borders

At its meeting on 25 February 2016, the JHA Council agreed on a general approach to the proposed regulation of reinforcing checks against relevant databases at external borders. The regulation was proposed by the Commission on 15 December 2015 as part of the so-called "borders package". The proposal seeks to amend Art. 7 of Regulation (EC) No. 562/2006 – the Schengen Borders Code. It is a reaction to the tragic terrorist attacks in Paris in autumn 2015 and to the threat from foreign terrorist fighters.

To date, the Schengen Borders Code only foresees minimum checks for persons enjoying the Community right to free movement *on entry* into the EU.

The new regulation plans to introduce, as a rule, mandatory, systematic checks on entry and on exit of both EU citizens as well as third country nationals. This obligation shall apply at all external borders (air, sea, and land borders). Border controls would have to consult all relevant databases, such as the Schengen Information System, the

Interpol Stolen and Lost Travel Documents Database, and relevant national systems in order to verify that persons arriving do not represent a threat to public order and internal security. The proposal also reinforces the need to verify the biometric identifiers in the passports of EU citizens in case of doubt as to the authenticity of the passport or on the legitimacy of the holder.

The text, however, also allows for the carrying out of only targeted checks if a systematic consultation of databases on all the persons enjoying the right of free movement under Union law could lead to a disproportionate impact on the flow of traffic at the sea and land borders – provided that a risk assessment shows that this does not lead to risks detrimental to internal security, public policy, international relations of the Member States, or to the public health. As regards air borders, the Council agreed that Member States may use this possibility, but only for a transitional period of six months from the entry into force of the amended regulation.

The agreement reached within the Council forms the basis for negotiations with the European Parliament as co-

legislator. Reaching an agreement on the new regulation is considered an absolute priority by the Council. (TW)

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### Roadmap for Restoring the Schengen System

On 4 March 2016, the Commission presented a detailed roadmap that contains concrete steps for restoring order to the management of the EU's external and internal borders. The migration crisis put the entire Schengen system under high pressure and the Commission's roadmap is a response to the call of the European Council in February 2016 "to restore, in a concerted manner, the normal functioning of the Schengen area while giving full support to Member States in the most difficult circumstances".

In order to return to normality, the Commission identifies three areas in which actions have to be taken:

- Remedy the deficiencies that were identified in the management of the external borders, in particular as to Greece;
- End the "wave-through approach" and restore the Dublin system with respect to asylum seekers;

- Replace the current patchwork of unilateral decisions on the reintroduction of internal border controls with a coordinated approach as foreseen in the Schengen Border Code.

As a consequence, all internal border controls should be lifted by December 2016 at the latest.

The Commission also presented figures on the costs of introducing internal border controls. From an economic perspective, the Commission has estimated that full re-establishment of border controls to monitor the movement of people within the Schengen area would generate immediate direct costs for the EU economy within a range of €5 to €18 billion annually. (TW)

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### Schengen Evaluation of Poland

In December 2015, the Council published a recommendation for Poland, which calls for remedial actions in order to lift deficiencies in the field of the Schengen Information System. The paper is based on a second on-site visit to Poland by the Commission within the scope of the new Schengen evaluation mechanism that came into force in 2013. (TW)

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#### Common abbreviations

|                |   |
|----------------|---|
| CEPOL          | European Police College   |
| CDPC           | European Committee on Crime Problems  |
| CFT            | Combatting the Financing of Terrorism   |
| CJEU           | Court of Justice of the European Union  |
| ECJ            | European Court of Justice (one of the 3 courts of the CJEU)   |
| ECtHR          | European Court of Human Rights  |
| EDPS           | European Data Protection Supervisor   |
| (M)EP          | (Members of the) European Parliament  |
| EPPD           | European Public Prosecutor Office   |
| FIU            | Financial Intelligence Unit   |
| GRECO          | Group of States against Corruption  |
| GRETA          | Group of Experts on Action against Trafficking in Human Beings  |
| JIT            | Joint Investigation Team  |
| LIBE Committee | Committee on Civil Liberties, Justice and Home Affairs  |
| (A)ML          | (Anti-)Money Laundering   |
| MLA            | Mutual Legal Assistance   |
| MONEYVAL       | Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism |
| PIF            | Protection of Financial Interests   |
| SIS            | Schengen Information System   |
| THB            | Trafficking in Human Beings   |

## Institutions

### Council

#### Working Programme of the Dutch EU Presidency

A comprehensive approach to migration and international security is one of the main topics of the working programme of The Netherlands presidency of the Council of the EU from 1 January to 30 June 2016. The programme states that internal and external issues of justice and home affairs are inextricably linked and that the EU must move forward in this regard.

As regards Justice and Home Affairs, the migration crisis dominates the agen-

da as well as the fight against terrorism and organised crime.

In the context of security, the Dutch presidency focuses on the implementation of the EU's Internal Security Strategy 2015-2020, which requires a coordinated European response to the following:

- The transnational nature of cyber-crime and cyber security issues;
- Terrorism and organised crime, including human trafficking;
- The prevention of radicalisation.

The new presidency would like to establish more effective operational cooperation and further improvements to the exchange of information, while at the same time maintaining data protection safeguards. It will also address the proposal to amend the Framework Decision on combating terrorism, improved rules on firearms, and a proposal for a European Criminal Records Information System for third country nationals. Ultimately, the Netherlands Presidency will seek to advance a number of ongoing legislative matters that are the subject of current negotiations. These relate, *inter alia*, to legal aid and the EU's accession to the ECHR. (TW)

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## European Court of Justice (ECJ)

### Reform of General Court

After more than four years of debate, the Council and the European Parliament finally adopted legislation for a reform of the General Court in December 2015.

The reform had been requested by the President of the General Court in order to tackle the consistently increasing caseload of the Court and to carry out proceedings within a reasonable time, as provided for by Art. 47 of the Fundamental Rights Charter and Art. 6 ECHR. The reasons for the backlog of cases were:

- The increase in the number and variety of legal acts on the part of institutions, bodies, offices, and agencies of the Union;

- The volume and mounting complexity of cases brought before the General Court, particularly in the areas of competition, state aid, and intellectual property.

The essential aspect of the reform is that the number of judges will be successively doubled to 56. In a first stage, 12 additional judges shall take office immediately after entry into force of Regulation (EU, Euratom) 2015/2422 amending Protocol No 3 on the Statute of the Court of Justice of the European Union. In a second stage, due to take effect in September 2016, the seven judges and staff of the Civil Service Tribunal is to be integrated. The third and final stage (foreseen for September 2019) will consist of the appointment of nine additional judges.

The reform also received much criticism, *inter alia* from MEPs. In particular, the cost of the reform and the lack of a proper impact assessment met with opposition.

The General Court, known as the Court of First Instance prior to the Lisbon Treaty, rules on actions for annulment brought by individuals, companies, and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, state aid, trade, agriculture, and trademarks. The Civil Service Tribunal rules on disputes between the EU and its staff. (TW)

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## OLAF

### New Agreement Between OLAF and EESC

On 13 January 2016, the Director General of OLAF, Giovanni Kessler, and the President of the European Economic and Social Committee (EESC), Georges Dassis, signed administrative arrangements that lay down the practicalities of the cooperation between their services in investigations at the EESC. It was also agreed that OLAF and the EESC will meet once a year from now on to monitor ongoing issues in the fight against fraud and corruption.

Georges Dassis also pointed out that fighting corruption is one of the EESC's political priorities. In this context, reference must be made to the EESC's opinion of September 2015 on fighting corruption within the EU. The opinion echoes the concerns of European citizens and companies regarding corruption and makes several recommendations as to how the fight against corruption can be strengthened. The opinion called, *inter alia*, for the following:

- A new five-year anti-corruption strategy and better EU monitoring of anti-corruption performance;
- Adequate protection for whistleblowers;
- The establishment of a European Public Prosecutor's Office;
- Stricter sanctions in the field of corruption in public procurement. (TW)

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### Major Organised Fraud Scheme Ends with Convictions

OLAF reported that a historic investigation, code-named "Operation Cocoon", resulted in the convictions of eight individuals in Italy. They were found guilty of defrauding the EU's budget. Assets of nearly two million euros were seized.

The case involved a network of fraudsters who coordinated almost identical bids for EU-funded research and innovation projects in several EU Member States, while also introducing in the consortia fake companies as partners or subcontractors. OLAF reported that, after being awarded the projects in question (amounting to 53 million euros during a period of over ten years), the individuals also claimed non-existent expenses in an organised manner.

According to OLAF's press release, the case is important in view of two issues: First, two individuals were not successful in denying the jurisdiction of the national Italian State Audit Court, arguing that the projects were funded by European Institutions themselves instead of being awarded through national or local bodies. The Italian Supreme Court

asserted, in this context, the competence of the national audit court to defend the EU budget to the same extent as it would defend the national budget.

Second, the case triggered several improvements (“lessons learnt”), e.g., training European Commission Project Officers in different research departments of EU institutions; updating guidelines for project evaluation, negotiation, and payment; refinement of IT systems used to combat fraud as well as better cooperation within the different European Commission services.

The President of the State Audit Court, Raffaele Squitieri, noted that the case demonstrated the inadequate review of public spending in Italy as one of the major reasons that made the fraud possible. Furthermore, the complexity and multiplicity of the Italian laws benefited the illegality. (TW)

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## Europol

### JHA Council Adopts Europol Regulation

On 4 December 2015, the Justice and Home Affairs (JHA) Council adopted the draft regulation on the European Agency for Law Enforcement Cooperation and Training (Europol). The new regulation – the first proposal of which was issued by the European Commission in 2013 – intends to align Europol’s legal basis with the requirements of the Lisbon Treaty, for instance by introducing parliamentary oversight. Furthermore, the regulation intends to equip Europol with the means to become the EU’s hub for information exchange between Member States’ law enforcement authorities by, for example, providing the agency with a modern data management regime (see also eucrim 2/2013, pp. 36-37 and eucrim 2/2014, p. 49).

Further steps after adoption by the JHA will be formal adoption by the Council and by the European Parliament. (CR)

►eucrim ID=1601015

### Release of Latest VGT Child Sexual Exploitation Environmental Scan

On 21 December 2015, Europol’s European Cybercrime Centre (EC3), together with the Virtual Global Taskforce (VGT), released the Child Sexual Exploitation Environmental Scan for 2015.

The report outlines current developments in online child sexual exploitation (CSE), the online victim environment, online offender behaviour, and future tendencies. It has been found that CSE methods of operation are continuing to develop in line with the adoption of technology.

The report concludes that CSE is a worldwide, dynamic phenomenon that needs to be looked at from an international perspective, with a coordinated approach towards major law enforcement operations. (CR)

►eucrim ID=1601016

### Operation Blue Amber Completed

Over the year 2015, law enforcement officers from 28 EU Member States, 31 non-EU countries, and other international partners joined forces to conduct a series of global actions aimed against organised crime. “Operation Blue Amber” focused on drug trafficking, irregular immigration, organised property crime, and the counterfeiting of goods, resulting in nearly 900 arrests, the seizure of 7.7 tonnes of drugs and 170 tonnes of stolen metal as well as the confiscation of 254 vehicles, 190 tonnes of counterfeit pesticides, and almost € 140 000 in cash. (CR)

►eucrim ID=1601017

### Agreement with U.S. Immigration and Customs Enforcement Signed

On 17 February 2016, Europol signed an agreement with the U.S. Immigration and Customs Enforcement (ICE) to join Europol’s Focal Point Sustrans.

Launched in 2001, Europol’s Focal Point Sustrans was established as a pan-European platform to integrate, process, and analyse all types of dedicated financial data, with the aim of supporting anti-

money laundering investigations. All 28 EU Member States as well as Australia, Eurojust, Iceland, Switzerland, and the U.S. Internal Revenue Service (US IRS) are already taking part in the Focal Point Sustrans. (CR)

►eucrim ID=1601018

### Embedment of FIU.net into Europol

On 1 January 2016, the decentralised computer network of the EU Member States’ Financial Intelligence Units (FIUs), called FIU.net, was integrated into Europol.

FIU.net supports relevant authorities within the EU Member States in their fight against money laundering and terrorist financing by allowing the exchange of information between FIUs on financial transactions with a cross-border nature. The embedment will now allow for FIU.net to be combined with the products and services of Europol. FIUs will be able to identify connections between the financial intelligence they collect and the criminal intelligence stored at Europol. Furthermore, the FIU.net platform can now be linked with other relevant Europol tools such as the Focal Point Sustrans (see above). (CR)

►eucrim ID=1601019

### Action Against Money Mule Schemes

From 22 to 26 February 2016, the first coordinated European operation against money muling was conducted by law enforcement agencies and judicial bodies from seven EU Member States and neighbouring countries, with the support of Europol, Eurojust, and the European Banking Federation (EBF). The operation resulted in the identification of nearly 700 money mules across Europe and in 81 arrests. With this operation, a prevention campaign was kicked-off in all participating countries in order to raise awareness of money muling and its consequences.

(Money mules are persons who transfer illegally obtained money between different accounts on behalf of others.) (CR)

►eucrim ID=1601020

## European Migrant Smuggling Centre Launched

On 22 February 2016, Europol launched its new European Migrant Smuggling Centre (EMSC). The Centre will proactively support EU Member States in dismantling criminal networks involved in organised migrant smuggling. As the European information hub to fight migrant smuggling, it provides support for analyses, experts on the ground, operational meetings, and joint operations. Furthermore, regional hotspots will assist national authorities with identification, asylum support, intelligence sharing, criminal investigations, and the prosecution of criminal networks of people smugglers. Two regional hotspots exist so far, one in Catania, Italy and one in Piraeus, Greece. (CR)

► [eucrim ID=1601021](#)

## 2nd Europol and INTERPOL Operational Forum on Countering Migrant Smuggling

From 22 to 23 February 2016, the second Europol and INTERPOL Operational Forum on Countering Migrant Smuggling Networks took place at Europol's headquarters in The Hague, bringing together approx. 200 experts from 70 source, transit, and destination countries affected by irregular migration flows as well as from international and regional organisations.

In addition to the launch of the European Migrant Smuggling Centre (see above), the forum presented a Europol-Interpol joint draft report on migrant smuggling networks affecting Europe, outlining their key hotspots and *modi operandi*, financial flows and the assets of supporting networks as well as expert assessments on future threats and risks. The report concludes with a list of recommendations for future operational actions.

Furthermore, Interpol presented the Specialist Operational Network against Migrant Smuggling, which is tasked with increasing the real-time exchange of law enforcement information world-

wide in order to more effectively investigate migrant smugglers and dismantle their networks. The network comprises 86 experts from 71 source, transit, and destination countries.

The forum also discussed concrete operational actions in key areas related to migrant smuggling. (CR)

► [eucrim ID=1601022](#)

## Eurojust

### Report on THB for the Purpose of Labour Exploitation

In December 2015, Eurojust's project team on trafficking in human beings (THB) published a report on the prosecution of THB for the purpose of labour exploitation.

The report provides sources of information for practitioners involved in the investigation and prosecution of THB for the purpose of labour exploitation, elaborates on a number of indicators of labour exploitation, and highlights best practice in judicial cooperation.

According to the report, indicators of labour exploitation include, for instance:

- Poor living and working conditions;
- Coercion and limitations on freedom of movement;
- Language limitations;
- Seizure of identification documents by or on behalf of the employer;
- Illegal/irregular entry or residence in the forum state;
- Bondage debt;
- No or limited medical insurance and social security contributions.

Regarding judicial cooperation, the report outlines the challenges faced by the involved countries, for example:

- The need to clarify links and/or possible overlap between parallel judicial proceedings and the need for coordination of ongoing investigations/proceedings;
- Competing European Arrest Warrants;
- Difficulties in judicial cooperation and the execution of letters of request;

■ No answer or misunderstandings in communication. (CR)

► [eucrim ID=1601023](#)

## New Italian National Member Appointed

On 25 January 2016, Filippo Spezia took up his duties as newly appointed National Member for Italy. After initial work experience as public prosecutor and anti-mafia public prosecutor, Felippo Spezia gained experience in Eurojust as Deputy National Member for Italy from 2008 to 2012. Before rejoining Eurojust, he worked in the Italian Anti-mafia and Anti-terrorism National Directorate, where he coordinated investigations into organised crime and terrorism. (CR)

► [eucrim ID=1601024](#)

## European Judicial Network (EJN)

### Revised Guidelines

The EJN published its revised Guidelines on the structure and functioning of the EJN as well as its revised Guidelines on the meetings of the EJN.

One of the key novelties under the new guidelines is the replacement of the EJN Trio Presidency working method with the EJN Presidency Board working method. The EJN Presidency Board now consists of the former Presidency of the Council of Justice and Home Affairs (JHA) together with the current and two incoming ones. It changes every half year, with one Presidency leaving and an incoming Presidency joining. Other amendments include a new threshold for allocation between budget lines and an updated description of the budget cycle. (CR)

► [eucrim ID=1601025](#)

## 3rd Report on EJN Activities 2013-2014 Published

On 12 December 2015, the EJN published the third report on its activities and management in 2013 and 2014.

According to the report, the number of requests for assistance dealt with by

the EJM Contact Points has continued to grow, with more than 20,000 cases in 2013 and 2014, compared to approximately 15,000 cases from 2011 to 2012. The majority of these cases involved assistance in the drafting and execution of mutual legal assistance requests as well as assistance in EAW procedures. Another important novelty during this period was the revamping of the EJM's Judicial Atlas, an online tool hosted on the EJM website to assist practitioners in locating the competent receiving/executing authority of a request for judicial cooperation. Furthermore, the Judicial Library has been enriched, now containing information on all relevant EU legal instruments for judicial cooperation in criminal matters, together with practical information related to each of the instruments, e.g., status of implementation, amending acts, notifications, declarations and statements, handbooks, reports, case law, etc. In the period 2013-2014, the EJM website continued to be the most important tool to promote the network, with approximately 4.2 million page views. (CR)

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## Frontex

### Operation Poseidon Rapid Intervention

In December 2015, Frontex replaced the Joint Operation Poseidon Sea with Poseidon Rapid Intervention. The latter offers a larger number of officers, including experts in screening, debriefing, fingerprinting, and forged documents. It also features technical equipment such as vessels to support Greece in handling the number of migrants arriving on its islands. (CR)

► [eucrim ID=1601027](#)

### Consultative Forum on Fundamental Rights Work Programme 2016

On 2 December 2015, the Frontex Consultative Forum on Fundamental Rights adopted its work programme for the year 2016.

According to the programme, in 2016, the Consultative Forum will give strategic advice on the fundamental rights implications in conjunction with the development of the Frontex mandate and operationalisation of the amended Frontex Regulation. It will contribute to the revision and further development of the Frontex Fundamental Rights Strategy and Action Plan. Delegations from the Consultative Forum will visit Frontex-coordinated joint operations. Special attention will be paid to Frontex pre-identification and screening activities as well as on the enhancement of child protection during Frontex operations. Ultimately, the Consultative Forum will assist with the development and evaluation of Frontex training tools and methodologies in areas related to fundamental rights. (CR)

► [eucrim ID=1601028](#)

### New Operational Cooperation Agreement with Europol

On 4 December 2015, Frontex and Europol signed a new operational cooperation agreement. Under the new agreement, Frontex will be able to send to Europol personal data gathered by Member States during operations coordinated by Frontex on people suspected of being involved in cross-border criminal activities. Furthermore, Frontex and Europol will cooperate in the planning and implementation of operational activities to combat cross-border criminal activities and share strategic and operational information.

The agreement repeals the existing agreement between Europol and Frontex of 28 March 2008. (CR)

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### Satellite Services Dedicated to Border Surveillance

On 17 December 2015, Frontex and the European Commission signed a delegation agreement providing funding to the agency to implement satellite services dedicated to border surveillance. Between 2015 and 2020, Frontex will re-

ceive €47.6 million to support services such as:

- Coastal monitoring;
- Monitoring of international waters;
- Reference mapping;
- Maritime surveillance of an area;
- Vessel detection, vessel tracking and reporting;
- Anomaly detection;
- Environmental assessment.

The funding is part of the Copernicus Programme, a European system for monitoring the earth. (CR)

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### Cooperation Agreement with the European Fisheries Control Agency

On 14 January 2016, Frontex and the European Fisheries Control Agency (EFCA) signed a cooperation arrangement to improve the exchange of information between the two agencies.

In the future, EFCA – with the consent of the relevant Member States – will be able to provide its Vessel Monitoring System (VMS) data to Frontex. With information on legitimate fishing vessels, Frontex should be better equipped to detect other smaller boats suspected of being used for cross-border crime and irregular migration. Furthermore, the information will help enhance the Frontex Eurosur Fusion Services. (CR)

► [eucrim ID=1601031](#)

### Western Balkans Quarterly

On 19 January 2016, Frontex published its Western Balkans Quarterly covering the months July until September 2015.

According to the report, a record number of illegal border-crossings (over 610,000) were reported at the common and regional borders in the Western Balkans. The majority of migrants were Syrians, closely followed by Afghans. The report also finds an increase in the number of Iraqi and Pakistani migrants. In addition, it finds that the large number of illegal border crossings severely overstrained the screening and registration capacity of border control in the region. (CR)

► [eucrim ID=1601032](#)

### Joint Report of Africa-Frontex Intelligence Community Published

On 28 January 2016, Frontex published its 2015 Africa-Frontex Intelligence Community (AFIC) Joint Report. The report analyses the irregular migratory movements affecting AFIC countries and EU Member States, cross-border criminality, and regional security threats.

In the absence of many legal travel channels for West Africans to the EU and a visa rejection rate close to 50% for some AFIC countries, the report finds that irregular migration from these countries to the EU is often seen as a means of economic migration. The currently preferred route is through Niger, as detection is less likely than on other routes.

Hence, in its conclusions, the report underlines the need to establish a new framework for legal pathways in order to reduce risks that migrants or asylum seekers face during irregular migration. Additionally, the effectiveness of rapid return of persons who are not eligible for international protection should be improved. Ultimately, the AFIC should be developed further. (CR)

► eucrim ID=1601033

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### VAT Fraud into PIF Directive? Disagreement on Key Issue Continues

There is still disagreement within the Council as to whether VAT fraud should be included in the scope of the proposed directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive). The inclusion was requested by the EP and the Commission, whereas most delegations of the Member States indicated opposition in the Council (see also eucrim 3/2015, p. 83).

The Luxembourg Presidency tried to further proceed with the file during the second half of 2015. JHA Ministers first debated the consequences of the ECJ decision of 8 September 2015 in the *Taricco* case (see eucrim 3/2015, p. 80) for the PIF Directive. The Luxembourg Presidency subsequently organized further discussion rounds in the working parties DROIPEN and CATS. Still, the opinions of the delegations as to whether or not VAT fraud should be included into the directive remained unanimous.

The Luxembourg Presidency concluded that the Council had to take a step towards the Parliament at some point if the PIF Directive was ever to be adopted. It was agreed that the VAT issue should thus be explored further. Before the Council resumes negotiations with the European Parliament, it would like to examine the following:

- Clarify the exact scope and impact of VAT fraud in general, in particular in close liaison with tax experts (e.g., the nature of VAT, VAT calculation methods, interaction between administrative and

### Conference on the Establishment of the European Public Prosecutor's Office (EPPO)

#### State of Play and Perspectives

The Hague, 7-8 July 2016

Ever since the European Commission issued its legislative proposal, six consecutive EU Council Presidencies have conducted negotiations on this flagship project in the policy Area of Freedom, Security and Justice (AFSJ). The time is ripe to examine the legislative drafts agreed upon between EU Member States at the end of the Dutch Presidency of the Council. The available drafts amply demonstrate substantial differences compared with the original proposal of the Commission. For example, in contrast to the original proposal, the EPPO will be led by a Central Office with a much broader composition and the criminal investigations led by the Office will be governed by the procedural law of each of the participating Member States. Presentations and discussions will be held on the implications of the EPPO for the functioning of the AFSJ, for the relevant agencies, for the national prosecuting authorities, as well as for suspects and victims.

Key topics (among others) are:

- Recapitulation of the outcome of three years of negotiations on the legislative proposal;
- Assessment of the available drafts in terms of legal quality and better regulation;
- Substantive issues concerning the EPPO's legislative framework, e.g., in relation to the PIF directive;
- Procedural and institutional issues ensuing from the EPPO legislative framework.

Who should attend? Judges, public prosecutors, criminal law practitioners, criminal law and EU law scholars, Member States' representatives, and experts from the institutions and think tanks of the EU Member States.

The conference will be held in English.

*This conference is organised by the Asser Institute and the Law Faculty of Leiden University, with financial support from OLAF.*

Fee: €50,- (includes coffee breaks, two lunches, two receptions and the conference reader).

Registration: You can register by completing the online registration form at [www.asser.nl/EPPO2016](http://www.asser.nl/EPPO2016)

*For further information, please contact Ms Eva da Costa (e-mail: [conferencemanager@asser.nl](mailto:conferencemanager@asser.nl)).*

criminal proceedings and sanctions).

- Define the scope that could be covered in the directive and find a corresponding draft (e.g., by which criteria – the cross-border nature of the offence or a threshold).

- Explore the link between the possible VAT provision in the directive and the Regulation on the establishment of a European Public Prosecutor's Office (e.g., the cross-border nature of the offence). (TW)

► eucrim ID=1601034

### Luxembourg Passes EPPO Dossier on Netherlands – State of Play

Luxembourg terminated its Council Presidency by obtaining provisional agreement of the JHA Ministers on the draft regulation on establishing the European Public Prosecutor's Office (EPPO) at their meeting on 3 December 2015. The agreement covers Arts. 17-23 and part of Art. 28a of the draft (see also eucrim 4/2015, p. 132). These articles relate to:

- The competence and exercise of the competence of the EPPO;
- The territorial and personal competence of the office;
- The initiation and conduct of investigations.

Following the December Council, the Luxembourg Presidency established a consolidated version of Arts. 1-35 in the draft regulation.

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The Netherlands Presidency, which started on 1 January 2016, has continued working to establish a consolidated, revised version of the full text of the regulation. The Netherlands Presidency is focusing on reaching principle agreement on:

- Provisions regarding relations of the EPPO with partners;
- Financial and staff provisions;
- The general provisions of the draft regulation.

At the technical level, the question was raised as to what the notion “operational expenditure” means. In particular,

it was discussed whether investigative measures undertaken at the national level within the framework of investigations by the European Public Prosecutor's Office are covered as operational expenditures of the European Public Prosecutor's Office and whether they would, as a consequence, be paid for by the budget of the Union.

In addition, current negotiations exclude all provisions related to data protection from discussions. (TW)

► eucrim ID=1601036

### Hercule III-Programme: Budget Increase

The European Commission decided to increase the budget for the Hercule III Anti-fraud Programme from 14.1 million euros in 2015 to 14.5 million euros in 2016. A special focus is laid on purchasing specialized technical equipment. Furthermore, strengthened cooperation with the European Maritime Safety Agency is envisaged. The development of a methodology to measure illicit tobacco trade from third countries into the EU is also being encouraged by the Hercule III Programme.

The current Hercule Programme covers the period 2014-2020 and has a total of 104.9 million euros at its disposal. It supports Member States' activities to protect the EU's financial interests against fraud, corruption, and other illegal behaviour. (TW)

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## Corruption

### Costs of Non-EU-Wide Anti-Corruption Measures

On 23 March 2016, a study was published by the European Parliament Research Service that estimates the costs of corruption if EU-wide action is lacking. According to the study, the loss to the European economy from corruption ranges between 179 and 990 billion euro annually in GDP, depending on different scenarios. The estimate goes beyond the

120 billion euro figure usually tabled by the European Commission. However, the Commission only includes lost tax revenue and investments in its estimation and does not additionally calculate the indirect cost of corruption.

In addition, the study looked into gaps and barriers in the existing regulatory framework that hinder the effectiveness of measures to combat corruption in the EU. The study finds that the lack of ratification, transposition, implementation, and enforcement of international and EU norms represents one of the main barriers in the fight against corruption and organised crime.

The lack of a proper EU definition of organised crime, the absence of an EU directive approximating corruption in the public sector, the lack of an EU-wide system for whistle-blower protection, and the fact that there is no consolidated framework for police and judicial cooperation are further obstacles according to the study. It also points out that OLAF's investigations lead to very low conviction rates in the Member States because they have often little interest in taking cases forward.

Regarding the potential of EU-wide actions with added value, the authors of the study propose, *inter alia*:

- Corruption costs could be reduced by 70 billion euro if the EU applies the updated Cooperation and Verification Mechanism, used for Bulgaria and Romania, to other Member States.

- The establishment of an effective and truly independent European Public Prosecutor's Office integrated into the work of Europol and Eurojust could save the EU budget 200 million euro annually.

- The implementation of a full EU-wide e-procurement system could potentially reduce corruption costs by 920 million euros each year.

The study is based on three reports by RAND Europe, the CEPS think-tank, and Prof. Federico Varese. It is part of a series of studies initiated by the EP on the costs on non-Europe. (TW)

► eucrim ID=1601038

### Opinion of Companies on Corruption

40% of companies in the EU stated that corruption is a problem when doing business in their country. In ten EU Member States, at least half of the companies say corruption is a problem for their businesses. On average in the EU, 71% of the companies said that corruption is widespread in their country. These are just a few of the results of a Eurobarometer survey that was released on 9 December 2015 to mark the 13th International Anti-Corruption Day.

The Eurobarometer survey explores the level of corruption perceived and experienced by businesses. It covers six key sectors:

- Energy, mining, oil and gas, chemicals;
- Healthcare and pharmaceuticals;
- Engineering and electronics, motor vehicles;
- Construction and building;
- Telecommunications and information technologies;
- Financial services, banking, and investment.

Questions relate, for example, to corruption practices, bribery among political parties and senior officials as well as the tackling of corruption and its punishment.

The first Eurobarometer survey on corruption was conducted in 2013. It is part of a range of EU activities to combat corruption in the EU. (TW)

➤ [eucrim ID=1601039](#)

### Money Laundering

#### Further Changes in Anti-Money Laundering Scheme Planned

On 2 February 2016, the European Commission presented an Action Plan to strengthen the fight against the financing of terrorism. The plan focusses on:

- Tracing terrorists through their financial movements;
- Preventing terrorists from shifting funds or other assets;
- Disrupting the sources of revenue used by terrorist organizations.

Against this background, the Euro-

pean Commission announced that it will propose a number of amendments to the Fourth Anti-Money Laundering Directive (AMLD) that was adopted in May 2015 (see also [eucrim 2/2015](#), p. 39). The following amendments are envisaged:

- A list of all compulsory checks (due

diligence measures) that financial institutions should carry out with regard to financial flows from high risk third countries;

- Widening the scope of information accessible to the Financial Intelligence Units (FIUs);

### Report

#### Annual Forum on Combating Corruption in the EU 2016

*Transnational Cooperation Between Judicial and Administrative Authorities to Better Protect the EU's Financial Interests*

ERA Trier, 21-22 April 2016

The 2016 "Annual Forum on Fighting Corruption," organised by the Academy of European Law (ERA) and co-financed by the European Commission (OLAF) under the Hercule III Programme, aimed mainly at discussing the transnational cooperation between judicial and administrative authorities to better protect the EU's financial interests. This topic was indicated as a priority in the Call for Proposals of Hercule III 2015: "Cooperation between OLAF and all anti-fraud agencies, including the customs, police and judicial authorities."

After a general introduction to the topic (Day 1, morning session) by academics and OLAF representatives, specific national cases were presented and analysed in detail throughout the course of the event. At the suggestion of OLAF, ERA also added slots for the United Nations, Transparency International, and the matter of whistleblowing. The seminar ultimately aimed at sharing the experiences made in Member States (especially those of judges, prosecutors, and civil servants) dealing with such matters. It debated ideas on how to improve the EU's fight against fraud and corruption by enhancing transnational and multi-disciplinary cooperation.

The following specific issues were dealt with at the conference:

- Strengthening cooperation between Member State judicial and administrative authorities to combat fraud and corruption in the EU;
- Cooperation between administrative authorities in transnational multi-agency investigations in the EU emphasising the role and powers of OLAF;
- Administrative measures and judicial follow-up;
- Work carried out by the United Nations and Transparency International;
- Challenges in prosecuting offences affecting the EU's financial interests with a view to enhancing transnational and multi-disciplinary cooperation;
- Current new investigation techniques used at the domestic level;
- Specific current examples of networking and good practice in fighting fraud and corruption in EU Member States;
- The need to establish national, European, and international platforms to better protect the financial interests of the EU;
- Status quo of the EPPD, three years after the Commission's proposal of the regulation.

The international and European legal frameworks (with a special emphasis on the role of OLAF at the EU level as well as the United Nations and Transparency International at the international level) were presented by the speakers. They were also the subject of discussion with the audience, which consisted mainly of EU lawyers, prosecutors, and anti-fraud investigators.

The day before the conference, the "Annual Meeting of the Presidents of the Associations for European Criminal Law and for the Protection of the EU Financial Interests" took place in Trier. The meeting was attended by more than 20 participants from different Member States.

*Laviero Buono, ERA*

- Giving FIUs easier and faster access to information on the holders of bank and payment accounts;
- Widening the scope of the AMLD to include virtual currency exchange platforms, requiring these platforms to apply customer due diligence controls when exchanging virtual for real currencies, thus ending the anonymity associated with such exchanges;
- Lowering the thresholds for identification and widening customer verification requirements regarding pre-paid instruments.

The Action Plan contains a number of other measures designed to disrupt the sources of revenue of terrorist organisations. (TW)

► [eucrim ID=1601040](#)

## Organised Crime

### EMCDDA Report on Virtual Drug Markets

On 11 February 2016, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) published a report that sheds more light on the evolving illicit trade of drugs in the Internet. The report is a meaningful contribution towards understanding how the drugs are currently supplied online. More than 20 experts (from academia, journalism, and frontline practitioners) contributed to the report, which is designed to be a knowledge base:

- How online drug markets function;
- What technologies are used;
- How online drug markets relate to the traditional drug market;
- How online drug markets can be monitored and controlled.

It is the first such report that brings together international expertise and explores the issue in more detail.

The report also highlights the vast potential of virtual online markets for drugs and the changing dynamics of how drugs will be bought and sold in the near future. (TW)

► [eucrim ID=1601041](#)

## Cybercrime

### Need for Effective Criminal Justice in the Digital Age

Member States would like to go ahead with exploring the challenges related to the collection and use of e-evidence in criminal proceedings. For this purpose, “e-evidence” is defined as all electronic data related to a criminal offence, which can be relevant in the course of criminal proceedings.

The issue of how e-evidence can be effectively collected, transmitted, and admitted emerged from an evaluation of the practical implementation and operation of European policies on preventing and combating cybercrime as well as from the Internet Organised Crime Threat Assessment (iOCTA) presented by Europol in 2015. The Member States held further discussions in the working groups in the Council during the second half of 2015, and the JHA Ministers agreed on priorities to be followed up at their meeting on 3/4 December 2015. The following matters of priority were identified:

- Loss of data in digital environments and the impact that an effective data retention regime can have.
- Problems related to mutual legal assistance requests as well as the effects that an optimal use of the European Investigation Order might have.
- Possibilities for improved cooperation with the private sector (foreign service providers) as well as analysis of problems in relation to fundamental and procedural safeguards.
- Legal consequences related to the location and ownership of digital infrastructure; this includes challenges related to better cooperation possibilities with key countries, such as the USA.
- Specific challenges related to cloud-computing, often referred as “loss of location”.
- Conditions related to the admissibility of e-evidence.
- Challenges in relation to balancing cyber-related criminal proceedings against fundamental rights principles,

procedural safeguards, and data protection guarantees.

Further work on these issues will not only raise awareness of the existing gaps in the fight against cybercrime and other related areas, such as terrorism and xenophobia, but also provide practical input for the Commission on potential new legislative instruments. (TW)

► [eucrim ID=1601042](#)

## Trafficking in Human Beings

### Gender Dimension Researched

A study, which was released in March 2016, looked into the gender dimension of trafficking in human beings. The study, conducted by the Lancaster University on behalf of the European Commission, contributes to a better knowledge of the gender consequences of the various forms of human trafficking as well as potential differences in the vulnerability of men and women to victimisation. A focal point of the study was trafficking for the purpose of sexual exploitation.

As part of the law and policy environment in the EU on anti-trafficking in human beings and on gender equality, the study was structured according to the priorities in the EU Strategy (COM(2012) 286 final) on the eradication of trafficking in human beings. These priorities include the following:

- Victim assistance;
- Law enforcement;
- Prevention by means of demand reduction;
- Coherence and coordination;
- Knowledge of new technologies;
- Emerging concerns.

The authors of the study also make recommendations concerning law and policy implementation and improvement. In general, the study recommends a fuller implementation of the EU’s gender equality principles that underpin actions in the field of anti-trafficking. Further recommendations relate to the specific Strategic Priorities. (TW)

► [eucrim ID=1601043](#)

## Procedural Criminal Law

### Procedural Safeguards

#### Directive on the Right to the Presumption of Innocence Published

The EU made another step forward in fulfilling the so-called roadmap on procedural rights for suspects and accused persons in criminal proceedings. The Council and the European Parliament adopted the Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (Directive (EU) 2016/343).

The purpose of this directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

The directive applies only to natural persons, not to legal persons. It applies from the moment a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, and therefore even before that person is made aware of the fact by the competent authorities of a Member State (by official notification or otherwise) that he or she is a suspect or accused person.

Member States have to take several measures in order to ensure the presumption of innocence, even though the directive stipulates exceptions and restrictions. The measures to be taken are as follows:

- Public authorities must pay due attention to the presumption of innocence when providing or divulging information to the media.
- Suspects or accused persons should not be presented as being guilty, neither in court nor in public, through measures of physical restraint.
- Member States must ensure that the burden of proof for establishing the guilt of suspects or accused persons is on the prosecution, and any doubt

should benefit the suspect or accused person.

- Without going into detail, the directive also foresees the obligation for Member States to ensure the right to remain silent and the right not to incriminate oneself.
- The directive provides that the exercise of the aforementioned rights shall not be used against the suspect or accused person and shall not be considered to be evidence that they have committed the criminal offence concerned.

Beyond the presumption of innocence, the directive also addresses the right to be present at one's trial. It is seen as a basic principle in a democratic society as regards the right to a fair trial. Notwithstanding, the directive acknowledges that the right to be present at the trial is not absolute and that suspects and accused persons are able to waive this right. The directive lays down several conditions under which judicial decisions can also be taken *in absentia*. If, for reasons beyond their control, suspects or accused persons are unable to be present at the trial, they should have the possibility to request a new date for the trial within the time frame provided for in national law.

Moreover, Member States must ensure that suspects and accused persons have an effective remedy if their rights under this directive are breached.

Member States must transpose the directive by 1 April 2018. For further information on the directive on the presumption of innocence see eucrim 4/2015, p. 134 and the article of *Cras/Erbežnik* in this issue. (TW)

➤eucrim ID=1601044

### Data Protection

#### MS Would Like New Union Law on Data Retention

After the CJEU had declared Directive 2006/24/EC on the retention of Data invalid in 2014, the legal landscape on the retention of data for the purposes of investigating, detecting, and prosecuting

serious crime became very confusing, since each EU Member State follows different approaches.

Opinions differ on the legal consequences of the Court's judgment, in particular on whether the data retention judgement of the CJEU affects national implementing legislations of the Data Retention Directive.

The JHA Ministers answered several questions and set the way forward at their meeting on 3/4 December 2015:

- They unanimously agreed that retaining bulk electronic communication data without a specific reason was still allowed.
- The majority felt that an EU-wide approach should be considered in order to put an end to the fragmentation of the legal framework on data retention across the EU.
- Several delegations called for a new legislative proposal by the Commission. (TW)

➤eucrim ID=1601045

#### Prosecutors Call for New Legislative Action on Data Retention

The way forward in relation to data retention was also a main topic at the Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union as well as at a workshop held at Eurojust, The Hague, on 10-11 December 2015. The Consultative Forum concluded, *inter alia*, that data retention is a fundamental investigative tool and that the current fragmented legal framework poses many difficulties as regards judicial cooperation, including the resolution of conflicts of jurisdiction, the efficiency of Joint Investigation Teams as well as the obtainability and admissibility of evidence.

Taking into consideration the different legal regimes across Europe and the problems encountered, the forum called for an EU solution to data retention. A harmonized EU framework on the retention of, and access to, data was deemed necessary. The Consultative Forum in-

vited the Commission to take legal action in line with the requirements established by the data retention judgment of the CJEU. The forum made several proposals as to what should be regulated in the new legislation. (TW)

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### Future Guidance on Data Retention from CJEU

Further guidance and assistance regarding the future development of an EU scheme on data retention can be expected from the CJEU. Currently, two cases for a preliminary ruling are pending that seek to better clarify the effects of the Court's judgment in case 295/12 (*Digital Rights Ireland* – also called the Data Retention Judgment).

In the *Tele2 Sverige* case, the CJEU was asked whether a general obligation to retain traffic data covering all persons, all means of electronic communication, and all traffic data without any distinctions, limitations, or exceptions for the purpose of combating crime is compatible with Art. 15(1) of Directive 2002/58/EC (Directive on privacy and electronic communications), taking into account Arts. 7, 8, and 15(1) of the Fundamental Rights Charter.

In case C-698/15 (*Davis and Others*), the Court of Appeal (England and Wales) would like to know from the CJEU whether Section 1 of the UK Data Retention Investigatory and Powers Act 2014 (DRIPA), which empowers the Secretary of State for the Home Department to require public telecommunications operators to retain communications data for a maximum period of 12 months, constitutes a serious interference with the fundamental rights laid down in Arts. 7 and 8 of the Charter. The Court of Appeal would also like to know whether Section 1 of DRIPA is incompatible with the articles of the Charter in that it does not comply with the requirements laid down by the judgment in *Digital Rights Ireland*. (TW)

► eucrim ID=1601047

### EU PNR Exchange System Adopted

In April 2016, the Council and the European Parliament formally approved the text of the Directive regulating the use and collection of passenger name record (PNR) data (see also eucrim 3/2015, p. 85).

The directive will establish a harmonised system in that collected PNR data can be processed for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime. Airlines will have to provide PNR data for flights entering or departing from the EU. The directive will also allow, but not oblige, Member States to collect PNR data concerning selected intra-EU flights. (TW)

► eucrim ID=1601048

### EU-US Privacy Shield – Texts Tabled

On 2 February 2016, the European Commission and the U.S. Department of Commerce reached an agreement on the so-called EU-US Privacy Shield. This is a political agreement that sets out a new framework for the transatlantic exchange of personal data for commercial purposes. Negotiations already began in 2013 to address the weaknesses of the former Safe Harbour framework. The latter was declared invalid by the CJEU on 6 October 2015 (see eucrim 3/2015, p. 85). The Commission stressed that the new Privacy Shield agreement also reflects the requirements set out by the CJEU in its ruling.

On 29 February 2016, the Commission made public the legal texts that will put in place the EU-US Privacy Shield. The publication was accompanied by a communication summarising the actions taken over the last few years (since the 2013 surveillance revelations by Edward Snowden) to restore trust in transatlantic data flows.

In comparison with the old Safe Harbour agreement, the EU-US Privacy Shield provides for stronger obligations on the part of American companies to protect the personal data of Europeans. Furthermore, and unlike its predecessor,

the Privacy Shield contains not only commitments in the commercial sector but also, for the first time, clear conditions, safeguards, and oversight mechanisms regarding access on the part of public authorities for law enforcement, national security, and other public interest purposes. Thus, a generalised access for the law enforcement purposes is to be prevented.

The main features of the new arrangement include:

- Companies that wish to transfer personal data must abide by the principles of the Privacy Shield arrangement and are subject to stronger monitoring and enforcement by the U.S. Department of Commerce and Federal Trade Commission.

- For the first time, the U.S. government has given the EU written assurance from the Office of the Director of National Intelligence that any access on the part of public authorities for national security purposes will be subject to clear limitations, safeguards, and oversight mechanisms, preventing generalised access to personal data.

- U.S. Secretary of State John Kerry has committed to establishing a redress possibility for Europeans in the area of national intelligence via an *Ombudsperson mechanism* within the Department of State. The Ombudsperson will be independent from national security services. The Ombudsperson will follow up complaints and enquiries by individuals and inform them whether the relevant laws have been complied with. These written commitments will be published in the U.S. federal register.

- EU citizens will have further redress possibilities in relation to companies. It is guaranteed that complaints have to be handled and resolved within 45 days. EU citizens can also go to their national Data Protection Authorities, who will work with the Federal Trade Commission to ensure that unresolved complaints by EU citizens are investigated and resolved. If a case is not resolved by any of the other means, as a last res-

sort there will be an arbitration mechanism ensuring an enforceable remedy. Moreover, companies can commit to complying with advice from European Data Protection Authorities. This is obligatory for companies handling human resource data.

- The functioning of the Privacy Shield is monitored by an annual joint review mechanism.

The Privacy Shield arrangement will be submitted to the “Article 29 Working Party”, the EDPS, and other EU institutions for their opinions on the level of protection provided. Once agreed on, it will form the basis for a new Commission adequacy decision. The “Privacy Shield” must be distinguished from the “Umbrella Agreement” that aims at putting in place a data protection framework on the horizontal information exchange between EU and U.S. law enforcement authorities. (TW)

➤ [eucrim ID=1601049](#)

### EDPS Opinion on “Umbrella Agreement”

After the arrangements for the “Privacy Shield” for the commercial environment were made, the Commission announced that it was proposing the signature of the so-called “EU-US Umbrella Agreement”. The Umbrella Agreement aims at enshrining a set of data protection safeguards for all transatlantic information sharing between the relevant authorities in the area of criminal law enforcement (horizontal data exchange).

After the EU and USA initialled the agreement on 8 September 2015 in Luxembourg and the American side fulfilled a condition by amending the 1974 Judicial Redress Act, it is now up to the European Parliament to consent and for the Council to sign the agreement. This amendment will give EU citizens the right to challenge how their data is used by law enforcement authorities in U.S. courts.

In his opinion of 12 February 2016, however, the EDPS called for reconsideration of recent developments after the

initialling of the agreement and for further improvements.

The EDPS made three essential recommendations for the text so that it complies with the Fundamental Rights Charter and Art. 16 TFEU:

- Clarification that all the safeguards apply to all individuals, not only to EU nationals;
- Ensuring that judicial redress provisions are effective within the meaning of the Charter;
- Clarification that transfers of sensitive data in bulk are not authorised.

Beyond that, the EDPS made a number of proposals for clarification in the text for the purpose of legal certainty. (TW)

➤ [eucrim ID=1601050](#)

### Opposition of MEPs in LIBE Regarding Umbrella Agreement

At a meeting on 15 February 2016, MEPs of the LIBE-Committee of the European Parliament discussed the Umbrella Agreement with the Commission’s representative of DG JUST, the EDPS, Giovanni Buttarelli, who presented his opinion (see aforementioned news), and the EP’s legal service. The legal service responded to some legal doubts. In its opinion, the Umbrella Agreement has the following distinguishing features:

- It will be an international accord within the meaning of the TFEU, meaning that it will have primacy over secondary legislation, such as the future data protection package;
- It does not require an additional adequacy decision since its effects are already clear;
- It does not comply with Art. 8 of the Charter and Art. 16 TFEU, because it does not afford rights of judicial redress to natural persons, falling within the scope of EU law, other than EU citizens. After the debate, some MEPs did not share the Commission’s justification of the agreement and casted serious doubts on the future transatlantic data transfer scheme. (TW)

➤ [eucrim ID=1601051](#)

## Ne bis in idem

### AG Answers Two Fundamental Questions on *ne bis in idem*-Guarantee

On 15 December 2016 Advocate-General Bot presented his conclusions on two important, frequently discussed issues on the interpretation of the *ne bis in idem* rule as enshrined in Art. 54 et seq. CISA and Art. 50 of the Charter.

The case was brought before the CJEU by the Higher Regional Court of Hamburg (Case C-486/14 – *Kossowski*). In the case, German authorities prosecuted Mr. *Kossowski*, a Polish citizen, for having committed blackmail with threats against limb of the victim within the context of a car deal on German territory in 2005. After the defendant fled to Poland, Polish authorities investigated the case but dropped it due to the absence of adequate grounds for suspicion. Under Polish law, such a decision is considered final after six months; investigations can only be re-opened when “essential evidence” against the suspect is uncovered. However, the Polish authorities apparently did not request mutual legal assistance and based their decision, *inter alia*, on the fact that the hearing of witnesses residing in Germany had not been possible.

When Mr. *Kossowski* travelled to Germany in 2014, he was arrested for the alleged offence of 2005. The German prosecutor argued that a criminal charge in Germany is possible, since Art. 55 para. 1 lit. a) CISA allows a country, upon declaration (as was the case for Germany), not to be bound by Art. 54 CISA for cases in which acts relating to the foreign judgment had taken place in whole or in part on its own territory. Furthermore, the Polish authorities did not properly assess the merits of the case, so that their decision cannot be considered “final” in the sense of Art. 50 of the Charter and Art. 54 CISA.

Hence, the Higher Regional Court of Hamburg seeks clarification as to whether Art. 55 CISA remains in force in the light of the limitations that are

stipulated by Art. 50 and Art. 52 para. 1 of the Charter. If this is answered in the negative, the Court would like to know whether it can apply the *ne bis in idem* rule of Art. 54 CISA, i.e., whether the decision of the Polish authorities must be considered “final”.

As to the first question, the AG concludes that there is no longer any necessity to uphold the exception of Art. 55 CISA in light of the Fundamental Rights Charter. The main argument is that the concept of “same acts” and “same offence” – as provided for by Art. 54 CISA and Art. 50 of the Charter – already offer broad possibilities to take into account substantial differences between offences.

As to the second question, the AG recommends not considering the decision of the Polish authorities in the present case as “final”. He argues that a decision cannot be recognized as such if the authorities in question had not investigated all aspects that concern the “core of the legal situation”, such as the examination of statements of victims or witnesses. (TW)

►eucrim ID=1601052

## Cooperation

### European Arrest Warrant

#### CJEU Strives to Balance Human Rights and Mutual Recognition

On 5 April 2016, the Grand Chamber of the CJEU decided on one of the most controversial issues of the European Arrest Warrant (EAW): May the judicial authority, which is responsible for executing an EAW, refuse its execution if fundamental rights are not maintained in the issuing state?

This question was posed by the Higher Regional Court of Bremen for a preliminary ruling by the CJEU (Joint Cases C-404/15 and C-659/15 – *Aranysosi and Căldăraru*). In both cases, the defendants claimed that detention con-

ditions in Hungary and Romania (the issuing states) may infringe their right of not being subjected to inhuman or degrading treatment (Art. 3 ECHR). Their views were backed by judgments of the ECtHR, which found that Romania and Hungary had infringed Art. 3 ECHR due to characteristic prison overcrowding in these states.

Although past decisions of the CJEU pointed to an opposite trend, the judges in Luxembourg decided in the submitted case that the execution of an EAW must be deferred if there is a real risk of inhuman and degrading treatment because of the conditions of detention of the person concerned in the issuing EU Member State.

The CJEU further states that the executing judicial authority is even bound to assess the existence of that risk if it is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, based on the standards of protection of fundamental rights guaranteed by EU law.

However, the CJEU sets clear guidelines on the conditions and the procedure for a possible rejection.

- First, the CJEU held that the identification of a true risk is not a refusal ground but that it is instead necessary to demonstrate that there are substantial grounds for believing that the individual will in fact be exposed to such a risk. In doing so, the CJEU takes over the jurisprudence of the ECtHR, which also demands in extradition cases that the real risk be concrete and would harm the individual concerned.

- Second, the CJEU obliges the executing authority to ask the issuing authority about the concrete circumstances. In this context, the authorities must examine whether the risk can be discounted. Only if the existence of that risk cannot be discounted within a reasonable time period – given the supplementary information by the issuing state and any other information available – must the executing judicial authority decide whether the

surrender procedure should be brought to an end.

In sum, the CJEU advocates that the principles of mutual recognition and mutual trust be subject to limitation in exceptional circumstances. However, the Court chips in a human rights clause if it comes to the application of the EU’s fast-track surrender regime. Nevertheless, the judgement will trigger debate over whether the CJEU left the path it embarked on in the *Melloni* and *Radu* cases and whether the present judgement satisfies the national constitutional courts (see also recent judgments of the Federal Constitutional Court as reported below). (TW)

►eucrim ID=1601053

#### AG Defends Rigorous Line in Cases of Human Rights Infringements

In its opinion of 3 March 2016 on the above-mentioned *Aranysosi* and *Căldăraru* cases, Advocate-General Bot defended the position that judicial authorities executing an EAW do not have the right to refuse surrender if fundamental rights or fundamental legal principles may not be maintained in the issuing Member States. AG Bot emphasised the wording of Art. 1 para. 3 and recital 10 of the FD EAW. The EU legislator would have had to make clear its intention to introduce a European *ordre public* clause. He further elaborated that – by considering the systematic dimension of the legal text – only the explicit grounds for refusal in Arts. 3 and 4 of the FD EAW allow for the non-execution of EAWs. In addition, the AG stressed that analysis of the leading principles of the FD EAW – the principles of mutual recognition and mutual trust – lead to the only possible conclusion that the executing judicial authority must automatically recognise the decision of the issuing authority.

However, AG Bot indicated that the principle of proportionality must be respected. Yet, it should be exclusively up to the issuing authorities to weigh up the fundamental rights of the persons con-

cerned against the purpose of prosecuting crime. If necessary, it is the responsibility of the issuing Member State to ensure the conditions such that the fundamental rights provided for in Art. 6 TEU are not infringed. (TW)

►eucrim ID=1601054

### Lawyers Express Concern About AG's Case Opinion

The aforementioned opinion of AG Bot in the cases *Aranyosi and Căldăraru* triggered a letter from lawyers and human rights NGOs to Věra Jourová, the Commissioner for Justice, Consumers and Gender Equality at the European Commission. The letter entitled “A Threat to Justice in Europe” takes issue with the opinion and cautions that the opinion, if adopted by the CJEU, “would place the EU legal order out of line with the ‘overwhelming global consensus’ that persons should not be extradited to countries where there is a real risk of torture or inhuman/degrading treatment”.

The lawyers and NGOs call on the Commission to consider legislative amendments to the EU’s fast-track surrender regime under the EAW, so that fundamental rights are protected more thoroughly. In this context, they refer also to the recommendations of the European Parliament of 2014. (TW)

►eucrim ID=1601055

### Federal Constitutional Court Invokes Identity Review in EAW Case

The German Federal Constitutional Court quashed a decision of the Higher Regional Court of Düsseldorf that actually allowed the surrender of an American citizen to Italy, where he was sentenced *in absentia* to a custodial sentence of 30 years for participating in a criminal organisation and importing cocaine. The case caused the Federal Constitutional Court to outline in a more fundamental way the relationship between the German Constitution and acts determined by Union law (here: the EAW legal framework).

The Federal Constitutional Court emphasized that the EU is (only) an association of states (*Staatenverbund*) and that the Member States remain the “masters of the treaties” (*Herren der Verträge*). Hence, in individual cases, the protection of fundamental rights by the Federal Constitutional Court may include review of sovereign acts determined by Union Law if this is indispensable to protecting the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law (*Grundgesetz*). This is also known as the identity review. It is based on the Court’s judgment on the Lisbon Treaty of 2009, but was first applied in practice by the present decision. Since, in the present case, it was questionable whether the complainant would have the opportunity of a new evidentiary hearing in Italy against the judgment *in absentia* at the appeal stage, the Federal Constitutional Court sees a violation of the principle of personal guilt (*Schuldprinzip*) that is rooted in the guarantee of human dignity enshrined in Art. 1 para. 1 and referred to in Art. 79 para. 3 of the Basic Law.

The Federal Constitutional Court stressed that it is not the German implementation law on the EAW that is unconstitutional, but rather the decision of the Higher Regional Court, since it did not fully take account of the safeguards of Art. 1 of the Basic Law.

The Court’s order is important from several aspects and will cause a lot of discussions among scholars. One of the main questions is whether complainants may more easily reach judgments that quash acts determined by Union Law. In this context, the present Court’s judgment is already called *Solange III* because it may come to pass that the individual no longer has to prove that essential fundamental rights are generally no longer safeguarded by the EU (as ruled in the *Solange II*-decision) – instead, he/she has only to prove a violation of human dignity by means of a Union act. This also leads to another question: Has Germany’s Federal Constitutional Court developed a new yard-

stick for an *ordre public*-reservation in view of the non-execution of EAWs?

The judgment of the Federal Constitutional Court may also be considered as opposition against the ECJ’s ruling in *Melloni*, in which the European Court actually ruled that measures related to EAWs cannot be made under the control of national constitutions. Ultimately, the question remains as to whether the Federal Constitutional Court would have been obliged to request a preliminary ruling by the ECJ in this case. The Federal Constitutional Court, however, rejects this idea by arguing that the ECJ would clearly have decided in the same way (*acte claire*-doctrine). (TW)

►eucrim ID=1601056

### Federal Constitutional Court Stops Surrender to Belgium

Shortly after the aforementioned decision, the Federal Constitutional Court again stopped a surrender. This time, it was a German national who had been charged in Belgium of instigation to commit murder. The Federal Constitutional Court held that the German judicial authorities had erroneously deemed the offense to have a substantial link to the requesting Member State. Instead, the Federal Constitutional Court considered the case to be “mixed”, namely one in which no clear link to either domestic or foreign territory can be identified. In such cases, the different interest must be balanced.

After the Federal Constitutional Court declared the first implementation void in 2005, the German law implementing the Framework Decision on the EAW stipulates rather complicated conditions for the surrender of own citizens. The Federal Constitutional Court reiterated in its present order the importance of the basic right of German citizens not to be extradited as safeguarded by Art. 16 para. 2 of the Basic Law (following the reasoning of 2005). German authorities must now decide whether the instigator must be charged in Germany or not. (TW)

►eucrim ID=1601057

### AG Gives Opinion in Bob-Dogi Case

A European Arrest Warrant (EAW) can only be issued if there is a separate national – domestic – arrest warrant (or an equivalent measure) which was issued in accordance with the criminal procedural rules of the issuing Member State, and therefore distinct from the EAW. If the national arrest warrant is not existent, the execution of a EAW must be refused for formal reasons. This is the result of the opinion of Advocate-General Bot which was published on 2 March 2016 in the preliminary ruling procedure of the *Bob-Dogi* Case (C-241/15). The question was referred to the CJEU by the Curtea de Apel Cluj. In the case before the Romanian court the Hungarian prosecution authorities only referred to the European Arrest Warrant in the relevant EAW form as basis for the search of the suspect without indicating a national arrest warrant. The preliminary ruling is very important for the practice since some EU Member States are of the opinion that the EAW can be considered as a replacement of the national arrest warrant. (TW)

► [eucrim ID=1601058](#)

### Criminal Records

#### Full Use of ECRIS for Non-EU Citizens

On 19 January 2016, the European Commission tabled a proposal for a better exchange of the criminal records of non-EU citizens in the EU. The existing European Criminal Records Information System (ECRIS) is to be upgraded for this purpose. The Commission is of the opinion that ECRIS, which has been allowing for the computerised exchange of information on convictions since 2012, does currently not work for non-EU citizens in a fully efficient manner. If a criminal court in the EU convicts a non-EU national, the information is stored only in the convicting Member State, meaning that another Member State wanting to know about previous convictions must consult all Member

States by means of a “blanquet request”. Furthermore, the unambiguous identification of third-country nationals is difficult in practice, so that ECRIS is often not used for lack of reliability.

The Commission is now taking legislative action, so that data on the criminal records of non-EU citizens can also be stored in the ECRIS system and exchanged more easily as a result. In the future, non-EU citizens can be searched via an index system. In case of a match, the requesting Member State can address individually other Member States concerned to receive the relevant information on criminal records (hit/no hit-system).

The new tool will also foresee the storage of the fingerprints of the non-EU citizens. This is deemed necessary in order to correctly identify third-country nationals and tackle the use of false identities.

The proposal is part of the European Agenda on Security (COM(2015) 185), which aims to improve cooperation between national authorities in the fight against terrorism and other forms of serious cross-border crime. By facilitating the existing ECRIS, the Commission anticipates better security for all citizens throughout the EU, boosting and improving judicial cooperation, and reducing costs and administrative burdens. (TW)

► [eucrim ID=1601059](#)

#### FRA on Upgrade of ECRIS Concerning Non-EU Citizens

In December 2015 already, the EU Fundamental Rights Agency (FRA) delivered an opinion on planned amendments to the existing ECRIS in order to more easily exchange criminal record data on third-country nationals. It was part of an impact assessment carried out by the European Commission before the official proposal (cf. aforementioned news). The FRA acknowledges the possible positive effects of the completion of ECRIS in relation to third-country nationals but also warns of adverse impacts in view

of the fundamental rights as enshrined in the Charter.

The FRA makes, *inter alia*, the following recommendations:

- Avoiding using the system for immigration law enforcement or for migration-related offences, e.g., neither for a withdrawal or refusal of residence permits nor to process convictions of people who entered the country irregularly due to limited legal entry channels. Such convictions may also pose integration problems for those who have been granted asylum, e.g., when looking for a job.
- Assessing the privacy risks of using fingerprinting data.
- Reviewing carefully the impact on children who may be victims of trafficking and, as a result, may be forced into criminal activities.
- Protecting personal data and ensuring that inaccuracies can be easily corrected. (TW)

► [eucrim ID=1601060](#)

### Law Enforcement Cooperation

#### EU's Most Wanted

On 29 January 2016, a website on Europe's most wanted fugitives was launched by the European Network of Fugitive Active Search Teams (ENFAST1), a network of police officers from the 28 EU Member States specialised in undertaking immediate action to locate and arrest fugitives. The website shares information on high-profile, internationally wanted criminals, convicted of – or suspected of having committed – serious crimes or terrorist acts in Europe. It offers citizens from all over the world the possibility to help trace these criminals by sending (anonymous) messages and is available in 17 EU languages.

The project is supported by Europol, which has developed a secure platform for the website and helps ENFAST administrators with technical issues such as logins and access rights. (CR)

► [eucrim ID=1601061](#)



## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

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

##### ECHR Launches New Factsheets

On 21 December 2015, the ECtHR launched a series of new factsheets online concerning the following:

- Derogation in times of emergency;
- Life sentences;
- Extradition and life sentences;
- Protection of reputation;
- Sports.

Since September 2010, the Court has published approx. 60 factsheets, aiming to assist the implementation of the European Convention on Human Rights and its case law by raising awareness of the Court's judgments among journalists, national authorities, and the general public.

➤ [eucrim ID=1601062](#)

#### Other Human Rights Issues

##### Commissioner Publishes Comment on Situation of Irregular Migrants

On 26 February 2016, *Nils Muižnieks*, CoE Commissioner for Human Rights, published a comment on the situation of irregular migrants, urging Europe to change its approach to migration (see also [eucrim 3/2015](#), pp. 86-87). The Commissioner was critical of the decisions of European countries to close borders to asylum seekers. He also criticised counter-productive policies such as reducing asylum seeker benefits,

seizing their belongings, restricting family reunification, and granting unstable forms of status.

The comment emphasised that many of these measures are generally ineffective and harmful as regards social cohesion, being contrary to European human rights standards and violating inter-state solidarity.

Among the range of possibilities for medium- to long-term solutions, the Commissioner highlighted the need to negotiate a political solution with the participation of the European countries and to expand legal venues for people so that they may arrive in a safe and orderly way, including family reunification and humanitarian visas. Furthermore, effective return policies should be adopted allowing the repatriation of those who do not have protection needs in compliance with human rights. Ultimately, European countries should increase their support for the Office of the United Nations High Commissioner for Refugees' efforts to provide for the basic needs of asylum seekers and refugees.

The Commissioner stressed that these measures require political leadership and considerable resources and that chaotic arrivals and the will to backslide on human rights can have immense political, social, and economic costs, the dimension of which will rapidly grow.

➤ [eucrim ID=1601063](#)

##### Commissioner Publishes Statement on the EU-Turkey Deal

On 21 March 2016, the Commissioner published a statement calling for the

Member States to take utmost care when implementing the EU-Turkey deal in order to dispel a number of serious concerns from a human rights perspective.

The Commissioner welcomed the legal safeguards in the deal, which should prevent automatic collective returns and offer an objective assessment of each individual request.

However, in order to ensure a more effective protection of migrants' human rights, the statement called for additional guiding principles for the implementation of the deal. These should ensure that the deal and its legal safeguards apply to all people reaching the EU and that Greece receives urgent financial and human resources to avoid violations of migrants' human rights generated by the dysfunctional Greek asylum system. The latter concerns, in particular, reception conditions and access to asylum. Additionally, the detention of migrants should be limited to exceptional cases, as irregular entry and stay in a country is not a crime.

The statement stressed that particularly vulnerable people, such as children, pregnant women, and victims of trafficking and torture are in need of special attention.

Moreover, the laws in the Member States should follow a more humane approach than criminalising those who enter and remain by irregular means. EU search-and-rescue operations in the Mediterranean should also be strengthened and public anxiety about migration confronted from a principled standpoint.

Overall, the statement called the EU-Turkey agreement part of the solution to protecting refugees but stressed that European countries must do more to safeguard those who flee wars and persecution.

➤ [eucrim ID=1601064](#)

\* If not stated otherwise, the news reported in the following sections cover the period September – November 2015.

## Specific Areas of Crime

### Corruption

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

On 22 January 2016, GRECO published its Fourth Round Evaluation Report on Romania. This latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of MPs, judges, and prosecutors (for other recent reports, see eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45; eucrim 3/2015, pp. 87-88). The report acknowledged Romania's efforts and determination in combating corruption, identifying as exemplary (in several areas) the system for the declaration of income, assets, and interests. Nevertheless, GRECO called for more effective prevention measures, especially the development of integrity rules for parliamentarians and an increase in the effectiveness of existing measures as regards judges and prosecutors.

Concerning MPs, the report states that Romania is at an early stage of implementation of preventive policies. There is a need to make the legislative process more transparent in order to limit the use of expedited procedures and to avoid the risks of manipulation. Consequently, the report recommends the adoption of a code of conduct for MPs as well as rules on gifts and other benefits and on relations with third parties. In addition, the system of immunities needs revision.

In order to avoid inappropriate conduct, the report calls for improved supervision of judges and prosecutors by the Superior Council of Magistracy and by the heads of courts and prosecutorial offices. Furthermore, the report recommends a general review of the code of conduct of 2005. In addition, GRECO recommends reviewing the conditions for appointment and dismissal of senior prosecutors in order to ensure their im-

partiality and to limit political interference.

► eucrim ID=1601065

#### GRECO: Fourth Round Evaluation Report on Portugal

On 10 February 2016, GRECO published its Fourth Round Evaluation Report on Portugal. The report called for more effective prevention measures, particularly concerning integrity, accountability, and transparency rules.

Regarding MPs, the report stressed the permissive nature of the rules on incompatibility and called for an evaluation of their effectiveness and the reinvigoration of the entire conflict-of-interest regime. Additionally, the assets of MPs require more timely and in-depth monitoring, and the procedure for lifting the immunity of deputies of the regional legislative assemblies requires review. The report noted that no rules of conduct have been established with regard to MPs and stressed the lack of regulation of contact with third parties as well as the insufficient openness of the law-making process to other stakeholders.

Regarding judges and prosecutors, the report emphasized that the statute of judges and the statute of prosecutors have not been aligned to the new judicial map introduced in 2014. This resulted in discordant regulations on the transfer of judges within district courts and on the reallocation of cases. For prosecutors, it led to an erosion of their strict hierarchical subordination.

The lack of financial autonomy undermines the statuses both of the judiciary and of the prosecution as a separate power and autonomous body. The courts are particularly vulnerable to undue political interference due to the prevalence of non-judges in the composition of the judicial councils for ordinary, administrative, and tax courts. The accountability of judges and prosecutors as well as that of the judicial and prosecutorial councils are hindered by the lack of standards of professional conduct and by the concealing of cer-

tain details of the outcome of disciplinary procedures.

► eucrim ID=1601066

#### GRECO: Fourth Round Evaluation Report on Bosnia and Herzegovina

On 22 February 2016, GRECO published its Fourth Round Evaluation Report on Bosnia and Herzegovina. GRECO is critical of the delays in the countries' anticorruption agenda and identified the lack of genuine political will to push forward far-reaching reforms as well as the fragmented and uncoordinated institutional framework as the main reasons. GRECO called for firm steps to implement its recommendations, which is also indispensable for Bosnia and Herzegovina's aspiration to further European integration.

The report acknowledges the steps taken to enhance openness and public awareness of parliamentary work as well as the existence of the Code of Conduct and strict rules on incompatibilities for MPs. Nonetheless, it remains unclear how non-compliance could lead to the punishment of MPs, and the transparency and control of the asset disclosure regime remains deficient. Additionally, the existing bodies overseeing conflicts of interest lack either the required powers or the independence to ensure abidance by the rules.

Regarding judges and prosecutors, the report expressed concerns over their negative public perception. The reasons for this are the complexity of the four judicial systems, poor case management, and the lack of certainty about available resources. In order to restore public trust, the report urged establishing the concept of judicial independence beyond doubt, ensuring a better prioritization of cases as well as a more efficient use of available resources across the judicial systems. To achieve this, the High Judicial and Prosecutorial Council's operation has to be strengthened, as it plays a key role in the process.

Additionally, the professionalism, integrity, and accountability of judges

and prosecutors needs to be improved, notably as regards performance appraisals. They are the determining factors for promotion, rules on conflicts of interest, and awareness of ethics and integrity.

With regard to the accountability of judges and prosecutors, the report notes that, as annual financial statements are neither controlled nor published, an effective review system with sanctions in case of non-compliance needs to be established. In addition, the disciplinary procedure and sanctions for misconduct needs to be revised. Ultimately, all these steps towards an increased efficiency and accountability of the judicial system need to be communicated to the public as part of a concerted communication strategy.

➤ [eucrim ID=1601067](#)

#### GRECO: Fourth Round Evaluation Report on Armenia

On 25 February 2016, GRECO published its Fourth Round Evaluation Report on Armenia. In general, the report notes that, although fighting corruption is a high priority on the political agenda, it remains a significant problem for Armenian society. The judiciary suffers from a deficit in independence, and public decision-making lacks transparency.

The report recommends improving the rules on and monitoring of the accepting of gifts by parliamentarians, judges, and prosecutors as well as establishing regular asset declarations. Additionally, the introduction of a code of conduct for MPs would improve the transparency of the parliamentary process.

As regards the judiciary, the existing procedures for recruitment, promotion, and dismissal of judges and prosecutors, including the Prosecutor General, as well as disciplinary procedures, need to be further amended with a deliberate policy for preventing improper influence on judges and prosecutors. In addition, the immunity of judges should be limited to activities related to the administration of justice.

➤ [eucrim ID=1601068](#)

| Council of Europe Treaty  | State   | Date of ratification (r), signature (s) or accession (a)                               |
|---|---|--|
| European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (CETS No. 51)   | Moldova   | 9 November 2015  |
| Additional Protocol to the European Convention on Extradition (CETS No. 86),  | Turkey  | 22 March 2016 (s)  |
| Additional Protocol to the Convention on the Transfer of Sentenced Persons (CETS No. 167)   | Turkey  | 2 May 2016 ( r )   |
| Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 177)  | Malta   | 8 December 2015 (r)  |
| Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No. 182)   | Spain<br>Turkey                                 | 9 October 2015 (s)<br>22 March 2016 (s)  |
| Convention on Cybercrime (CETS No. 185)   | Liechtenstein                                   | 27 January 2016 (r)  |
| Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No. 189) | Turkey  | 29 April 2016 (s)  |
| Protocol amending the European Convention on Suppression of Terrorism (CETS No. 190)  | Portugal  | 25 November 2015 (r)   |
| Additional Protocol to the Criminal Law Convention on Corruption (CETS No. 191)   | Andorra<br>Hungary<br>Portugal                  | 20 February 2015 (r)<br>27 February 2015 (r)<br>12 March 2015 (r)                      |
| Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)  | Hungary   | 27 February 2015 (r)   |
| Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)   | Portugal  | 12 March 2015 (r)  |
| Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)                        | Lithuania<br>France<br>Germany                  | 28 October 2015 (s)<br>8 December 2015 (r)<br>28 January 2016 (s)                      |
| Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)  | Hungary<br>Liechtenstein<br>Germany<br>Slovakia | 3 August 2015 (r)<br>11 September 2015 (r)<br>18 November 2015 (r)<br>1 March 2016 (r) |
| Third Additional Protocol to the European Convention on Extradition (CETS No. 209)  | Turkey  | 22 March 2016 (s)  |
| Convention on preventing and combating violence against women and domestic violence (CETS No. 210)  | Netherlands<br>San Marino<br>Belgium            | 18 November 2015 (r)<br>28 January 2016 (r)<br>14 March 2016 (r)                       |

| Council of Europe Treaty   | State   | Date of ratification (r), signature (s) or accession (a)  |
|--|---|---|
| Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)                                | Austria<br>Turkey   | 1 February 2016 (r)<br>22 March 2016 (s)  |
| Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) | Lithuania<br>Poland<br>Netherlands<br>Hungary<br>Albania<br>Bulgaria<br>France<br>Sweden  | 2 September 2015 (r)<br>10 September 2015 (r)<br>1 October 2015 (a)<br>30 November 2015 (r)<br>17 December 2015 (r)<br>11 January 2016 (r)<br>3 February 2016 (r)<br>29 March 2016 (r)  |
| Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214)       | Lithuania<br>Finland  | 2 September 2015 (r)<br>7 December 2016 (r)   |
| Council of Europe Convention against Trafficking in Human Organs (CETS No. 216)                                    | Ireland<br>Russia   | 8 October 2015 (s)<br>24 September 2015 (s)   |
| Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217)              | Albania<br>Belgium<br>Bosnia and Herzegovina<br>Bulgaria<br>Denmark<br>Estonia<br>France<br>Germany<br>Greece<br>Iceland<br>Italy<br>Latvia<br>Lithuania<br>Luxembourg<br>Malta<br>Moldova<br>Netherlands<br>Norway<br>Poland<br>Portugal<br>Romania<br>Slovenia<br>Spain<br>Sweden<br>Switzerland<br>Turkey<br>Ukraine<br>United Kingdom | 7 December 2015<br>22 October 2015<br>22 October 2015<br>10 November 2015<br>3 May 2016<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>27 October 2016<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>23 March 2016<br>22 October 2015<br>4 May 2016<br>21 March 2016<br>1 March 2016<br>22 October 2015<br>22 October 2015<br>15 March 2016<br>11 March 2016<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>22 October 2015<br>28 October 2015<br>22 October 2015 |

► eucrim ID=1601073

### GRECO: Fourth Round Evaluation Report on Turkey

On 17 March 2016, GRECO published its Fourth Round Evaluation Report on Turkey, which highlighted the need to provide for more openness in the parliamentary process as a major concern. The report includes a large number of recommendations to improve anti-corruption measures in respect of institutional settings and practices as well as with regard to the conduct of the officials concerned.

Regarding MPs, the report recommends taking strong measures to prevent parliamentary immunities from hampering criminal investigations of suspected corruption. The report stresses the need to establish codes of ethics for MPs, in particular to prevent situations of conflicting interests.

Additionally, in order to provide for more transparency in law-making, the report calls for the increased use of public consultation and the regulation of various forms of conflict of interest that occur in the daily work of MPs.

The report stresses the need to strengthen the independence of the judiciary in general and of the High Council of Judges and Prosecutors vis-à-vis executive powers in particular. This is to be achieved *inter alia* by increasing the influence of the judiciary itself in the selection and training of judges and prosecutors and by adopting codes of ethics for these professional groups.

The report further recommends that judges, upon appointment, be obliged to take an oath to adhere to fundamental principles of judicial independence and impartiality.

► eucrim ID=1601069

### Money Laundering

#### MONEYVAL: Second Progress Report of The Holy See

On 15 December 2015, MONEYVAL published its second progress report on the Holy See, which evaluates the Member State's compliance with the recom-

recommendations made in previous MONEYVAL reports (see eucrim 3/2012, pp. 108-109; 2/2014, pp. 58-59).

The report stresses that most of the technical deficiencies in the AML/FT system have been addressed. However, no effective results in practice, i.e., in terms of prosecutions, convictions and confiscation, have been achieved.

In its analysis, the report points out that the intensive review and closing of approximately 4800 accounts of the Institute for the Works of Religion (IOR) corrected significant shortcomings in the implementation of FATF measures to accurately identify account holders. As a result mainly of the continued review process of IOR accounts, the number of suspicious activity reports has increased sharply since the last progress report. Additionally, the categories of customers entitled to hold accounts in the IOR have been clarified and, in 2014, the financial intelligence authority (AIF) carried out a full inspection of the IOR and provided it with a detailed action plan. The number of AIF reports forwarded to the prosecutor responsible for investiga-

tion of ML has risen (as has the number of follow up investigations). Under the new rules, approximately 11 million euros of potential criminal proceeds were frozen.

Nonetheless, no indictments or prosecutions have been brought in ML cases since the adoption of the 2012 evaluation report. Therefore, MONEYVAL called for the respective national authorities to deliver real results.

➤eucrim ID=1601070

#### **MONEYVAL: Fourth Round Evaluation Report on Guernsey**

On 15 January 2016, MONEYVAL published its Fourth Round Evaluation Report on the United Kingdom's Crown Dependency of Guernsey. MONEYVAL called for:

- Strengthening financial penalties related to ML and FT;
- Increasing the number of investigations, prosecutions, and convictions in this area;
- The use of restraint and confiscation orders.

On the positive side, the report acknowledged the mature legal and regula-

tory system of Guernsey, which has been enhanced by the introduction of modern legislation covering all important aspects of the finance industry.

➤eucrim ID=1601071

#### **MONEYVAL: Fifth Evaluation Round Report on Armenia**

On 28 January 2016, in the first report published in the Fifth Mutual Evaluation Round, MONEYVAL acknowledged Armenia's progress:

- Establishing a sound legal framework;
- Effectiveness of the financial sector in applying preventive measures;
- Mechanisms for detecting and preventing FT and proliferation.

The report stressed that the banking and real estate sectors are the most vulnerable to ML in the Armenian economy. Although financial intelligence is gathered very effectively, the law enforcement often fails to use it to develop evidence, trace, seize, and confiscate criminal proceeds from ML. These weaknesses need to be addressed by means of an effective national policy to investigate and prosecute ML.

➤eucrim ID=1601072

## Hercule III Programme – Call for Proposals

In view of implementing the 2016 Financing Decision, the Commission has published three “Calls for Proposals” within the framework of the Hercule III programme:

### I Legal Training and Studies

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Call for Proposals for the following eligible actions:

1. Developing high-profile research activities, including studies in comparative law;
2. Improving the cooperation between practitioners and academics (through actions such as conferences, seminars and workshops), including the organisation of the annual meeting of the Presidents of the Associations for European Criminal Law and for the Protection of the EU Financial Interests;
3. Raising the awareness of the judiciary and other branches of the legal profession for the protection of the financial interests of the Union, including the publication of scientific knowledge concerning the protection of the financial interests of the Union.

The available budget for this Call is: EUR 500 000.

The **deadline** for submitting applications is: **Thursday, 16 June 2016**.

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

[olaf-fmb-hercule-legal@ec.europa.eu](mailto:olaf-fmb-hercule-legal@ec.europa.eu)

### II Training & Conferences

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Call for Proposals for the following eligible actions:

1. Exchanging experience and best practices between the relevant authorities in the participating countries, including specialised law enforcement services, as well as representatives of international organisations;
2. Disseminating knowledge, particularly on better identification of risk for investigative purposes.

These aims can be achieved through the organisation of:

- Conferences, seminars, colloquia, courses, e-learning and symposia, workshops, hands-on training, exchanges of best practices (including on fraud risk assessment), etc.;
- Staff exchanges between national and regional administrations in different Member States (in particular neighbouring Member States) are to be encouraged.

The available budget for this Call is: EUR 900,000.

The **deadline** for submitting applications is: **Thursday, 23 June 2016**.

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

[olaf-anti-fraud-training@ec.europa.eu](mailto:olaf-anti-fraud-training@ec.europa.eu)

### III Technical Assistance

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Call for Proposals for the following eligible actions:

1. The purchase and maintenance of investigation tools and methods, including specialised training needed to operate the investigation tools;
2. The purchase and maintenance of devices (scanners) and animals to carry out inspections of containers, trucks, railway wagons and vehicles at the Union’s external borders and within the Union in order to detect smuggled and counterfeited goods;
3. The purchase, maintenance and interconnection of systems for the recognition of vehicle number plates or container codes;
4. The purchase of services to support Member States’ capacity to store and destroy seized cigarettes and tobacco.

The available budget for this Call is: EUR 8 800 000.

The **deadline** for submitting applications is: **Thursday, 9 June 2016**.

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

[olaf-fmb-hercule-ta@ec.europa.eu](mailto:olaf-fmb-hercule-ta@ec.europa.eu)

#### Eligible Applicants:

- National or regional administrations of a Member State which promote the strengthening of action at Union level to protect the financial interests of the Union (for all three Calls);
- Research and educational institutes and non-profit-making entities provided that they have been established and have been operating for at least one year, in a Member State, and promote the strengthening of action at Union level to protect the financial interests of the Union (for “Legal Training and Studies” and “Training & Conferences” Calls).

[http://ec.europa.eu/anti-fraud/policy/hercule-iii\\_en](http://ec.europa.eu/anti-fraud/policy/hercule-iii_en)

# The Directive on the Presumption of Innocence and the Right to Be Present at Trial

## Genesis and Description of the New EU-Measure

Steven Cras and Anže Erbežnik\*

### I. Introduction

On 9 March 2016, the European Parliament and the Council adopted Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.<sup>1</sup> The Directive is the fourth legislative measure that has been brought to pass since the adoption, in 2009, of the Council's Roadmap on procedural rights for suspects and accused persons. This article describes the genesis of the Directive and provides a description of its main contents.

### II. Genesis of the Directive

#### 1. Background: Roadmap and Stockholm programme

In November 2009, on the eve of the entry into force of the Lisbon Treaty, the Council (Justice and Home Affairs) adopted the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.<sup>2</sup> The Roadmap provides a step-by-step approach<sup>3</sup> – one measure at a time – towards establishing a full catalogue of procedural rights for suspects and accused persons in criminal proceedings. Taking into account the objective of Art. 82(2) TFEU, the aim of the Roadmap is to foster the application of the principle of mutual recognition of judicial decisions, for example in the context of the Framework Decision on the European Arrest Warrant<sup>4</sup> or the more recent Directive on the European Investigation Order.<sup>5</sup> The Roadmap also seeks to improve the balance between the measures aimed at facilitating prosecution, on the one hand, and the protection of procedural rights of the individual, on the other.

The Roadmap calls on the Commission to submit proposals for legislative measures on five rights (A–E).<sup>6</sup> During the negotiations in the Council that led to the adoption of the Roadmap, some Member States presented suggestions for other rights to be included in the Roadmap, in particular the right to remain silent and the presumption of innocence.<sup>7</sup> Since there was no majority in the Council for these suggestions, the list of five rights was maintained. As a compromise, however, it was

specified, in point 2 of the Council resolution on the Roadmap, that the rights included therein “could be complemented by other rights.”

In December 2009, the European Council welcomed the adoption of the Roadmap and made it part of the Stockholm programme.<sup>8</sup> During the negotiations that led to the adoption of this programme, some Member States again presented their suggestions for rights other than those mentioned in the Roadmap and in respect of which, in their opinion, legislative proposals should be presented by the Commission. Italy, in particular, reiterated the suggestion that the Commission should also present a proposal on the presumption of innocence. The Swedish Presidency, being favourable to this suggestion, proposed a compromise consisting of mentioning the presumption of innocence as an *example* of one of the rights that could complement the rights mentioned in the Roadmap. This proposal was agreed on and, in the Stockholm programme, one can therefore read that the European Council “invites the Commission to examine further elements of minimum procedural rights for suspected and accused persons and to assess whether other issues, *for instance the presumption of innocence*, need to be addressed.” Since the Stockholm programme, unfortunately, does not quote the measures of the Roadmap, the presumption of innocence is the only right that is explicitly mentioned in that programme. It hence could not be ignored.

#### 2. The Commission's proposal

The first three measures on the basis of the Roadmap were adopted within a rather short time frame: Directive 2010/64/EU on the right to interpretation and translation (measure A) was adopted on 20 October 2010;<sup>9</sup> Directive 2012/13/EU on the right to information (measure B) was adopted on 22 May 2012;<sup>10</sup> and Directive 2013/48/EU on the right of access to a lawyer (measure C1+D) was adopted on 22 October 2013.<sup>11</sup>

In November 2013, the Commission presented a package of three further measures to complete the rollout of the Roadmap, as integrated in the Stockholm programme: a proposal for a

Directive on provisional legal aid (measure C2-),<sup>12</sup> a proposal for a Directive on procedural safeguards for children (measure E-),<sup>13</sup> and a proposal for a Directive on the presumption of innocence (the “example” of the Stockholm programme).<sup>14</sup>

The proposal on the presumption of innocence is based on the exploratory work that the Commission carried out in view of its Green Paper on this issue in 2006<sup>15</sup> and on the views that it subsequently gathered from academics, practitioners, judges, defence lawyers, prosecutors, and other stakeholders. The Commission was also able to benefit from the consultations that had been carried out in respect of other initiatives in the field of procedural rights. The Commission tested its ideas for the proposal of a Directive during a meeting on 19 February 2013 with representatives of ministries of justice of the Member States and of Croatia, which at that time was an acceding Member State. The information gathering was completed by means of an on-line survey that was launched in the context of the consultation for the impact study relating to the proposal and in respect of which more than 100 responses were received.<sup>16</sup>

### 3. Criticism of the proposal

From the moment of its presentation, the proposal met with criticism. Various Member States reiterated the doubts that they had expressed in the meeting with the Commission on 19 February 2013. The criticism concerned mainly the fact that the proposal for a Directive, apart from addressing the issue of presumption of innocence, also contained provisions on the right to be present at the trial, on trials *in absentia* and on the right to a new trial (Arts. 8 and 9).<sup>17</sup> The Member States observed that these provisions were requested neither in the Roadmap nor in the Stockholm programme, and that they would not be compatible with Framework Decision 2009/299/JHA on trials *in absentia*.<sup>18</sup>

A few Member States, such as the Netherlands, went even further and questioned the added value of the entire proposal; they considered it neither necessary nor advisable for the Union to adopt legislation on the presumption of innocence, since provisions of national law, and of Union and international law, already provide sufficient protection in this field. In this context, reference was made, in particular, to Art. 48 of the EU Charter of Fundamental Rights (Charter) and to Art. 6(2) of the European Convention on Human Rights (ECHR), according to which “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” It was observed that the application of the presumption of innocence is monitored both by national courts and by the European Court of Human Rights (ECtHR), and that this latter Court had found an infringement of this principle in relatively few cases. It was also felt to be unwise to attempt to legislate

the issue of the presumption of innocence at this point in time, since the case law of the ECtHR was still in full development, and any legislation could impede a dynamic development of this case law.<sup>19</sup> In this context, it is worth noting that the Commission itself, in its explanatory memorandum to the proposal, had noted that “the level of safeguards in Member States’ legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area.” According to the Commission, however, points still existed in which legal safeguards could and should be improved.

In the end, though, there was only one Member State (United Kingdom) which used the possibility to issue a reasoned opinion, on the basis of Protocol No. 2 to the Lisbon Treaty, stating that the proposal of the Commission did not comply with the principle of subsidiarity.<sup>20</sup> This opinion was one of the reasons why the United Kingdom decided not to participate in the adoption of the Directive, in application of Protocol No. 21 to the Lisbon Treaty. On the same basis, Ireland also decided not to participate. Moreover, Denmark did not participate, as it nowadays never does in the area of Freedom, Security and Justice, in accordance with Protocol No. 22 to the Lisbon Treaty.

### 4. Discussions in the Council and in the European Parliament

In the Council, the discussions on the proposal did not begin immediately, since the Greek Presidency, which held office in the first semester of 2014, devoted all its efforts and resources to the proposal for a Directive on procedural safeguards for children.<sup>21</sup> It was therefore for the Italian Presidency, which held office in the second semester of 2014, to launch the discussions on the proposal for a Directive on the presumption of innocence. This was appropriate, since Italy had been the main advocate for the proposed Directive. Working intensively at various levels,<sup>22</sup> the Italian Presidency managed to have the Council reach a general approach on 4 December 2014.<sup>23</sup>

In the European Parliament, the file was attributed to the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). *Renate Weber* (Romania, ALDE), who was appointed first responsible member (*rapporteur*), prepared a working document relating to the proposal.<sup>24</sup> The document called for setting higher standards in the Directive, observing that the ECHR only provides minimum rules and that, according to Art. 52(3) of the Charter, Union law may provide more extensive protection. The report was critical in respect of several elements of the Commission proposal, for example regarding the use of compulsion – which the text as proposed by the Commission seemed to endorse<sup>25</sup> – the reversal of the burden of proof, and the admissibility of evidence.

After the 2014 elections of the European Parliament, Ms *Weber* did not return to the LIBE Committee. Subsequently, *Nathalie Griesbeck* (France, ALDE) was appointed *rapporteur*. Under her guidance, the LIBE Committee adopted its orientation vote, with draft amendments to the Commission proposal, on 31 March 2015.<sup>26</sup> The orientation vote followed the line of thinking set out in the said working document and demanded, *inter alia*, an extension of the scope of the proposed Directive to legal persons, application of the proposed Directive not only to criminal proceedings but also to “similar proceedings,” deletion of the reversal of the burden of proof, definition of the right to remain silent as an “absolute right,” stringent rules concerning “*in absentia* trials,” and a strict inadmissibility rule impeding courts and judges to take account of evidence that has been collected in breach of the rights set out in the Directive.

## 5. Start of the trilogue negotiations

In mid-April 2015, the orientation vote of the European Parliament was available in a workable format. As a consequence, the two co-legislators, with the assistance of the Commission, were able to start (trilogue) negotiations in order to reach a compromise on the text of the draft Directive. As was the case in the negotiations for the already adopted procedural rights Directives, the intention of the negotiators was to reach an agreement in first reading, since this would avoid the strict deadlines applicable in the remainder of the ordinary legislative procedure of Art. 294 TFEU. The Latvian Presidency, which held office in the first semester of 2015, had hoped to close the file under its Presidency, but two months were simply not enough to do the job. Two trilogues were held, however, in which much progress was made.

## 6. The surprising compromise offer of the European Parliament

On the first day of the Luxemburg Presidency, 1 July 2015, the third trilogue was held. At the fourth trilogue, mid-September 2015, the *rapporteur* of the European Parliament surprised the Council and the Commission by presenting – at this very early stage – an overall compromise package. In exchange for the deletion of Art. 5(2) on the reversal of the burden of proof (or the use of “presumptions” as in the Council general approach, see further below) and some other minor modifications, the European Parliament indicated that it could accept the text as it stood at that moment in the negotiations (and which was still very close to the general approach of the JHA Council).

At first, the Luxemburg Presidency reacted negatively, since Art. 5(2) was considered to be the “crown jewel” of the Coun-

cil general approach. However, after a more detailed study of the offer of the European Parliament (as explained by the latter in an informal talk), the Luxemburg Presidency decided that it was worth testing this offer with the Member States. After having gained confidence, through informal consultations, that the offer of the Parliament might “fly,” the Presidency presented it to the Council working party at a meeting at the beginning of October 2015.<sup>27</sup> During this meeting, the Member States indicated that they could agree to the offer of the European Parliament, subject to some minor modifications. The Commission, however, expressed doubts on the possible compromise, considering the deletion of Art. 5(2) not to be legally sound. It was said that the Commission might have to deliver a negative opinion, in application of Art. 294(9) TFEU, which would require the Council to act unanimously.

In the subsequent weeks, a quite unique power play developed. A lot of pressure was exercised on the Commission, both by the European Parliament and by the Council, in order to persuade it to accept the compromise that had been reached by the two co-legislators. The file went to the highest institutional levels, a situation which had never occurred before in the rollout of the Roadmap. In the end, the Commission decided that it could accept the compromise, while issuing a declaration stating that, although regretting the deletion of Art. 5(2), it would not stand in the way of the adoption of this Directive.<sup>28</sup>

## 7. Swift conclusion

On 27 October 2015, the fifth and final trilogue took place. After two hours of intense negotiations, a text with all the details of the compromise was agreed upon in the exact form as it had been tabled by the Luxemburg Presidency. Coreper agreed to the result on 4 November 2015, concluding the negotiations in record time and with relatively few trilogues (the Directives on the right to information and on the right of access to a lawyer needed double the amount of trilogues).

Following legal-linguist examination of the text – always a delicate affair – the European Parliament and the Council formally approved the Directive. On 9 March 2016, the Directive was signed in Strasbourg. On behalf of the Council, it was signed by Jeanine Hennis-Plasschaert, a former Member of the European Parliament and its LIBE Committee. By attributing this task to her, the Netherlands Presidency made its own small but fine contribution to the adoption of the Directive. The Directive was published in the *Official Journal* on 11 March 2016; it has to be implemented by the Member States by 1 April 2018.

### III. Description of the Main Contents of the Directive

In this section, the main contents of the Directive are described. It is a selection; some elements, such as the (non-) application of the Directive in case of written proceedings,<sup>29</sup> have been left out. The description shows that the Directive is, to a large extent, a codification of the case law of the ECtHR.

#### 1. Scope of the Directive

##### a) *Rationae personae*

In the first three Directives adopted on the basis of the Roadmap, it was not specified whether these instruments would only apply to natural persons or also to legal persons. However, the negotiations on these Directives had clearly been conducted in the spirit that they would apply to natural persons only.

In the proposed Directive on the presumption of innocence, however, the Commission suggested *explicitly* restricting the scope of the proposed Directive to natural persons. The Commission observed in this context that the Court of Justice of the European Union (CJEU) has recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons.<sup>30</sup> In competition cases, for example, the CJEU has allowed that enterprises might sometimes be obliged to provide information that could incriminate them.<sup>31</sup>

While the Council could accept the approach of the Commission, the European Parliament requested that the Directive also apply to legal persons in Member States in which the concept of criminal liability of legal persons exists. However, there would be no need for the Directive to apply to legal persons in Member States in which this concept does not exist. In support of its request, the European Parliament pointed out that Union law in the field of criminal law already criminalises legal persons in connection with certain offences and provides for sanctions against them. It referred specifically to Directive 2013/40/EU on attacks against information systems<sup>32</sup> and Directive 2011/92/EU on combating sexual abuse against children.<sup>33</sup>

The Council and the Commission, which was under the pressure of its competition directorate not to give in on this point, fiercely opposed the request of the European Parliament. They argued that the approach of the European Parliament would result in a patchwork of applicability of the Directive across the Union, which would run counter to the objective of establishing harmonised minimum rules. In the end, the European Parliament dropped its request. It was agreed, however, to underline in the recitals that the presumption of innocence with regard to legal persons should be ensured by existing legisla-

tive safeguards, notably as set out in the ECHR and as interpreted in the case law, and that it should be determined in the light of the evolution of such case law whether there would be a need for any Union action.<sup>34</sup>

##### b) *Rationae temporis*

The first three Directives that were adopted in the field of procedural rights all provide similar wording, stating that these instruments apply from the moment the persons concerned have been made aware – by official notification or otherwise – that they are suspected or accused of having committed a criminal offence. All three institutions felt, however, that in order for the principle of the presumption of innocence to be effective, it should apply at the earliest stages of the proceedings, and even before the persons concerned have been made aware that they are suspects or accused persons.

Therefore, Art. 1 of the Directive, as finally adopted, simply states that it applies “from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence.” It is also pointed out in this article that the Directive applies at all stages of the criminal proceedings. The reference to the “alleged criminal offence” is meant to refer to cases in which something has actually happened (e.g., a dead body is found) and it is not yet certain whether or not a criminal offence has been committed (murder, homicide, or death by natural causes or an accident). The reference was added with the aim of extending the scope of the Directive as much as possible, but it is probably redundant, since without this reference (as is the case in the other, already adopted Directives) the scope also seems to allow investigating or judicial authorities to conclude that no criminal offence has been committed.

The Directive applies until the decision on the final determination of whether the person has committed the criminal offence in question, “has become definitive.” This is normally the case when appeal is no longer possible. It is clarified in the recitals that legal actions and remedies that are available only once a decision has become definitive, including actions before the ECtHR, do not fall within the scope of the Directive.<sup>35</sup>

##### c) *Notion of criminal proceedings*

The Commission proposed that, as in the other three adopted Directives, this Directive should also apply only to “criminal proceedings.” It would therefore not apply to administrative proceedings and civil proceedings.

The European Parliament was afraid that Member States could avoid the application of the Directive by a “creative” classification of their proceedings, for example by organising

proceedings having a criminal nature under the guise of administrative proceedings. It therefore requested providing in Art. 2 that the Directive would apply to criminal proceedings “and similar proceedings of a criminal nature leading to comparable sanctions of a punitive and deterrent nature.” The EP also proposed making a reference in an accompanying recital to the so-called *Engel* criteria of the ECtHR as to the notion of “criminal charge.”<sup>36</sup> The Council and the Commission, however, objected that such an addition would create substantial confusion, since it was not contained in the other three already adopted Directives. They also felt that the addition requested by the European Parliament would not be necessary, since “criminal proceedings” is an autonomous notion of Union law, as interpreted by the CJEU. A compromise was reached by adding in the recitals that the Directive should apply only to criminal proceedings as interpreted by the CJEU, without prejudice to the case-law of the ECtHR.<sup>37</sup>

## 2. Public references to guilt

Art. 3 basically repeats Art. 6(2) ECHR and Art. 48(1) of the Charter: suspects and accused persons should be presumed innocent until proven guilty according to law.

Art. 4 concerns the concrete action, or non-action, that should be taken by the Member States in this respect. According to paragraph 1, public authorities should not make public statements that refer to a person as guilty as long as that person has not been proven guilty according to law.

The Commission had proposed adding to “public statements” a reference to “official decisions,” but the Council rejected this proposal because there was no basis for such a reference in the case law of the ECtHR and because the term “official decisions” is extremely vague – how would one define such a decision? The request of the European Parliament to add a reference to “judicial decisions” was more difficult to ignore, however, since the case law of the Strasbourg court explicitly makes reference to such decisions, for example in the *Matijašević* case.<sup>38</sup> After substantial hesitation, the Council accepted a reference to “judicial decisions,” on condition that the clarification “other than those on guilt” would be added: indeed, a (final) judgment of a court finding a person guilty of a criminal offence is without doubt a “judicial decision,” but it clearly should not be governed by the rule that such a decision should not refer to the guilt of a suspect or accused person.

The Council also made clear that a number of other acts should be exempted from the general rule, in particular acts on the part of the prosecution, which precisely aim to prove the guilt of the suspect or accused person, such as the indictment, and

preliminary decisions of a procedural nature, such as decisions on pre-trial detention.

Art. 4(3), as explained in the recitals,<sup>39</sup> contains a general exception: the obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings if this is strictly necessary for reasons relating to the criminal investigation. This could be the case, for example, when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence. Information containing references to persons as being guilty could also be legally disseminated if it is in the public interest, such as when inhabitants of an area are informed of an alleged environmental crime for safety reasons, or when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order to prevent a disturbance of public order.

## 3. Presentation of suspects and accused persons

Art. 5 on the presentation of suspects and accused persons was not part of the original Commission proposal. Following a suggestion by LEAP (Legal Experts Advisory Panel of Fair Trials), the LIBE Committee proposed inserting an additional article in the text of the draft Directive obliging Member States to ensure that suspects or accused persons would not be presented in court or in public in a manner that would suggest their guilt prior to the final conviction. It was explained in a proposed recital that such presentation – in glass boxes, handcuffs, leg irons, or prison clothes – could create an impression of guilt from the outset. The amendment clarified that the proposed rule should not prevent Member States from applying measures that are genuinely required for case-specific security reasons, on the basis of specific identified risks posed by the individual suspect or accused person.

The amendment was clearly influenced by the case law of the ECtHR on Art. 3 ECHR, which prohibits torture and “inhuman or degrading treatment or punishment.” According to the Strasbourg Court, measures of restraint, such as handcuffing, do not normally give rise to an issue under Art. 3 of the Convention if they have been imposed in connection with lawful arrest or detention “and do not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances.”<sup>40</sup> In respect of metal cages, the unjustified or “excessive” use of such a measure of restraint was often found to constitute a violation of Art. 3 ECHR.<sup>41</sup>

While the Commission supported the amendment of the European Parliament, the Member States in the Council were reluctant to introduce this new rule, since it would be too intrusive

of their criminal law procedures. The Member States pointed out that the issue raised by the Parliament dealt with Art. 3 ECHR, regarding inhuman or degrading treatment or punishment, whereas the Directive was meant to deal with Art. 6(2) ECHR, regarding the presumption of innocence. The Member States also put forth the argument that judges are independent and that it would hence be impossible for the Member States to “ensure” the new rule as proposed by the European Parliament; according to the Member States, they could merely take “appropriate measures,” such as setting up an adequate legal framework and providing relevant information.

During the trilogue negotiations, however, the European Parliament emphasised that this was a very important issue for a majority of its Members. The Parliament also pointed out that there was a clear link between the presentation of suspects and accused persons in court or in public, on the one hand, and the presumption of innocence, on the other, since the use of measures of physical restraint (such as when a suspect or accused person wears handcuffs in a courtroom) automatically creates an impression of guilt, which should be avoided as much as possible. Moreover, the European Parliament remarked that the ECtHR had established a link between a violation of Art. 3 ECHR and the presumption of innocence in its case law. The Parliament referred, in particular, to the judgment in the *Svinarenko* case in which the ECtHR had stated that “the fact that the impugned treatment [keeping suspects and accused in a metal cage] took place in the courtroom in the context of the applicant’s trial brings into play the principle of presumption of innocence in criminal proceedings as one of the elements of a fair trial.”<sup>42</sup>

In the end, the Member States agreed to a text according to which they should take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, neither in court nor in public, through the use of measures of physical restraint (such as handcuffs, glass boxes, cages, and leg irons).<sup>43</sup> However, it was made clear that this should not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to one of the following: 1) security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property; 2) the prevention of suspects or accused persons from absconding; or 3) the prevention of such persons from having contact with third persons.<sup>44</sup>

The European Parliament had specifically insisted on the use of the word “case-specific” because it wanted to ensure that there should be an individual assessment in each case as regards the proportionality of the use of measures of physical restraint, in line with the case law of the ECtHR<sup>45</sup> and other international instruments.<sup>46</sup> At the request of the Council,

however, it was specified that the possibility of applying measures of physical restraint “does not imply that the competent authorities are to take any formal decision on the use of such measures.”<sup>47</sup> Indeed, the police and other law enforcement authorities should not be hindered from carrying out their tasks in an efficient manner.

#### 4. Burden of proof

During the negotiations, the provision on the burden of proof was extensively discussed. All parties agreed that, in accordance with Art. 6(2) ECHR, as interpreted in the case law of the ECtHR, the presumption of innocence presupposes that the burden of proof is on the prosecution and that any doubt as to guilt should benefit the suspects or accused persons (*in dubio pro reo*). Two main questions arose in this context: firstly, could the burden of proof shift to the defence (and, if so, under which circumstances)? And, secondly, what would the consequences be in case of doubt as to the guilt of the suspect or accused person?

##### a) Reversal of the burden of proof

The Commission in its proposal had suggested that it should be possible to shift the burden of proof to the defence. In fact, Art. 5(2) of the Commission proposal stated that Member States should ensure that “any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable.”

During the discussions for the Council general approach, several Member States indicated that they would prefer to abstain from explicitly stating that the burden of proof could shift to the defence because this could easily lead to misunderstandings. The Member States suggested referring only to the possibility of using presumptions of fact or law, since these are tools which most Member States are familiar with. During the debate in the Council, it emerged that such presumptions work in the way that a fact is considered proven by a reasoning that infers the existence of an unknown fact from a known fact.<sup>48</sup>

It should be noted that such presumptions are often used in practice, for instance in relation to traffic offences, such as speeding, when the person in whose name a vehicle has been registered is presumed to have driven it at the moment the traffic offence was committed.<sup>49</sup> In the areas of environmental crime, financial crime, and drug-related crime, Member States often also use presumptions.

In the case law of the ECtHR, the use of presumptions of fact and law is recognised. In the *Salabiaku* case,<sup>50</sup> for example, the Strasbourg Court ruled as follows: “Presumptions of fact

and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle.” However, the ECtHR indicated several conditions under which such presumptions could be used: “[The Convention] does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. [...] Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”<sup>51</sup>

The Council general approach reflected this case law. Art. 5(2) of the text provided as follows: “Member States may provide for the use, within reasonable limits, of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence. Such presumptions shall be rebuttable; in any case, they may only be used provided the rights of the defence are respected.”<sup>52</sup>

The European Parliament was very much against a reversal of the burden of proof and also against mentioning, in the operative part of the text, the possibility of using presumptions of fact and law. According to the Parliament, such presumptions would bear the risk of eroding the very principle of the presumption of innocence and could easily be “misused” in view of the broad definition proposed by the Council.

As outlined above in Section II, in order to ensure the removal of the reference to presumptions of fact and law from the operative part of the text, the European Parliament was ready to accept many wishes of the Council by endorsing by and large the Council general approach (complemented with an article on the presentation of suspects and accused persons, the current Art. 5). Hence, Art. 6 in the text finally agreed upon does not make reference to the possibility of reversing the burden of proof or of using presumptions of fact or law.

The possibility of using such presumptions is, however, still clearly recognised in Recital 22. The Council generally believed that, although it would have been preferable to mention the possibility of using presumptions of fact and law in the operative part of the text, it also seemed satisfactorily to mention this in the recitals only. This consideration was supported by two arguments: firstly, it was put forth that the use of presumptions is not a true exception to the general rule regarding the burden of proof but more a modified application of this rule (the presumptions only come into play when the authorities already have incriminating evidence, such as a photo of a speeding car) and, secondly, the possibility of using presumptions of fact and law is already recognised in the case law of the ECtHR.

Various Member States wondered if it was wise on the part of the European Parliament to request deletion of the provisions regarding the presumptions of fact and law from the operative part of the text. In view of the fact that these presumptions are applied on a daily basis by Member States in various fields, it might have been more helpful for citizens for this fact to be recognised in the operative part of the text, while simultaneously defining the limitations within which the presumptions should apply.

#### b) Consequences in case of doubt as to guilt

All parties agreed that any doubt as to guilt should benefit the suspects or accused persons. The question arose as to what the consequences of such doubt should be. The European Parliament considered that when there is “doubt” as to the guilt of a suspect, the accused person should be acquitted. The Council felt that this reasoning would be too simple, since 100% certainty is rare. Would any doubt, even the slightest one, have as a consequence that the person concerned should be acquitted? Moreover, the Council had the more principal objection that the European legislator should not impose any concrete instructions on courts and judges as to what to decide in a criminal case.

In the end, a solution was found by stating, in Art. 6(2), that Member States should ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, “including where the court assesses whether the person concerned should be acquitted.”

### 5. Right to remain silent and right not to incriminate oneself

#### a) Absolute right?

The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the ECHR, but the ECtHR has derived these rights from the right to a fair procedure under Art. 6 ECHR.<sup>53</sup> In the Commission proposal, the right to remain silent and the right not to incriminate oneself were presented in separate Arts. (former Arts. 6 and 7 of the Commission proposal). The Commission had also added the right “not to cooperate,” but this right was deleted during the trilogue negotiations, since it is not a right that is explicitly recognised in the ECHR, as interpreted in the case law of the ECtHR. The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, meaning that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights. As regards the right to remain silent, the text of Art. 7(3) as proposed by the Commission read as follows:

“Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts.” In this regard, the Commission distanced itself from its Green Paper of 2006, in which it had considered the right to remain silent not to be absolute. In fact, referring to the judgment of the ECtHR in the *John Murray* case,<sup>54</sup> the Commission in the Green Paper had noted that “adverse inferences could be drawn from a failure to testify” and that, under certain circumstances, “evidence obtained using indirect pressure may be used.” The judgment in the *John Murray* case, however, attracted a lot a criticism,<sup>55</sup> as did the Commission’s (preliminary) position in its Green Paper.

The European Parliament, aiming at setting high standards of protection for citizens, therefore very much welcomed the revised position of the Commission with its definition of the right to remain silent and the right not to incriminate oneself as absolute rights. In this context, the European Parliament had in mind that setting such high standards favours the application of the principle of mutual recognition, since a judicial authority in one Member State could consider not cooperating with a judicial authority in another Member State if it felt that the standards of protection in that other Member State were not at an appropriate level. In addition, not setting high standards of protection could prejudice the relationship between the Court of Justice and national (constitutional) courts as regards the primacy of Union law,<sup>56</sup> since the latter courts could be inclined to deny such primacy and apply instead the higher standards applicable in their Member State.<sup>57</sup>

The Council, in its general approach, merged the provisions regarding the right to remain silent and the right not to incriminate oneself into one article, an idea that was later agreed to by the European Parliament and the Commission. However, in view of the fact that the case law of the ECtHR had explicitly stated that both rights are not absolute,<sup>58</sup> the Council made some changes in the text. It first stated that “the exercise of the rights should not be considered to be *evidence* that the person had committed the offence concerned.” Secondly, the Council added wording in the recitals in order to take account of Member States having a system of free assessment of evidence, providing that “this should be without prejudice to national rules or systems which allow a court or a judge to take account of the silence of the suspect or accused person as an element of corroboration of evidence obtained by other means, provided the rights of the defence are respected.”<sup>59</sup>

The European Parliament and the Commission very much opposed the latter addition, which was therefore deleted from the recitals. The text as finally agreed upon in Recital 28 now reads as follows: “The exercise of the right to remain silent or the right not to incriminate oneself should not be used against

a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.”

While Art. 7 of the Directive seems to provide a clear prohibition on deriving any adverse inference from the right to remain silent, the words “in itself” and the last sentence of Recital 28, read together with Art. 10(2) on remedies, appear to indicate that *John Murray* is still hanging (a bit) around.

## b) The use of compulsion

One of the European Parliament’s major criticisms of the initial Commission proposal concerned Recital 17, in which the Commission appeared to endorse the use of compulsion (force/coercion exercised on a person in order to persuade him/her to provide information). In fact, the said recital stated *inter alia* that “Any compulsion used to compel the suspect or accused person to provide information should be limited.” The EP working document of March 2014 requested the deletion of this recital, since it would be incompatible with the absolute right of Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment), as interpreted in the case law of the ECtHR.<sup>60</sup> This line of reasoning was subsequently followed in the orientation vote of the LIBE Committee.

The Council agreed that Recital 17 of the Commission proposal had not been drafted in the most fortunate way. It proposed to substitute the recital with an entirely new one (Recital 27), in which it is now said that “the right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so.” The Council insisted, however, on adding an explicit reference to the (developing) case law of the ECtHR, in the light of which it should be interpreted whether there would be a violation of the right to remain silent and the right not to incriminate oneself.

Ultimately, in line with the case law of the ECtHR (e.g., the *Saunders* case<sup>61</sup>), it was clarified that the exercise of the right not to incriminate oneself should not prevent the competent authorities from gathering evidence that may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and that has an existence independent of the will of the suspect or accused person, such as material acquired pursuant to a warrant; material in respect of which there is a legal obligation of retention and production upon request; breath, blood, or urine samples, and bodily tissue for the purpose of DNA testing.<sup>62</sup>

## 6. Right to be present at the trial and the right to a new trial

Arts. 8 and 9, relating to the right to be present at the trial and the right to a new trial, caused quite some headaches in the Council. Under Italian Presidency, by far the most time in the discussions on reaching a general approach was dedicated to these two articles.

The basic idea of the Commission proposal, which was laid down in the first paragraph of Art. 8 (suspects and accused persons should have the right to be present at their trial) did not cause many problems. However, some clarifications were introduced, in particular that this right is without prejudice to national rules allowing the court or the judge to temporarily exclude a person from the trial if this is necessary in the interest of securing the proper conduct of the criminal proceedings. This exception could, for instance, apply when the person concerned behaves violently in the courtroom or when he/she insults the court or the judge. According to the Commission, this provision would just be common sense and, as a “modality,” it would be better placed in the recitals. The Member States, however, wanted it to be crystal-clear that the right to be present at the trial is not absolute, and therefore this exception has been introduced into the operative part.<sup>63</sup>

The provisions regarding trials *in absentia*, which the Commission had proposed in paragraphs 2 and 3 of Art. 8, were more problematic. Here, the Commission had almost copy-pasted provisions of Framework Decision 2009/299/JHA on trials *in absentia*.<sup>64</sup> As a consequence, the Commission proposal contained some very detailed rules on the conditions under which Member States could proceed with a trial despite the absence of the suspect or accused person. Member States had two basic objections to the transfer of the rules from the Framework Decision to the proposed Directive. The first one was that the Framework Decision was meant to operate in a completely different setting than the Directive: whereas the objective of the Framework Decision was to introduce optional grounds for refusal in respect of certain mutual recognition instruments (including the Framework Decision on the European Arrest Warrant), the Directive was meant to harmonise/ approximate the laws of the Member States by establishing minimum rules. The second objection of the Member States was that the provisions proposed by the Commission were far too detailed and did not at all constitute “minimum rules” in the sense of Art. 82(2) TFEU.

After various rounds of discussion, both in the working party and at the level of directors of justice (CATS),<sup>65</sup> the Member States reached a compromise on a much lighter and more readable text, while keeping the spirit of the original text of the Commission.

Clarity in the text was notably achieved by transferring substantial parts of the text to the recitals. As a result of this structure – which, after initial objections<sup>66</sup> and some minor changes, was ultimately endorsed by the European Parliament – Arts. 8 and 9 are now accompanied by ten recitals (33-42).

The Directive has brought clarity on an important point. In fact, in the Framework Decision it was not clear whether in respect of suspects or accused persons whose location is unknown a trial *in absentia* could be held and whether the resulting decision, including a custodial sentence, could be enforced immediately, in particular if the person concerned has been apprehended. Indeed, one could interpret the Framework Decision to mean that the authorities would not be able to immediately enforce a decision taken *in absentia* but should first wait for the person to make up his/her mind on whether or not to request a new trial (during which time the person could again flee). In order to tackle crime effectively, it was important for various Member States that it be clarified, in Art. 8(4), that it is possible to hold a trial *in absentia* in respect of a suspect or accused person whose location is unknown and to enforce the decision taken *in absentia* immediately, in particular once the person concerned has been apprehended.

Important conditions apply, however: firstly, Member States may only use the possibility to hold a trial *in absentia* if they have undertaken “reasonable efforts” to locate the suspects or accused persons. Secondly, the Member States must inform those persons, in particular upon being apprehended, of the decision taken *in absentia* as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.

Art. 9 specifies that such a new trial or “other legal remedy” should allow a fresh determination of the merits of the case, including examination of new evidence, and it should enable the original decision to be reversed. The provision is not entirely satisfactory on the point of the “other legal remedy,” since this concept is also meant to include an appeal: if a person has been tried *in absentia* and this person subsequently is only offered an appeal (not a new trial), he/she basically loses one instance (i.e., the decision *in absentia* has been taken by the court of first instance; after having been apprehended, the person claims a new trial but is only offered the possibility of another legal remedy consisting of an appeal before the appeal court; if the person then loses the case before the appeal court, he/she most often can not have recourse to another instance to defend him- or herself).

## 7. Remedies

There is no effective right without effective remedies. During the rollout of the Roadmap, more attention has gradually

been paid to the issue of remedies: whereas Directive 2010/64/EU on interpretation and translation does not contain a general reference to remedies, Directive 2012/13/EU on information in criminal proceedings contains such a general reference,<sup>67</sup> which has subsequently been made more specific in Directive 2013/48/EU on access to a lawyer.<sup>68</sup>

The major question in the discussions on the Directive on the presumption of innocence was: what could or should a judge do with evidence that has been obtained in breach of the right to remain silent or the right not to incriminate oneself? Should that evidence be automatically excluded from the file or could the judge examine and use that evidence and, if so, under which circumstances?

It should be noted that the criminal law systems of the Member States as regards “admissibility of evidence” are very different. Some Member States apply an exclusionary rule, others look at the fairness of proceedings, and yet others apply a system of free assessment of evidence by judges. Many variations exist, also within these categories. Admissibility rules are very important in the legal orders of the Member States: if they are not of a constitutional nature, they are often at least closely connected to constitutional rights.<sup>69</sup>

In its proposal for the Directive on presumption of innocence, the Commission included admissibility rules in Arts. 6 and 7 regarding the right not to incriminate oneself and the right to remain silent. The Commission proposed applying the standard of “fairness of the proceedings,” by providing that “any evidence obtained in breach of [these rights] shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.” In its orientation vote, the European Parliament requested replacing the rule on the “fairness of the proceedings” with a full-fledged inadmissibility rule and suggested putting the relevant text in Art. 10 on remedies.

The Council firmly objected to the position of the European Parliament. To this end, the Council referred to Art. 82(2) TFEU, according to which minimum rules should take into account the differences between the legal systems and traditions of the Member States. It stressed that several Member States, such as the Nordic countries, have a system of free assessment of evidence, which, as noted above, often has a constitutional nature. According to the Council, while Member States are free to use an exclusionary rule, it should also be permissible, in the context of a Directive on *minimum rules*, that Member States with a system of free assessment of evidence be able to continue using it. It was observed, incidentally, that while an exclusionary rule might provide a high level of protection to suspects or accused persons, a system of free assessment of evidence might provide an even higher level of protection to victims of crime.

As a compromise, the Directive as finally agreed contains in Art. 10 on remedies a text that is similar to the one in Directive 2013/48/EU on the right of access to a lawyer. According to the provision, Member States should ensure that “in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.” It is made clear, however, that this is “without prejudice to national rules and systems on the admissibility of evidence.” This is meant especially to include systems in which the court or the judge can freely assess all evidence in a case, whether or not such evidence has been “legally” obtained.

Upon request of the European Parliament, however, a strongly worded recital was added, containing a reference to ECtHR case law on inadmissibility of evidence gathered in violation of Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment) and to the UN Convention against torture.<sup>70</sup> This addition is certainly an added value in the Directive because it reminds all Member States – including those having a system of free assessment of evidence – that they are bound by that case law and by the said Convention.

#### IV. Concluding Remarks

The advisability of the proposed Directive, which did not form part of the rights initially contained in the Roadmap for strengthening procedural rights, was not entirely clear to all Member States from the outset. It appears, however, that there is a general feeling that the Directive as finally adopted is a valuable contribution to the developing catalogue of procedural rights in the European Union.<sup>71</sup>

It was not possible for the Council to satisfy all requests of the European Parliament. This concerns, in particular, the requests for provisions that would immediately interfere with the manner in which criminal law cases are dealt with by courts and judges in the Member States. This remains indeed a sensitive matter for almost all Member States.

The added value of the Directive lays notably in the fact that it clarifies how the case law of the ECtHR should apply as minimum rules of Union law, to be interpreted by the CJEU, across 25 Member States.

In this context, it should be recalled that harmonisation (or approximation) of criminal procedural rights at the Union level is a gradual process that interplays with national (constitutional) rights and issues of sovereignty and legitimacy. One should therefore not expect a revolution but be satisfied with an evo-

lution; like the development of the Roadmap itself, progress in the area of procedural rights goes step-by-step.

As has been observed in respect of the three earlier adopted Directives on procedural rights, one must now wait and see how this Directive will be applied by the Member States and interpreted by the CJEU. An interesting final question is to what extent this Directive, which has been strongly influenced by the case law of the ECtHR, will in turn have an influence on the case law of that Court.

\* This article reflects solely the opinion of the authors and not that of the institutions for which they work.

- 1 O.J. L 65, 11.3.2016, p. 1.
- 2 O.J. C 295, 4.12.2009, p. 1.
- 3 The step-by-step approach was adopted after it had appeared to be impossible, in 2007, to reach agreement on a comprehensive text encompassing several procedural rights – see the never adopted proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 0328; see, on the Roadmap, S. Cras, and L. De Matteis, “The Directive on the right to interpretation and translation in criminal proceedings”, in *eu crim* 4/2010, p. 153).
- 4 O.J. L 190, 18.7.2002, p. 1.
- 5 O.J. L 130, 1.5.2014, p. 1. The Directive on the European Investigation Order represents the newest generation of mutual recognition measures and includes, *inter alia*, a fundamental rights non-recognition ground (see Art. 11 lit. f and Recital 39).
- 6 Measure A: Translation and interpretation; Measure B: Information on rights and information about the charges; Measure C: Legal advice and legal aid; Measure D: Communication with relatives, employers and consular authorities; Measure E: Special safeguards for suspected or accused persons who are vulnerable.
- 7 See Council doc. 12531/09.
- 8 O.J. C 115, 4.5.2010, p. 1; point 2.4.
- 9 O.J. L 280, 26.10.2010, p. 1. See, on this measure, S. Cras and L. De Matteis, *op. cit.* (n. 3).
- 10 O.J. L 142, 1.6.2012, p. 1. See, on this measure, S. Cras, and L. De Matteis, “The Directive on the right to information”, in *eu crim* 1/2013, p. 22.
- 11 O.J. L 294, 6.11.2013, p. 1. See, on this measure, S. Cras, “The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings”, in *eu crim* 1/2014, p. 32.
- 12 COM(2013)824.
- 13 COM(2013)822/2.
- 14 COM(2013)821.
- 15 COM(2006)174.
- 16 See point 1.2 of the explanatory memorandum to the Commission proposal.
- 17 See, e.g., Council doc. 11632/14.
- 18 O.J. L 81, 27.3.2009, p. 24.
- 19 Council doc. 12196/14.
- 20 Council doc. 6655/14; ES, IT, and PT issued positive opinions.
- 21 The Greek Presidency reached a general approach in June 2014, see Council doc. 10065/14.
- 22 Under the Italian Presidency, the file was no longer referred to as “POI” (Presumption of Innocence) but as “PDI” (Presunzione di Innocenza), since “poi” is a common word in Italian, meaning i.a. “then” or “subsequently.”
- 23 Council doc. 16531/14.
- 24 Doc. of 17 March 2014, EP code: PE<NoPE>530.088</NoPE><Version>v01.
- 25 See Recital 17, first sentence, of the Commission proposal: “Any compulsion used to compel the suspect or accused person to provide information should be limited.” See also under Article 7.
- 26 Final version of 20 April 2015, EP code: A8-0133/2015. See also Council doc. DS 1228/15.
- 27 Council doc. 12497/15.
- 28 Council doc. 5098/16.
- 29 See, e.g., Arts. 7(6) and 8(6).
- 30 COM(2013)0821, points 26 and 27.
- 31 See, e.g., Case C-301/04 P, *Commission v SGL Carbon*, 29 June 2006, para. 41: “... the Commission is entitled to compel an undertaking, if necessary by adopt-

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- ing a decision, to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct.”
- 32 O.J. L 218, 14.8.2013, p. 8; see Art. 10 of this Directive.
  - 33 O.J. L 335, 17.12.2011, p. 1; see Art. 12 of this Directive.
  - 34 Recitals 14 and 15.
  - 35 Recital 12.
  - 36 See *Engel and others v. Netherlands*, judgment of 23 November 1976 (Appl. no. 5100/71 et. al).
  - 37 Recital 11.
  - 38 ECtHR, *Matijašević v. Serbia*, 19 September 2006 (Appl. no. 23037/04), para. 45.
  - 39 See Recital 18.
  - 40 See, e.g., ECtHR, *Raninen v. Finland*, 16 December 1997 (Appl. no. 152/1996/771/972), para. 56, and ECtHR, *Miroslaw Garlicki v. Poland*, 14 June 2011 (Appl. no. 36921/07), para. 74.
  - 41 See, e.g., ECtHR, *Ramishvili and Kokhreidze v. Georgia*, 27 January 2009 (Appl. no. 1704/06) and ECtHR, *Khodorkovskiy v. Russia*, 31 May 2011 (Appl. no. 5829/04).
  - 42 ECtHR, *Svinarenko and Slyadnev v. Russia*, 17 July 2014 (Appl. nos. 32541/08 and 43441/08), para. 131.
  - 43 Art. 5(1) and Recitals 19 and 20. The obligation to wear prison clothes, which is not a measure of physical restraint, was dealt with in Recital 21.
  - 44 Art. 5(2) and Recital 19.
  - 45 See the case law cited above and also, e.g., ECtHR, *Gorodnitchev v. Russia*, 24 May 2007 (Appl. no. 52058/99), para. 101-102.
  - 46 Such as the Standard Minimum Rules for the Treatment of Prisoners of the UN, in particular the Instruments of Restraint, points 33 and 34.
  - 47 Recital 20.
  - 48 See Council doc. 13538/14.
  - 49 See, e.g., ECtHR, *Falk v. Netherlands*, 19 October 2004 (Appl. no. 66273/01).
  - 50 ECtHR, *Salabiaku v. France*, 7 October 1988 (Appl. no. 10519/83), para.28.
  - 51 Ibidem.
  - 52 The words “in any case” are meant to address a situation, which is sometimes possible in relation to minor offences (in particular minor traffic offences), in which the presumption in itself is not rebuttable but the person has other means of defence (example: as a registered vehicle owner, a person is presumed to have committed the criminal offence of speeding; this presumption cannot be rebutted, and the vehicle owner therefore will have to pay the fine imposed, but he/she can claim the money back from the person who actually drove the car at the moment the offence was committed).
  - 53 See, e.g., ECtHR *Funke v. France*, 25 February 1993 (Appl. no. 10828/84), para. 44.
  - 54 ECtHR, *John Murray v. UK*, 8 February 1996 (Appl. no. 18731/91).
  - 55 See already the partly dissenting opinion of Judge Pettiti.
  - 56 See, e.g., CJEU, case 6-64, *Costa/ENEL*, 15 July 1964; see also the Declaration No. 17 to the Lisbon Treaty, stating as follows: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the EU, the Treaties

and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, under the conditions laid down by the said case law.” See also the *Melloni* judgment on the controversy between the Court of Justice and the Spanish Constitutional Court (case C-399/11, 26 February 2013).

57 See, e.g., the Solange doctrine of the German Federal Constitutional Court (*Bundesverfassungsgericht*), in particular the judgments of 29 May 1974 (Solange I) and 22 October 1986 (Solange II). See also, more recently, the order of 15 December 2015, in which the Court held that, in an individual case, the protection of fundamental rights might include a review of acts of Union law if this is indispensable to protecting the constitutional identity of German Basic Law. Based on this doctrine, the Court refused a surrender to Italy based on a European Arrest Warrant for a judgment rendered *in absentia*, as the person would not have the right to a new evidentiary hearing in Italy (for a summary, see the news section “European Arrest Warrant” in this issue).

58 Apart from the judgment in John Murray, see, e.g., ECtHR, *Heaney and McGuinness v. Ireland*, 21 December 2000 (Appl. no. 34720/97), para. 47.

59 Recital 20b in the Council general approach, see Council doc. 16531/14.

60 See, e.g., ECtHR, *Saadi v. Italy*, 28 February 2008 (Appl. no. 37201/06).

61 ECtHR, *Saunders v. United Kingdom*, 17 December 1996 (Appl. no. 19187/91), para. 69.

62 Art. 7(3) and Recital 29.

63 See Art. 8(5).

64 For the Framework Decision, see also T. Wahl, “Der Rahmenbeschluss zu Abwesenheitsentscheidungen” in *eu crim* 2/2015, p. 70.

65 See, e.g., Council doc. 12955/14.

66 The EP even wanted to substitute an “or,” as used in the Commission proposal, with an “and,” thus cumulating two conditions (informing the person of the trial and having a lawyer), which would make it extremely burdensome to organise trials *in absentia*.

67 Art. 8 of Directive 2012/13/EU.

68 Art. 12 of Directive 2013/48/EU.

69 See more on the issue of admissibility of evidence in A. Erbežnik, “Mutual Recognition in EU Criminal Law and its Effects on the Role of a National Judge”, in N. Peršak (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice*, 2014, pp. 131-152, and A. Erbežnik, “European Public Prosecutor’s Office (EPPO) – too much, too soon and without legitimacy?” in *EuCLR* 2/2015, pp. 209-221, esp. p. 219.

70 Recital 45. The ECtHR case law clearly prohibits the use of evidence from torture (see, e.g., ECtHR, *Gäfgen v. Germany*, 1 June 2010 (Appl. no. 22978/05) or ECtHR, *El Haski v. Belgium*, 25 September 2012 (Appl. no. 649/08)). Art. 15 of the UN Convention against Torture unequivocally states: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

71 The Directive was unanimously agreed to by all 25 participating Member States.

## The Directive on the Presumption of Innocence

### A Missed Opportunity for Legal Persons?

Stijn Lamberigts

The recently adopted Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings<sup>1</sup> (hereafter: Directive on the Presumption of Innocence)<sup>2</sup> applies exclusively to natural persons.<sup>3</sup> This is in contrast to previously adopted directives of the Roadmap for strengthening procedural rights in criminal proceedings<sup>4</sup> which applied to suspected or accused persons and did not explicitly exclude legal persons.<sup>5</sup> Therefore, one could argue that legal persons could benefit from the implementation of relevant provisions of the previously adopted directives of the Roadmap<sup>6</sup> but that they cannot infer rights from the Directive on the Presumption of Innocence.

Limiting the scope of application of the Directive on the Presumption of Innocence to natural persons was an explicit choice of the EU legislator.<sup>7</sup> The legislative history of the Directive shows that the European Parliament tried to broaden its scope in order to cover legal persons.<sup>8</sup> However, the Council, supported by the Commission, rejected the Parliament’s ap-

proach.<sup>9</sup> In support of its arguments, the Council and the Commission referred to several considerations that have now been incorporated into the recitals of the Directive.<sup>10</sup> Accordingly, the EU legislator considered the needs and levels of protection for individuals and legal persons with regard to certain aspects of the presumption of innocence to differ. The EU legislator hereby relies on the case law of the Court of Justice. It has held that the rights stemming from the presumption of innocence do not accrue equally to both categories of persons. Ultimately, the recitals recall that, in light of national law, as well as of Union law and national case law, legislative action with regard to legal persons is considered premature. These arguments raise several interesting issues.

First, referring to the case law of the Court of Justice on legal persons, in order to exclude them from the Directive’s scope seems to overlook the specific context of this case law.<sup>11</sup> Landmark cases, such as *Orkem*,<sup>12</sup> have been handed down in the context of EU competition law. Until now, the Court of Justice

has not accepted that fines in competition cases are criminal in nature.<sup>13</sup> Moreover, Art. 23(5) of Council Regulation (EC) 1/2003 explicitly rules out that fines imposed in this context by the Commission are of a criminal nature. In other words, excluding legal persons from a Directive applicable to criminal proceedings by reference to case law, which relates to an area of law that has not been recognized as being “criminal”, seems questionable.

Second, the arguments of the EU legislator seem to pay little attention to the importance of corporations in criminal proceedings. In the meantime, most EU Member States have introduced corporate criminal liability or punitive mechanisms for corporate wrongdoing. In particular, investigations involving the financial interests of the EU can focus on “economic operators”,<sup>14</sup> making legal persons the object of investigations and prosecution.<sup>15</sup> Yet, this attention to corporations as subjects of criminal law is not always matched by similar attention to their procedural rights, and national practices often differ.<sup>16</sup>

This article will argue that the exclusion of legal persons from the scope of the Directive is a missed opportunity. It aims to examine what protection is available to legal persons under the ECHR and in the case law of the Court of Justice with regard to some of the rights covered by the Directive.<sup>17</sup> More specifically, the analysis will focus on the protection of legal persons’ right to remain silent as well as on their right not to incriminate themselves,<sup>18</sup> as the applicability of this right has been subject to different approaches in the various Member States. Before turning to the protection of legal persons’ right to silence, however, the article will provide a brief analysis of what exactly is covered by the right to silence as foreseen by the Directive on the Presumption of Innocence.<sup>19</sup> This will help us understand to what extent the exclusion of legal persons from its scope can be considered a missed opportunity.

## I. The Right to Silence in the Directive on the Presumption of Innocence

It should be recalled that the Directive’s scope is limited to “criminal proceedings”,<sup>20</sup> thus not covering punitive administrative proceedings. Suggestions to adopt a broader scope,<sup>21</sup> better reflecting the case law of the ECtHR in *Engel* and subsequent cases, did not make it into Art. 2 of the Directive. In order to align the different views, the first sentence of Recital 11 nevertheless states that “This Directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case law of the European Court of Human Rights.” This first sentence suggests that the scope of the Directive could be broader than proceedings that are formally qualified as crimi-

nal by the legislator. The second sentence of recital 11, however, stipulates that: “This Directive should not apply to civil proceedings or to administrative proceedings, including where the latter can lead to sanctions, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings.” Read in combination, the two sentences of recital 11 strike one as odd. This risks blurring the Directive’s scope. The legal status of testimony and other evidence obtained under compulsion in non-criminal proceedings, proceedings not covered by the Directive, is particularly problematic. In light of the *Saunders* case law of the ECtHR, due attention should be paid in order to prevent evidence obtained in non-criminal proceedings by the use of compulsion<sup>22</sup> from later being admitted in criminal proceedings.<sup>23</sup>

The key provision on the right to silence, Art. 7 of the Directive, provides an explicit legal basis for the right to silence,<sup>24</sup> which as such is innovative for the EU and the Council of Europe, as neither the Charter of Fundamental Rights nor the ECHR expressly provide for the right to silence.<sup>25</sup> Nevertheless, the ECtHR has repeatedly stressed that these rights [the right to silence and the right not to incriminate oneself] “are generally recognised international standards which lie at the heart of the notion of a fair procedure under Art. 6 [ECHR].”<sup>26</sup> The right to remain silent applies in relation to the criminal offence that the person is suspected or accused of having committed.<sup>27</sup> Recital 26 suggests that the reference to the criminal offence of which the person is suspected or accused of having committed is used to make sure that the person can still be required to answer certain questions, for instance, to identify himself.

A combined reading of Art. 7(1), 7(2), and 7(5) suggests that the right to silence, as incorporated in the Directive, is quite strong, since exercising the right to silence cannot lead to negative inferences. Art. 7(5)<sup>28</sup> explicitly spells out the fact that a suspected or accused person exercising his right to silence cannot have this right be used against him/her and it is not to be considered evidence.<sup>29</sup> Yet, several articles of the Directive seem to undercut the strength of the right to silence to some extent. Art. 7(4) gives Member States the power to allow judicial authorities to take into account the cooperative behaviour of the defendant when sentencing and thereby potentially discourages suspects from invoking the right to silence. This – in combination with recital 28, with its reference to “in itself”<sup>30</sup> and the absence of a strong exclusionary rule – seems to allow for some flexibility on the part of the Member States.

A further weakening of the right to silence can be found in Art. 7(3) and recital 29 of the Directive, which states that “The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may

be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.” Art. 7(3) clearly draws on some of the ECtHR’s case law<sup>31</sup> that adopts a restrictive view with regard to evidence existing independently of the will of the accused, thereby enabling limitations of the protection provided by the right to silence. According to *Saunders*, evidence that has an existence independent of the will of the accused covers documents acquired pursuant to a warrant. Nevertheless, recital 25 explicitly stipulates that suspects or accused persons should not be forced to produce documents that could lead to self-incrimination. As will be shown below, the protection offered against self-incriminating documents under the case law of the ECtHR is more complicated than the *Saunders* judgment may suggest.<sup>32</sup> The scope of the term “legal powers of compulsion” in Art. 7(3) can be understood in different ways. A Member State may interpret it as allowing blood tests or the taking of DNA samples, yet nothing precludes a Member State from understanding it as allowing the use of production orders<sup>33</sup> to obtain documents from a suspect under the threat of a sanction for failure to comply with the order. As a result, the Directive on the Presumption of Innocence seems to allow Member States, which wish to do so, to keep up practices under which suspects can be required to hand over self-incriminating documents, which can then be used against the suspect.

Lastly, the final text changed the wording of the exclusionary rule<sup>34</sup> foreseen for breaches of the right to silence. Art. 10(2) of the Directive now requires that the fairness of the proceedings and the rights of the defence be respected, which is less strong than an absolute exclusionary rule. Admittedly, the ECtHR’s case law does not go so far as to provide an absolute exclusionary rule for breaches of the right to silence either.

In sum, if the Directive had included legal persons in its scope, they would have benefited from the following protection (in the context of the right to silence): they would have expressly been granted a right to silence, which would not explicitly protect them against the use of evidence obtained under compulsion in non-criminal proceedings and – depending on the Member States’ interpretation of “legal powers of compulsion” – not allow them to refuse to hand over self-incriminating documents. Furthermore, if the Directive had included legal persons in its scope, the current wording of Art. 7 would have allowed Member States to apply the right to silence of legal persons in a very restrictive manner: a key issue connected to the right to silence of legal persons is which employees or officials of the legal person can exercise the right to silence on behalf of the legal person. Member States that would have wanted to restrict the impact of the Directive could have defined a very small circle of individuals who can exercise the right to silence of

the legal person. In particular, the possibility to keep requiring suspects to hand over documents would be very unfavourable for legal persons, as documentary evidence is often of crucial importance in the prosecution of legal persons.<sup>35</sup>

## II. Legal Persons’ Right to Silence under the ECHR?

Although the ECtHR has handed down several landmark cases on the right to silence since its ruling in *Funke*,<sup>36</sup> it has not directly addressed the question of whether its case law on the right to silence applies to legal persons (in the same way).<sup>37</sup> Yet, the ECtHR has generally been willing to apply Art. 6 ECHR to legal persons.<sup>38</sup> In the context of articles other than Art. 6, the ECtHR has nevertheless shown that it may be more willing to accept interference with Convention rights in the context of claims made in a business setting.<sup>39</sup> If the ECtHR were to apply a similar reasoning in relation to a future case on the right to silence of legal persons, it is uncertain whether legal persons would be able to fully rely on the protection offered by the ECtHR in this context.<sup>40</sup>

In order to ascertain to which extent legal persons may invoke the right to silence, the cases in which the ECtHR deals with the compulsory handing over of documents are particularly insightful, since documents often play a key role in criminal proceedings against legal persons.<sup>41</sup> The *Funke* case dealt with the issue of compelled cooperation with law enforcement officials. After a house search by custom officials and a police officer turned up financial documents linked to foreign banks, Mr. Funke was asked to hand over documents related to his accounts at these banks. Since he did not do so, criminal proceedings were brought against him in order to convict him to a fine and further penalties until he produced the documents. The ECtHR found that securing this conviction aimed at getting the documents, which the authorities believed to exist and which they could not or did not want to get by other means.<sup>42</sup> Thereby, they attempted to compel Mr. Funke to provide evidence of offences he had allegedly committed. The ECtHR found that this amounted to an unjustifiable breach of the right to silence. It is worth noting that the Court did not find that the special features of customs law justified this infringement.

The *Funke* case left several questions unanswered,<sup>43</sup> particularly in relation to the scope of this newly recognized right to silence. The landmark judgment in *Saunders*,<sup>44</sup> handed down just three years after *Funke*, raised additional questions. Saunders, who was under an enforceable obligation to respond to questions asked by Department of Trade and Industry inspectors, complained about the later use in criminal proceedings of the statements he had made. The Strasbourg Court stressed that its sole concern was the use of these statements in the

criminal proceedings.<sup>45</sup> It highlighted the importance of the right to silence<sup>46</sup> as an essential part of the right to a fair trial.<sup>47</sup> It pointed out that the prosecution needs to prove its case without using evidence that has been gathered through coercive or oppressive methods in disregard of the will of the accused. The ECtHR then held that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent,<sup>48</sup> thereby finding that the right to silence does not cover the use in criminal proceedings of material gathered from the accused by using compulsory powers but which exists independently of the will of the accused. One of the Court's examples of such material is "documents acquired pursuant to a warrant". This reference has been considered to justify practices that require suspects to hand over documents, even if they are self-incriminating and if they are used in criminal proceedings.

How should the findings in *Saunders* and *Funke* be reconciled? Was the practice in *Funke* too much of a fishing expedition, as the authorities were not fully certain of the existence of the documents? Or was the ECtHR simply trying to prevent the right to silence from becoming an insurmountable obstacle to prosecuting crime? Alternatively, one could argue that the reference to warrants in *Saunders* should be understood as a reference to search warrants. Since search warrants do not, as opposed to production orders that compel a person to actively hand over documents, require the suspected person to actively contribute to his own incrimination, they are not directly problematic in light of the right to silence. Nevertheless, such a reading does not fully address the ECtHR's reference to "evidence which has an existence independent of the will of the accused."

In a post-*Saunders* judgment, *J.B. v Switzerland*,<sup>49</sup> the ECtHR was again faced with a case in which the claimant had been required to hand over documents and where a fine had been imposed for failure to provide these documents. The Court paid particular attention to the fact that the individual involved could not rule out that these documents might be detrimental for him in a tax evasion case.<sup>50</sup> Interestingly, the Court added that *J.B.* "did not involve material of this nature, which like that considered in *Saunders*, has an existence of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person".<sup>51</sup> This case further leads to confusion by suggesting that the right to silence can protect suspects against the compulsory handing over of documents. The key question remains as to what the status of pre-existing documents is.<sup>52</sup> Whereas *Saunders* seems to suggest that the right to silence would only protect a person from being compelled to create new documents, as opposed to handing over documents that already exist, *Funke* and *J.B.* do not seem to be that restrictive.<sup>53</sup> In *Jalloh*, where intrusive chemicals

were used to force a suspect to regurgitate drugs, the ECtHR referred to *Funke* and *J.B.* and added that in these cases, like in *Jalloh*, real evidence was retrieved in disregard of the applicant's will,<sup>54</sup> thereby stressing the importance of the will of the suspected person. In its more recent judgment in *Chambaz*, the ECtHR confirmed again that the privilege against self-incrimination was violated after the claimant had been fined, as these fines amounted to pressure on the claimant to submit documents and that he could not rule out that these documents might harm his position in a tax evasion case.<sup>55</sup>

Not only the ECtHR's case law on the issue of documentary evidence, but also its case law on the right to silence in general is at times confusing.<sup>56</sup> In *Jalloh*, the ECtHR pointed out which factors are decisive in deciding whether a violation of the right to silence has taken place or not: "the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."<sup>57</sup> This reconfirms that the right to silence, as understood by the ECtHR, is not an absolute right. The Court stressed that measures cannot go so far as to extinguish the very essence of the right,<sup>58</sup> but not every form of direct compulsion automatically results in a violation.<sup>59</sup> In *O'Halloran*, the ECtHR confirmed that – in the particular context of road traffic offences – requiring the registered keeper of a car to inform the authorities of the identity of the driver on a specific date, failure of which can be subject to a fine, does not necessarily amount to the violation of the right to silence.<sup>60</sup> Thus, the ECtHR allows states, in specific circumstances and subject to certain conditions, to require individuals to state a fact. Unlike the case law of the Court of Justice in competition cases, the scope of this approach is strictly limited. It should be noted that the complexity of certain types of crime, for example corporate crime or fields of law, e.g., the special features of customs law, cannot be accepted by the ECtHR as justifying provisions that extinguish the essence of the right to silence.<sup>61</sup>

In sum, the case law of the ECtHR on the right to silence does not always offer clear guidance on issues, such as requiring suspects to contribute to their own incrimination. Moreover, the interplay between the *Jalloh* criteria and other case law, such as *Funke* and *Saunders*, is not yet fully clear: are the *Jalloh* criteria to be applied when the issue of the forced handing over of documents comes up<sup>62</sup> or is the previous case law still relevant? *Chambaz* suggests that pre-*Jalloh* case law remains relevant. Moreover, the Court in Strasbourg has not yet ruled on the applicability of the right to silence for legal persons. Therefore, any protection that can be derived from the ECHR by legal persons who seek to have an effective right to silence is precarious.

### III. The Court of Justice's Approach to Legal Persons' Right to Silence

If one looks at the protection of the right to silence of legal persons by the Court of Justice, this necessarily leads to its case law in the field of competition law. As has been mentioned above, the Court of Justice in Luxembourg has not considered competition fines imposed by the Commission criminal sanctions, and Regulation 1/2003 also stresses that they are not criminal in nature.

The question of whether undertakings can benefit from a right to silence in the context of competition proceedings by the Commission was addressed by the Court of Justice in its landmark judgment in *Orkem*.<sup>63</sup> The judgment predates the ECtHR's judgment in *Funke*, and it must thus be seen in a context in which Art. 6 ECHR was not yet understood as including a right to silence. *Orkem*, a limited liability company, challenged a decision of the Commission requesting information on several grounds, one of which was the breach of the rights of defence. According to *Orkem*, the applicant, the decision compelled it to incriminate itself by admitting an infringement of competition law.<sup>64</sup> Since the applicable Regulation at the time<sup>65</sup> did not explicitly provide for a right to silence, the Court of Justice turned to the general principles (at that time) of Community law. It took stock of the fact that there was neither a judgment of ECtHR recognizing a right to silence nor an express provision in the ECHR on it.<sup>66</sup> Moreover, its analysis of the Member States' law on the issue showed that the right to silence was primarily reserved to natural persons in criminal proceedings.<sup>67</sup> Yet, it found that the power of the Commission to compel undertakings to provide it with information and documents may not go so far that it would, by means of a decision calling for information, undermine the rights of defence of the undertaking.<sup>68</sup> It then held that compelling an undertaking to provide answers that might involve an admission of the existence of a competition law infringement on its part could not be accepted.<sup>69</sup> Ultimately, requiring answers to factual questions and the handing over of documents is acceptable, whereas requiring an admission of a violation of EU competition law is not. *Orkem* was later incorporated into Recital 23 of Regulation 1/2003. The Court of Justice has not fundamentally altered its case law in light of the case law of the ECtHR, although it acknowledged the developments in the Strasbourg Court's case law in *Limburgse Vinyl Maatschappij*.<sup>70</sup> In the same judgment, it specified that the right to silence can only come into play where coercion is involved.<sup>71</sup>

It is self-evident that the limited scope of the right to silence recognized by the Court of Justice leads to difficult distinctions in practice between admissible factual questions, on the one hand, and forbidden questions, on the other hand, which

might involve an admission on the part of the undertaking of the existence of an infringement.<sup>72</sup>

In sum, the protection that legal persons can derive from the Luxemburg Court's case law with regard to the right to silence is limited: factual questions must be answered, the handing over of incriminating documents can be required, and only questions that might imply an admission of guilt do not have to be answered.

### IV. Concluding Remarks

Is the exclusion of legal persons from the scope of the Directive on the Presumption of Innocence a missed opportunity? It is, to a certain extent. This article has shown the following: the Directive adopts a minimum level of protection on several points, e.g. by broadly referring to "the use of legal powers of compulsion." Depending on its implementation by the Member States, this can, for example, result in situations in practice in which suspects are required to hand over documents. Hence, even if the Directive had covered legal persons, the protection it offers on some points seems limited. One could even argue that Member States will have to keep an eye on the more protective case law of the ECtHR when they implement Arts. 7 and 10 of the Directive, as they cannot undermine the protection offered by the ECHR.<sup>73</sup>

However, if the Directive had covered legal persons, additional protection would have been made available to them: until a future case of the ECtHR decides along these lines, legal persons cannot be sure that the case law of the ECtHR on the right to silence is applicable to them. Having been included in the Directive's scope would at least have removed some of that uncertainty.

Admittedly, even if the Directive on the Presumption of Innocence had covered legal persons, this would still allow Member States to adopt diverging approaches. One of the key questions related to a legal persons' right to silence is the definition of persons who may exercise this right on behalf of the legal person. Is it limited to a very select group of employees or officials of the legal person, or can it be invoked on behalf of the legal person by a broad circle of individuals? Member States could have answered this question restrictively, thereby limiting the impact of the Directive in practice.

1 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, O.J. L 65, 11.3.2016, p. 1.

2 On the Directive, see also the contribution of Cras and Erbežnik in this issue.

3 See Art. 2 of the Directive on the Presumption of Innocence, as well as recitals 13–15.

4 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, O.J. C 295, 4.12.2009, 1.

5 See, for example, Art. 1 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and Arts. 1 and 2 of Directive 2012/13/EU on the right to information in criminal proceedings.

6 Or, in case of an improper implementation, rely directly on the Directive.

7 It is interesting to note in this context that the legal basis used for the Directive on the Presumption of Innocence, Art. 82(2)(b) TFEU, refers to “the rights of individuals in criminal procedure”. Should this be understood as limiting the competence of the EU legislator to procedural safeguards that apply only to natural persons and thus not to legal persons? Other language versions of the TFEU, such as the Dutch and the French versions, refer to “persons” and thus seem less restrictive in their wording. Moreover, the use of the term “individuals” in Art. 82(2)(b) TFEU does not seem to have been an issue during the negotiations on the Presumption of Innocence Directive. On the limits of Art. 82 TFEU, see: S. Peers, *EU Justice and Home Affairs Law – Volume II: EU Criminal Law, Policing and Civil Law*, Oxford 2016, pp. 134–138.

8 EP Document of 20.04.2015, A8-0133/2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0133+0+DOC+PDF+V0//EN>, amendments 9 and 39.

9 See Council doc. of 29.07.2015, 11112/15, p. 4, n1, available at: <http://data.consilium.europa.eu/doc/document/ST-11112-2015-INIT/en/pdf>.

10 See recitals 13–15 of the Directive on the Presumption of Innocence.

11 See, similarly, the ECBA response to the Commission’s Proposal for a Directive on certain aspects of the presumption of innocence and of the right to be present at trial, available at: [http://www.ecba.org/extdocserv/20141106\\_ECBA\\_PresumptionOfInnocence.pdf](http://www.ecba.org/extdocserv/20141106_ECBA_PresumptionOfInnocence.pdf), p. 5.

12 ECJ, Case C-374/87, *Orkem v Commission*, 18 October 1989.

13 K. Lenaerts, “Due process in competition cases”, in *NZKart* 2013, p. 175. Yet it has accepted the *Engel* criteria of the ECtHR. See: ECJ, C-489/10, *Lukasz Marcin Bonda*, 5 June 2012, paras 36–46.

14 See Art. 2(6) of Regulation (EU, Euratom) 883/2013 concerning investigations conducted by OLAF.

15 In this context, see also the joint position paper of Fair Trials and the Legal Experts Advisory Panel on the proposed Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings of 11 November 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-Position-Paper2.pdf>, pp. 8–9.

16 The EP considered the fact that several MS have introduced the concept of criminal liability of legal persons to justify the application of the Presumption of Innocence Directive. See also amendment 39.

17 Recital 14 of the Directive expressly refers to these instruments as the sources on which legal persons can rely in order to obtain protection.

18 Hereafter, these two rights will be referred to as the right to silence.

19 See Arts. 7 and 10(2) of the Directive. For a more extensive overview of the Directive, see the author’s recent contribution to the European Law Blog, <http://europeanlawblog.eu/?p=3192>.

20 See Arts. 1 and 2 of the Directive, as well as Recital 11.

21 Amendments 6 and 39, EP Document of 20/04/2015, A8-0133/2015, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0133+0+DOC+PDF+V0//EN>.

22 For example, by requiring the person involved to answer questions under the threat of sanctions.

23 Similar concerns were expressed in the joint position paper of Fair Trials and the Legal Experts Advisory Panel, *op. cit.* (n. 16), p. 9.

24 Both the right to remain silent and the right not to incriminate oneself.

25 Admittedly, Art. 3 of Directive 2012/13/EU on the right to information in criminal proceedings already foresaw an obligation to provide information on the right to remain silent. Yet, it did not address the contents of that right.

26 ECtHR, *Shlychkov v Russia*, 9 February 2016, (Appl. no. 40852/05), para 81; ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91), para 68.

27 Art. 7(1) of the Directive on the Presumption of Innocence.

28 The exercise of the right to remain silent or of the right not to incriminate oneself by suspects and accused persons shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence.

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PhD candidate at the University of Luxembourg and junior affiliated researcher at the KU Leuven. The topic of his thesis is the right to silence of corporations.



29 Indeed, this seems to go further than the criticised case law of the ECtHR in *Murray*, which accepts, under certain conditions, negative effects of the choice to stay silent. See ECtHR, *Murray v UK*, 8 February 1996, (Appl. no. 18731/91). See more recently: ECtHR, *O'Donnell v UK*, 7 April 2015, (Appl. no. 16667/10).

30 The exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.

31 ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91), para 69.

32 See *infra*.

33 A production order requires a person to hand over or make available certain material, such as documents to persons such as law enforcement officials within a specified period.

34 Admittedly, the exclusionary rule of the original proposal was not absolute either.

35 US Supreme Court, *Braswell v United States*, 1988, 487 US 99, p. 115; J. Gobert and M. Punch, *Rethinking Corporate Crime*, Cambridge 2003, pp. 189–190; V.S. Khanna, “Corporate Defendants And The Protections of Criminal Procedure: An Economic Analysis”, in *Law & Economics Working Papers Archive: 2003–2009*, Paper 29, [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1029&context=law\\_econ\\_archive](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1029&context=law_econ_archive), p. 46; J. McDonald, “No Body to Be Kicked or Soul to be Damned: Corporate Claims to the Privilege Against Self-Incrimination”, in *Bond Law Review*, vol. 5, 1993, p. 5.

36 ECtHR, *Funke v France*, 25 February 1993, (Appl. no. 10828/84).

37 P. Oliver, “Companies and their fundamental rights: a comparative perspective”, in *International and Comparative Law Quarterly*, vol. 64, 2015, p. 685.

38 See for example: ECtHR, *Menarini Diagnostics v Italy*, 27 September 2011, (Appl. no. 43509/08). On this topic, see also: P. H. van Kempen, “The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice” in M. Pieth and R. Ivory (eds.), *Corporate Criminal Liability – Emergence, Convergence and Risk*, Dordrecht 2011, p. 373.

39 ECtHR, *Bernh Larsen Holding AS and Others v Norway*, 14 March 2013, (Appl. no. 24117/08), para 104.

40 See the critical analysis D. Brodowski, “Minimum Procedural Rights for Corporations in Corporate Criminal Procedure” in D. Brodowski, M. Espinoza de los Monteros de la Parra, K. Tiedemann and J. Vogel (eds.), *Regulating Corporate Criminal Liability*, Heidelberg 2014, pp. 221–223.

41 See *supra* n. 35.

42 ECtHR, *Funke v France*, 25 February 1993, (Appl. no. 10828/84), para 44.

43 See also B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice*, London 2012, p. 615.

44 ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91).

45 And not whether the investigation of the DTI inspectors was subject to the guarantees foreseen in Art. 6 ECHR. *Ibid.*, para 67.

46 Understood as also covering the privilege against self-incrimination.

47 *Ibid.*, para 68.

48 *Ibid.*, para 69.

49 ECtHR, *J.B. v Switzerland*, 3 May 2001, (Appl. no. 31827/96).

50 *Ibid.*, para 66.

51 *Ibid.*, para 68.

52 Documents that already exist at the time a request to hand them over is made by government officials, thus not documents drawn up in response to such a request.

53 B. Emmerson, A. Ashworth and A. Macdonald, *op. cit.* (n. 43), p. 620.

54 ECtHR (GC), *Jalloh v Germany*, 11 July 2006, (Appl. no. 54810/00), para 113.

- 55 ECtHR, *Chambaz v Switzerland*, 5 April 2012, (Appl. no. 11663/04), paras 53–58.
- 56 M. Veenbrink, “The Privilege against Self-incrimination in EU Competition Law: A deafening Silence?”, in *Legal Issues of Economic Integration*, 42, 2015, p. 123.
- 57 ECtHR (GC), *Jalloh v Germany*, 11 July 2006, (Appl. no. 54810/00), paras 97, 101, and 117.
- 58 *Ibid.*, para 97. See also: ECtHR, *John Murray v UK*, 8 February 1996, (Application no. 18731/91), para 49.
- 59 ECtHR (GC), *O’Halloran and Francis v UK*, 29 June 2007, (Appl. nos. 15809/02 and 25624/02), para 53. See on this case: J.R. Spencer, “Curbing speed and limiting the right to silence”, in *Cambridge Law Journal*, vol. 66, 2007, pp. 531–533.
- 60 *Ibid.*, para 62.
- 61 See in this context: ECtHR, *Marttinen v Finland*, 21 April 2009, (Appl. no. 19235/03), para 75.
- 62 Deruyck suggests that it is likely that such questions will be governed by the *Jalloh* criteria. See: F. Deruyck, “De rechten van verdediging van de rechtspersoon in de Belgische strafprocedure: van verre evident, maar verre van evident”, in *Nullum Crimen* 2016, p. 43.
- 63 ECJ, Case C-374/87, *Orkem v Commission*, 18 October 1989.
- 64 *Ibid.*, para 18.
- 65 Regulation No 17 of the Council of 6 February 1962, the first Regulation implementing Arts. 85 and 86 of the Treaty, O.J., English Special Edition 1959–62, p. 87.
- 66 *Orkem*, para 20.
- 67 On this point, see the extensive analysis of AG Darmon in *Orkem*, starting at para 97.
- 68 *Orkem*, para 34.
- 69 *Ibid.*, para 35.
- 70 ECJ, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij et al. v Commission*, 15 October 2002, para 274.
- 71 *Ibid.*, para 275. See also: L. Ortiz Blanco, *EU Competition Procedure*, Oxford 2013, p. 307.
- 72 For a recent example, see: Opinion of AG Wahl in Case C-267/14 P, *Buzzi Unicem SpA*, 15 October 2015, paras 73–91.
- 73 Art. 13 of the Directive on the Presumption of Innocence.

# Inaudito reo Proceedings, Defence Rights, and Harmonisation Goals in the EU

## Responses of the European Courts and New Perspectives of EU Law

Prof. Dr. Stefano Ruggeri

### I. An Unprecedented Problem in EU Law: Inaudito reo Criminal Proceedings

The right to personal participation in criminal proceedings and the problem of *in absentia* procedures have lain at the core of the EU legislative agenda over the last several years. Before the entry into force of the Lisbon Treaty, Framework Decision 2009/299/JHA amended, *inter alia*, the EAW Framework Decision, tightening the conditions under which defendants can be surrendered to other Member States in proceedings instituted in the accused’s absence.<sup>1</sup> Although this legislative intervention also contributed to the process of indirect harmonisation of criminal procedure law, initiated under the former Third Pillar,<sup>2</sup> it was unrealistic to think that the new rules could work properly at the transnational level without previous harmonisation of the rules governing domestic proceedings held *in absentia*. In 2013, under the new legislative framework set forth by the Lisbon Treaty, the Commission proposed a Directive aimed at strengthening certain aspects of the presumption of innocence and at laying down minimum standards governing the right to personal participation in domestic criminal proceedings.<sup>3</sup> After

a rather long path, the Directive was approved on 9 March 2016 (Directive 2016/343/EU – hereafter: DPIPT).<sup>4</sup>

A close examination of these developments, moreover, reveals that, until now, EU law has handled *in absentia* procedures with almost exclusive regard to default or contumacy proceedings, a procedure that allows a criminal law action being instituted in the accused’s absence. Furthermore, there is another type of criminal proceeding held *in absentia*, namely a criminal process designed to achieve a guilty verdict in writing and without any trial hearing. In most cases, these proceedings can lead to a conviction without the defendants having the opportunity of being heard and often even without knowing that a formal accusation has been brought against them. Following the civil law doctrine of proceedings *inaudita altera parte*, these proceedings – which are characteristic of several continental European countries in the Roman-German tradition – are usually known in the field of criminal justice as *inaudito reo* procedures. Unlike default proceedings that still constitute an exception from the rule whereby the accused should be put in a position to take part in the criminal trial, *inaudito reo* procedures rule out any participation on the part of the defend-

ant prior to the decision-making, while giving the accused the right to challenge the conviction by means of a special remedy having the form of an opposition. There is little doubt that these proceedings are scarcely compatible with the fair trial requirements of European countries, which are increasingly oriented towards a participatory model of criminal justice.<sup>5</sup>

Also at the EU level, *inaudito reo* procedures had not raised specific concerns until recently. The problem has drawn general attention, moreover, due to the recent *Covaci* case,<sup>6</sup> which gave the European Court of Justice the first opportunity to examine two of the main legislative instruments launched under the 2009 Roadmap on procedural rights, i.e., the Directive on the right to interpretation and translation (hereafter: DIT),<sup>7</sup> and the Directive on the right to information in criminal proceedings (hereafter: DICP).<sup>8</sup> Alongside this case-law, the recent Directive 2016/343/EU provides some important indications on the possibility of procedural phases other than the trial or even specific types of criminal proceedings being conducted in the defendant's absence – albeit mainly focusing on the right to be present at trial. Of course, it is still early to foresee which direction EU law will follow in the future. However, these developments allow us to draw some provisional conclusions on a highly delicate subject matter.

## II. The Responses of the EU Court of Justice: The *Covaci* Judgment

### 1. The case and the questions raised

As noted above, the question of whether *inaudito reo* proceedings are compatible with EU law made little sense until recently. The recent *Covaci* case presented the first opportunity for the European Court of Justice to give general indications on the developments in EU legislation in relation to information and linguistic rights and can thus be considered a good resistance test for the ongoing harmonisation process of defence rights in criminal justice.

In this judgment, the Luxemburg judges examined the case of a Romanian citizen who, it was discovered during a police check in Germany, had been driving a vehicle for which no valid mandatory motor vehicle civil liability insurance had been taken out, the proof of insurance being a forgery. At the police office, Mr. *Covaci* was thus questioned with the assistance of an interpreter but, since he had no fixed domicile or residence in Germany, he was required to issue an irrevocable written authorisation for three officials of the local court (*Amtsgericht*) in Laufen to accept service of court documents addressed to him. The competent public prosecutor requested a penal order through a simplified procedure that under German law excludes any hearing of the accused persons who can

in turn challenge the conviction by means of an objection. In this case, the accused is tried in open court; otherwise the penal order becomes final upon expiry of a period of two weeks from its service. In the present case, however, the competent prosecutor requested that the penal order be served on Mr. *Covaci* through the persons authorised to accept service and, above all, that any written observations made by the person concerned, including any objection lodged against that order, should be in German.

Against this background, the competent German court raised the two following questions to the Luxembourg Court: *a*) whether Arts. 1(2) and 2(1)&(8) DIT preclude a court order from requiring, under its own law, the accused to lodge an appeal only in the language of the proceedings and *b*) whether Art. 2, 3(1)(c) and 6(1)&(3) DICP precludes the accused from being required to appoint a person authorised to accept service, where the period for bringing an appeal begins to run upon service on that person.

### 2. The right to effectively challenge a conviction rendered *inaudito reo*

#### a) Out-out: linguistic or legal assistance?

Advocate General *Bot* has suggested an interesting approach to the first issue.<sup>9</sup> The reasoning of Mr. *Bot*'s opinion lay with the main question of

“whether the costs incurred in respect of translation or interpretation in this context should be borne by the defence, obliging the defence to lodge an appeal in German, or by the prosecution, allowing the defence to submit an appeal in a language other than the language of the proceedings.”<sup>10</sup>

Starting with this premise, the Advocate General proposed an original redefinition of the legal classification of the issue raised,<sup>11</sup> whereby the relevant EU rules applicable to the case should not be those of Art. 2 DIT (relating to the right to translation of documents produced by the competent authority and addressed to the accused) but those of Art. 3 DIT (concerning the defendants' right to be assisted by an interpreter with a view to filing procedural acts addressed to the competent authorities).<sup>12</sup> Moreover, Art. 2 DIT ensures that the accused persons are afforded linguistic assistance with respect to filing an appeal against a judgment. According to Mr. *Bot*'s opinion, however, this guarantee should not be restricted only to oral activities:

“Where the accused person is unable to communicate in the language of the proceedings, he is therefore entitled to interpretation services so that statements made in a language of which he has a command, whether orally, in writing, or possibly in sign language, if he is hearing impaired or speech impaired, are translated into the language of the proceedings.”<sup>13</sup>

However, the Court did not follow this interpretation. Opting for a more traditional approach, the Luxemburg judges made a clear distinction between the guarantees of interpretation and translation,<sup>14</sup> on the assumption that the former provides defendants with linguistic assistance to give oral statements, whereas the latter allows the accused persons to understand written documents that are essential for the exercise of their defence rights. According to the Court, therefore, defendants must be given free-of-charge assistance of an interpreter if they decide to lodge an oral objection against the penal order. By contrast, EU law does not require the State to provide translation of an objection lodged in writing, nor can this obligation derive from Art. 2 DIT, which cannot be interpreted as charging Member States with the responsibility for the translation of any appeal brought by the persons concerned against a judicial decision issued against them.<sup>15</sup>

Notwithstanding these premises, the Court somehow softened its approach by stressing that EU law only aims to establish minimum standards without precluding Member States from ensuring the translation of further documents that are essential to guaranteeing the fairness of the criminal process.<sup>16</sup> By these means, therefore, the Luxemburg judges offloaded onto national authorities the decision to establish, taking into account the characteristics of the case at stake, whether the objection lodged in writing against a penalty order should be considered an essential document for the purposes of its translation.<sup>17</sup>

Certainly, this conclusion has brought about an innovative interpretation of the 2010 Directive, extending the obligation of translation of “essential documents” to documents produced by the defence, such as written statements and the appeal against a conviction.<sup>18</sup> Notwithstanding its merits, the approach followed by the Court gives rise to serious human rights concerns. In particular, this Solomon-like interpretation – relating to the national implementation of EU law and especially its application by the individual national courts – jeopardises the need for legal certainty by not enabling the individuals concerned to know in advance whether their appeal will be deemed an essential document in the case at stake and whether they can also count on linguistic assistance.

A further detrimental implication of the Court’s approach is that the rigid distinction between interpretation and translation offloads onto the accused persons the difficult decision as to whether to obtain the assistance of an interpreter with a view to lodging an oral objection or, if they choose to lodge a written objection, to obtain the assistance of a legal counsel “who will take responsibility for the drafting of the appropriate document, in the language of the proceedings.”<sup>19</sup> It is questionable whether legal and linguistic assistance can be considered as alternative guarantees. Moreover, each one – taken in isola-

tion – may not be sufficient to achieve the proclaimed dual goal of enabling the full exercise of defence rights and ensuring the overall fairness of criminal proceedings. On one hand, the sole assistance of an interpreter provides the accused with the help of a person who, although equipped with linguistic knowledge, may have no competence in legal matters. This risk is particularly high in those countries that do not foresee mandatory legal assistance in penal order procedures.<sup>20</sup> On the other hand, the sole assistance of a lawyer may be insufficient to reflect the will of defendants who may be unable to properly express themselves in language of the court. Furthermore, offloading onto the lawyer the responsibility of a written objection can deprive the accused persons, who might be equipped with legal knowledge, of the possibility of contributing their own input to the appeal initiative.

Most significantly, the Court’s conclusions offer little focus on the specific problems of penal order procedures. It has been observed that the objection constitutes the first opportunity for defendants to react against a conviction issued against them without a trial hearing and is often the only tool available for them to make their voice heard in criminal proceedings. In relation to the first question raised, however, the Court does not seem to give much weight to the particularly vulnerable condition of defendants who were convicted in a foreign country, without being heard and often without even knowing of a criminal process instituted against them.

#### **b) Information rights and the guarantee of adequate timeframe**

Compared to the reasoning on the first issue, the arguments produced for the second one soon reveal the Court’s awareness of the particularities of *inaudito reo* decisions. The Luxemburg judges began considering that service of a penal order “represents the first opportunity for the accused person to be informed of the accusation against him” and that the defendant’s initiative does not aim at a new judgment by a higher court but enables him to obtain a trial hearing at which he can take part.<sup>21</sup> These arguments led to the Court concluding that under EU law the notification of a penal order can be deemed a form of communication of the accusation and must thus satisfy the requirements set out in Art. 6 DICTP.<sup>22</sup> In this regard, the Court shares the Advocate General’s opinion that Member States still have a certain margin of discretion in choosing the procedure by which information on the charge must be provided.<sup>23</sup> Whatever the procedure adopted, it cannot jeopardise the aims pursued by EU legislation, which enables the accused persons to prepare their defence and to safeguard the fairness of the proceedings.<sup>24</sup> From this it follows that the 2012 Directive should be interpreted as not precluding a Member State from requiring defendants not residing in that country to ap-

point a person authorised to accept service of a penalty order concerning them, provided they are given the entire prescribed period for lodging an objection against the conviction, starting the moment they were personally served.

At first glance, this conclusion strengthens the binding force of EU law, which requires countries allowing *inaudito reo* judgments to provide the defendants with personal information on the conviction, while granting them the entire period to oppose the decision. This approach reveals the Court's disfavour towards those domestic solutions that allow penal orders to become final as a result of the objective lack of any opposition, while enabling defence lawyers to file an objection on their own initiative.<sup>25</sup> It must be acknowledged, however, that personal information is of little help to those defendants who, despite being afforded the entire objection period, must face alone the delicate decision of whether to lodge an objection against their conviction, since national law does not grant them any legal assistance.

It is worth observing that the Court was well aware that the period of two weeks can give rise to discrimination between defendants residing within the jurisdiction concerned and accused persons whose residence does not fall within that jurisdiction. Notwithstanding the merit of granting the accused persons the entire period prescribed from the moment they were personally served with the decision, the adopted solution constitutes a weak means of compensation for the obligation of appointing a person authorised to accept service of judicial decisions if foreign defendants can count neither on legal nor linguistic assistance when deciding whether to lodge an opposition. On close examination, the main discrimination exists between the accused persons residing in the country in which criminal proceedings are instituted, who are possibly familiar with that law, and non-resident defendants, who may fully ignore the law of the competent jurisdiction and the general legal culture of that country. Despite the Court's arrangements, the former do not need to appoint a person authorised to accept service of judicial decisions and, once notified of the penal order, often have the tools to prepare their own defence and assess the convenience of lodging an objection. By contrast, the latter are burdened with that obligation and, even though the period for lodging an objection begins with their being informed of the conviction, they may not have the necessary knowledge and often face enormous difficulties in deciding whether to oppose the penal order.

For these defendants, therefore, the solution adopted by the Court is a poor guarantee and the fact that the period for lodging an objection begins to run can even end up being a dangerous boomerang for the accused. Any hasty decision can jeopardise them. Failure to lodge any objection leads to the

“provisional” conviction becoming final at the end of the two weeks, whereas lodging an opposition can lead to a *reformatio in peius* in the trial hearing. In any event, it is worrying that the Court has shown no concern about the result of the expiry of the prescribed period and, more specifically, about the fact that, in a fair model of criminal justice, a conviction can become final regardless of whether or not the accused truly understood the information received and knowingly chose not to oppose the penal order.

### III. Right to be Present at Trial and the Lawfulness under EU Statutory Law of Special Types of Criminal Proceedings Held *in absentia*

Notwithstanding the great importance of this judgment, the responses of the Luxemburg case-law on these proceedings cannot be deemed definitive. As anticipated, the recent Directive on the presumption of innocence and the right to personal participation in criminal proceedings lead us to analyse whether and under what conditions EU law allows *inaudito reo* procedures and which safeguards defendants must be ensured. In particular, it is worth observing that this legislation, while establishing strict limits for the institution of trial hearings in the accused's presence, has left Member States free to provide for “proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.”<sup>26</sup> At first glance, this solution may seem to be primarily aimed at leaving to EU countries a certain leeway in deciding whether to ensure defendants' participation in phases that, although dealing with the merits of the case, do not aim at a decision on their guilt (e.g., intermediate proceedings), as well as in interlocutory proceedings that can lead to decisions seriously impinging on fundamental rights (e.g., a decision on discontinuance of the proceedings or remand proceedings). On close examination, these exceptions cannot concern interlocutory proceedings or intermediate phases, since both situations fall in any case outside the scope of application of the new rules that, as noted, are designed to ensure the right to take part at a “trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence”.<sup>27</sup> Therefore, the meaning of the exceptions should be defined within the scope of the main provision. In other words, Member States could decide not to ensure the accused's personal participation not only at interim decisions or phases of the proceedings not aimed at the decision on guilt but also in special types of criminal proceedings designed to achieve a guilty verdict prior to the trial phase – however, within which limits?

Whereas no indications emerge from the rules of the new Directive, Recital No. 41 contains a highly worrying statement:

“The right to be present at the trial can be exercised only if one or more hearings are held. This means that the right to be present at the trial cannot apply if the relevant national rules of procedure do not provide for a hearing. Such national rules should comply with the Charter and with the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights, in particular with regard to the right to a fair trial. This is the case, for example, if the proceedings are conducted in a simplified manner following, solely or in part, a written procedure or a procedure in which no hearing is provided for.”

It is debatable whether this approach is in line with the EU Charter of Fundamental Rights that, acknowledging the right to a “fair and public hearing,”<sup>28</sup> not only prevents interpretations aimed at lowering the standards of protection of the European Convention on Human Rights (ECHR)<sup>29</sup> but also requires the scope of this guarantee to be defined in the same terms acknowledged by the European Convention and especially the Strasbourg case-law.<sup>30</sup> Of course, this does not mean that the right to a fair and public hearing is an absolute guarantee. However, the EU Charter of Fundamental Rights, like the European Convention, may not appear to allow for individuals to be convicted by means of a written criminal procedure on the basis of a prosecutorial decision. It gives rise to serious concerns that the new EU provisions may simply remain inapplicable if national law does not provide for a hearing before the decision-making, and it is hardly understandable how in such a case national law should anyway satisfy the fair trial requirements set by the case-law of both the Luxembourg and the Strasbourg Courts. Thus, Strasbourg case-law has on several occasions acknowledged the lawfulness of criminal proceedings held without a public hearing, provided that the accused persons were in a position to unequivocally waive this guarantee and that this does not run counter to any important public interest.<sup>31</sup> These findings should make the adoption of simplified written procedures conditional on the fact that the defendants either were given the possibility to waive their right to a court hearing or could have access to an effective subsequent remedy.

Assuming that EU law does not preclude a change in the *status quo* in those countries in which *inaudito reo* proceedings are still allowed, it must be further analysed which guarantees must be afforded to individuals convicted *in absentia*. According to the Luxembourg conclusions in the *Covaci* case, the examination of EU legislation paints a rather disappointing picture in relation to the two legislative instruments. Furthermore, no specific solutions emerge from the Directive on access to a lawyer (hereafter: DAL)<sup>32</sup> that, despite requiring Member States to protect defendants in such time and in such a manner so as to allow them to “exercise their rights of defence practically and effectively,”<sup>33</sup> does not take into account the particular case of a conviction *inaudito reo*. It is true that the 2013 legislation has a very broad scope of application, which includes, “where applicable, sentencing and the resolution of

any appeal.”<sup>34</sup> However, we have seen that the Luxembourg Court has explicitly stressed that penal order procedures enable the convicted person

“to bring not an appeal against that order before another court, but an objection making him eligible, before the same court, for the ordinary *inter partes* procedure, in which he can fully exercise his rights of defence, before that court rules again on the merits of the accusation against him.”

Surprisingly, whereas the 2013 Directive did not deal with the case of penal order procedures (which only exist in some continental countries), the EU institutions took into consideration the specific situation of Member States that enable an authority other than a court having jurisdiction in criminal matters to impose a sanction, which may, in turn, be appealed or referred to a criminal court. In this case, however, the solution of EU law is also rather reductive, since the right to access to a lawyer should not be necessarily granted before administrative authorities but instead only in proceedings before a criminal court.<sup>35</sup> Certainly, the case of *inaudito reo* proceedings is quite different, since a single judge having jurisdiction in criminal matters usually has the competence to issue penal orders. At any rate, applying the same rule would clearly leave foreign individuals unprotected in the timeframe for lodging the appeal against the judge who convicted them.

Remarkably, the drafters of the 2013 Directive did not ignore the problem of defendants undergoing serious interference with their fundamental rights without their being involved in the decision-making. In particular, this legislation requires national countries to make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right. Significantly, this requirement goes beyond the national rules on mandatory legal assistance,<sup>36</sup> which entails that EU law prevails over national solutions, imposing the obligation to provide the accused subjected to a restriction of liberty with legal assistance, especially for the purpose of challenging the judicial order. There is no doubt that individuals convicted in written and without having had the opportunity to be heard are in a similarly vulnerable situation, which should require legal assistance in order to enable them to decide whether to request a criminal trial at which they can fairly participate or to waive this guarantee.

#### IV. *Inaudito reo* Procedures and Human Rights – The Problem of Subsequent Remedies

These observations lead us to broaden the area of the present investigation by examining whether penal order procedures are in line with human rights law in Europe. To answer this question, I shall now focus on the problem of subsequent remedies, analys-

ing whether the opposition can truly compensate for the lack of previous involvement of the defence and ensure to the accused an “ordinary *inter partes* procedure.” This is certainly a point of utmost importance, which impinges on the overall lawfulness of convictions issued without the accused persons having been involved in the criminal law action initiated against them.

Moreover, expressed in such general terms, the problem not only concerns *inaudito reo* but also *in absentia* procedures. One could even say that this is perhaps the main common feature of these procedures, given the Strasbourg case-law that, since the *Colozza* case, has traditionally allowed judgments rendered *in absentia* if the convicted persons are granted a fair opportunity for retrial or a further instance aimed at a revision of the decision.<sup>37</sup> It is unquestionable that this doctrine has had enormous influence on the developments in the last decades, not only in various European countries but also, as noted, in the EU law on transborder procedures and, more recently, on domestic criminal proceedings. Nevertheless, this approach can be highly problematic as a result, and doubts can be raised as to whether it is compatible with a human rights-oriented model of criminal justice. For the sake of clarity, I shall examine the problem from three perspectives, i.e., EU human rights law, constitutional law, and international human rights law.

### 1. The perspective of EU human rights law

From the viewpoint of EU human rights law, the possibility of a subsequent mechanism aimed at granting an “ordinary *inter partes* procedure” is apparently sufficient to ensure the lawfulness of any criminal procedure that rules out the involvement of the defence prior to the decision-making. Concerning *inaudito reo* procedures, it has been observed that, following the interpretation of the Luxemburg Court in the *Covaci* case, EU law only requires defendants to be personally informed of the conviction and they must have the entire prescribed period available to lodge an opposition, while granting them either legal or linguistic assistance if they decide to take this initiative. However, EU law does not prevent national law from leaving the accused unprotected during the period available and when deciding whether to lodge an objection.

An even worse situation is possible in *in absentia* procedures. As noted above, the 2016 Directive on the presumption of innocence and the right to be present at the trial allows a criminal law action to be carried out without the competent authorities having fulfilled their obligation of personally informing the defendants, if the latter are granted the opportunity of a subsequent remedy – no matter whether a retrial or a recourse to another instance – aimed at a full review of the conviction. To be sure, the Directive has not failed to lay down some

qualitative requirements that subsequent tools must anyway fulfil. In particular, both a retrial and a remedy must ensure a fresh reassessment of the merits of the case, including the examination of new evidence as well as the reversal of the conviction.<sup>38</sup> However, these conditions may not be sufficient if defendants suffer from limitations to the effective exercise of their defence rights, meaning that certain defensive measures (e.g., access to alternative proceedings) are definitively lost. This demonstrates that the alternative between the accused’s involvement before the decision-making and subsequent solutions cannot be accepted in abstract terms but only as far as such legal tools can effectively compensate for the loss of defensive opportunities at the first instance. Yet, this is not always the case at the national level, nor does EU law contain clear solutions in this regard.

### 2. The perspective of constitutional law

Further concerns emerge from the perspective of constitutional law. To be sure, it is worth noting that recourse to the argument of a subsequent trial has traditionally eradicated any doubt over the constitutionality of penal order procedures in the countries in which this type of proceeding is allowed. In Germany, notwithstanding the Federal Constitution acknowledges the right of every person to a hearing in court in accordance with law,<sup>39</sup> the Federal Constitutional Court has always advocated the constitutionality of penal order procedures, provided certain safeguards are ensured.<sup>40</sup> Even though German constitutional case-law has increasingly focused on the need for any individuals concerned to be clearly and unequivocally informed on the objection to a penal order and the deadline provided by the law,<sup>41</sup> the accused cannot count on legal assistance to decide whether to lodge an opposition.

The Italian Constitutional Court, since its very first ruling on this issue,<sup>42</sup> has also consistently rejected any doubt on the incompatibility of penal order procedures with the Italian constitution. The main argument used was purely theoretical, based on the idea – originally elaborated in the field of civil proceedings<sup>43</sup> – of the subsequent, albeit only potential, involvement of the defence (*contraddittorio eventuale e differito*). According to this approach, even though the conviction was issued without the accused persons even knowing about the institution of a criminal process against them, they can be involved after the decision-making if they decide to request, by means of the opposition, an “ordinary *inter partes* procedure.” Surprisingly, this doctrine remained untouched even after the 1999 fair trial reform,<sup>44</sup> which enacted into the Constitution a model of fair criminal justice based on the parties’ involvement in the administration of justice and, not less significantly, on the principle of equality of arms.<sup>45</sup> Criminal law scholars

have certainly contributed to this result, supporting the lawfulness of penal order procedures under the new constitutional framework on the double assumption that the right to a fair hearing can still be satisfied as long as the decision has not become final and, more specifically, that the Italian constitution enables the accused to consent to evidence being taken without an adversarial hearing.<sup>46</sup>

Whereas the latter argument relates to a particular feature of the Italian model of a fair trial,<sup>47</sup> the former goes beyond the peculiarities of Italian law, posing a question of a broader nature that certainly concerns penal order procedures also in other European countries that acknowledge the right to a fair hearing at the constitutional level. Can the *audi alteram partem* rule, especially if viewed in terms of the individual right to *contradictoire*, be fulfilled regardless of whether the defence was involved before or after the decision-making? In my view, the response is radically negative, especially because a subsequent trial is not always able to erase the negative consequences of a previous conviction rendered against the accused. Until recently, as noted, Italian law imposed on absent defendants allowed to challenge the conviction considerable hurdles regarding the right to evidence at the second instance. Moreover, it is worth noting that, even though both the Italian criminal law scholars and the Constitutional Court still advocate the lawfulness of penal order procedures, some important developments have recently occurred in constitutional case-law. In a 2007 ruling, the constitutional judges departed from the traditional concept of a “provisional conviction,”<sup>48</sup> a view also shared by the Luxembourg Court in the *Covaci* case, while acknowledging that an opposition can entail the loss of important defensive opportunities.<sup>49</sup> This new jurisprudence was further enhanced in a more recent judgment in which the Italian Constitutional Court declared the regulation on penal order procedures unconstitutional in that it enabled the complainant to lodge a preventative opposition to a penal order in case of criminal proceedings for offences that can only be prosecuted after a lawsuit by the victim.<sup>50</sup> This judgment reveals a significant development in Italian constitutional case-law, which has, for the first time, shifted from the traditional understanding of penal order procedures, characterised by subsequent involvement of the defence, towards a new constitutional justification rooted in the need for an expeditious criminal justice.

These observations lead us to doubt that penal order proceedings – as still construed in countries such as Germany and Italy – can be deemed compatible with the requirements of the constitutional model of a fair trial. These requirements also do not remain without consequences for the relationship with EU law, especially if a strong approach is adopted, such as that recently advocated by the German Federal Constitutional Court.<sup>51</sup> Following this doctrine, whenever a competent authority is of the

opinion that national law foresees higher standards of human rights protection,<sup>52</sup> it should disapply EU law in favour of the domestic regulation.

### 3. The perspective of international human rights law

Finally, it is highly questionable whether criminal procedures ruling out the accused’s involvement before the decision-making, on the assumption that a subsequent trial will provide a proper compensation, are compatible with international human rights law. Even though the Strasbourg Court constantly invokes the lawfulness of subsequent remedies in relation to judgments *in absentia*, this doctrine entails serious human rights risks. Clearly, the Court’s arrangements reflect the clear attempt to strike a compromise between the adversarial culture of trial hearings and the continental tradition of countries allowing criminal proceedings held *in absentia*. This point also reveals the weakness of the Court’s reasoning, however. The main problem probably lies in the justification of criminal proceedings held without giving the accused the opportunity for a previous hearing. Thus, the fact that national authorities have applied all the available means to make defendants aware of the institution of criminal proceedings does not in itself make a criminal law action absolutely necessary in any case. Certainly, especially when serious crimes are at stake, a prompt criminal law action can at best satisfy the needs concerned with a criminal policy aimed at a social defence and avoid further shortcomings, such as the danger that relevant evidence may get lost or that evidence subject to a high risk of deterioration be altered. However, these undisputable advantages are largely outweighed by the risks that can arise from a criminal process, especially if the grounds for the accused’s absence have remained unclear. In the *Colozza* case, the Strasbourg Court was already aware that “the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice.”<sup>53</sup>

Notwithstanding, the Court has always been aware that the institution of criminal proceedings in the defendant’s absence must satisfy a public interest; this requirement is constantly blurred if defendants are given the chance for a retrial. A clear example of this approach was the saga of judgments that led to the conviction of Italy for its old contumacy proceedings. It is thus no surprise that – even after the 2005 Italian reform on the right to be relieved of the effects of the expiration of the time to challenge contumacy judgments<sup>54</sup> – the European judges confirmed the lawfulness of default convictions on the assumption that absent defendants could have easier access to a second instance,<sup>55</sup> without any consideration of the serious restrictions on the right to evidence at the second instance.<sup>56</sup>

Yet, there are damages that certainly cannot be erased by means of a remedy or a retrial, even where a “fresh determination of the merits of the charge” is ensured – not to mention the adverse effects that the initiation of criminal proceedings can produce for the images of both the defendants and their families in today’s information society. In the future, all these considerations should lead the Strasbourg case-law to a better approach towards the human rights implications that default proceedings entail for the accused’s participatory rights.

The Strasbourg Court has not traditionally had many opportunities to examine the issue of subsequent remedies in relation to penal order procedures. The recent case *Gray v. Germany*, however, gives us a rather clear picture of the Court’s approach to this procedure, while highlighting some new problematic aspects.<sup>57</sup> In the case at hand, the applicants complained under Art. 2, read in conjunction with Art. 1 ECHR, that shortcomings in the British health system in connection with the recruitment of *locum* doctors and supervision of out-of-hours *locum* services had led to their father’s death as a consequence of medical malpractice by a German *locum* doctor.<sup>58</sup> Although the case did not directly concern the right to a fair hearing, the complaint focused on two important aspects of penal order proceedings. In particular, the applicants stressed that the summary criminal proceedings instituted in Germany had not “involved a proper investigation or scrutiny of the facts of the case or the related evidence” and, more specifically, that “the German authorities had failed to inform them of the proceedings and had thus deprived the deceased’s next of kin of any possibility to get involved and participate in the latter.”<sup>59</sup>

These complaints highlighted the highly problematic nature of penal order proceedings from a rather different perspective, which concerns their evidentiary justification and the possibility of injured parties being involved in a criminal law action. Of course, the latter problem did not relate to the stage prior to the decision-making but to the trial phase in which, pursuant to German law, the applicants could have joined the prosecution as plaintiffs. This result did not materialise, however, since the penal order was not challenged and the applicants learned of the procedure after the conviction had already become final.

This focus therefore shifted the problem of participation in criminal proceedings to individuals other than the accused. The Strasbourg judges, while rejecting the complaint relating to Art. 2 ECHR, incidentally provided some worrisome indications on penal order proceedings. As to the lack of involvement of the applicants, the Court, relying quite uncritically on the Government’s arguments, simply recognises that German law neither requires the aggrieved parties to be informed of a penal order procedure nor enables them to challenge the conviction with a view to joining the prosecution as plaintiffs.<sup>60</sup>

The Court further excludes that the obligation to involve them can derive from Art. 2 ECHR, as conversely acknowledged in relation to situations in which the responsibility of State agents in connection with a victim’s death had been at stake.<sup>61</sup> The reasoning used to support this conclusion is rather unconvincing. On close examination, the Strasbourg judges did not also rule out that, as regards medical negligence, “the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests,”<sup>62</sup> provided, however, that the “circumstances surrounding the death were suspicious or unclear.”<sup>63</sup> Also in this regard, the Court limited itself to concurring with the government’s argument “the circumstances of the case had been sufficiently established in the course of the investigative proceedings,” such that “a participation of the applicants in a potential main hearing, even if it might have a cathartic effect for the victim’s next of kin, could not have further contributed to the trial court’s assessment of the case.”<sup>64</sup> This argument is rather difficult to understand without an overall consideration of the Court’s reasoning, which comes to the conclusion that “the applicants have not specified which aspect” of the applicant’s “responsibility for medical negligence causing the applicants’ father’s death has not been sufficiently clarified.”<sup>65</sup>

This functional approach is rather paradoxical. Pursuant to Strasbourg case-law, the European Convention protects the right of the aggrieved parties to be involved in a criminal inquiry only as long as they can demonstrate the usefulness of their potential contribution in a public hearing. This argument is as surprising as maintaining that, under the European Convention, defendants must be granted the right to be informed about the accusation only if it is proven that insufficient information would jeopardise the effective exercise of the defence in a concrete case.<sup>66</sup> It is not easy to understand how the injured party must be granted the right to participation in criminal proceedings but cannot claim this guarantee. It cannot be accepted that the right to be involved in a criminal inquiry is granted only *secundum eventum* or, even worse, that the individual concerned can be burdened with the task of proving in advance what contribution they could provide in a trial hearing. By stating that “in the sphere of medical negligence the procedural obligation imposed by Art. 2 does not necessarily require the provision of a criminal-law remedy,”<sup>67</sup> the Court makes it clear that the European Convention cannot grant the injured party a subsequent remedy if not provided for by national law. Yet, the main question raised by the aggrieved parties – namely, whether “in an unusual and sensitive case like the present one the prosecution authorities’ decision to apply for a conviction”<sup>68</sup> through a summary proceeding that radically excludes their involvement was justified, notwithstanding sufficient evidence gathered against the accused – remained unanswered.

## V. Concluding remarks

The rapid developments that have occurred in EU law over the last few years in relation to defence rights in criminal proceedings has recently brought an unprecedented question to the surface, namely whether and to what extent a criminal law action can be instituted with a view to a summary conviction that excludes the involvement of the accused and any other interested party prior to the decision-making. In the *Covaci* case, the Luxembourg Court, ruling for the first time on the EU legislation on the right to linguistic assistance and information in criminal proceedings, renders a rather minimalist interpretation of EU law, which not only provides foreign defendants with scant guarantees but also leaves them alone with the delicate decision of whether to lodge an opposition to a penal order. The picture emerging from this judgment is that penal orders are only provisional decisions and, provided that the accused is given the abstract opportunity of a subsequent trial hearing, a procedure held *inaudito reo* is acceptable under EU law.

This scenario suggests broadening the area of the analysis, requiring in-depth reflection on the subsequent remedies aimed at saving the lawfulness of criminal proceedings held against absent defendants, both when this result is ordinarily foreseen (*inaudito reo* procedures) and when it is an exception from the rule of the direct involvement of the defence (*in absentia* procedures). The discussion takes on further relevance in light of the recent Directive on the presumption of innocence and the right to be present at trial, legislation that, while allowing EU countries to maintain special procedures held in writing and without a trial hearing, confirms the legitimacy of default proceedings, provided the accused persons are granted either a retrial or a remedy aimed at a full review of their conviction. A close examination of the constitutional law requirements of countries allowing *inaudito reo* procedures and a reflection on the Strasbourg case-law, both on *in absentia* and *inaudito reo* procedures, however, raise doubts as to whether this is the appropriate direction to be followed in a European area aimed at ensuring high standards of human rights protection.



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1 Framework Decision 2009/299/JHA.

2 See, in this sense, M. Böse, 'Harmonizing Procedural Rights Indirectly: the Framework Decision on Trials in Absentia', in *North Carolina Journal of International Law* (2011), pp. 489 ff.; F. Siracusano, 'Nuove prospettive in materie di processo *in absentia* e procedure di consegna', in T. Rafaraci (ed.), *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona*, Giuffrè, 2011, p. 91 f.

3 COM(2013) 821 final. This initiative was not aimed at implementing the 2009 Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. However, the European Council, incorporating the Roadmap into the Stockholm Programme, stressed its non-exhaustive character, thus calling for further initiatives on procedural issues, e.g., the presumption of innocence.

4 OJ L 65, 11.3.2016, p. 1. See also the news-section "Procedural Criminal Law – Procedural Safeguards" in this issue.

5 For reservations on the compatibility of Italian penal order procedures with constitutional law, see S. Ruggeri, 'Il procedimento per decreto penale', in G. Di Chiara (ed.), *Eccezioni al contraddittorio e giusto processo. Un itinerario attraverso la giurisprudenza*, Giappichelli, 2009, pp. 133 ff.

6 ECJ, judgment of 15 October 2015, *Covaci*, C-216/14. See M. Gialuz, 'Dalla Corte di Giustizia importanti indicazioni esegetiche in relazione alle prime due direttive sui diritti dell'imputato', [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it).

7 Directive 2010/64/EU.

8 Directive 2012/13/EU.

9 Opinion of Advocate General Bot, delivered on 7 May 2015.

10 *Ibid.*, § 44.

11 M. Gialuz, *op. cit.*, pp. 3 f.

12 Opinion of Advocate General Bot, § 55 *et seqq.*

13 *Ibid.*, § 61.

14 ECJ, *Covaci*, § 28 *et seqq.*

15 *Ibid.*, § 38.

16 *Ibid.*, § 49.

17 *Ibid.*, § 50.

18 For a positive consideration of this approach, see M. Gialuz, *op. cit.*, p. 6 f.

19 ECJ, *Covaci*, § 42.

20 This is the case for Germany, as seen in the case under examination. For Italy see § 407 *et seqq.* CCP-Italy. In Italy, penal order procedures did not traditionally provide for mandatory legal assistance either prior to the decision-making or with a view to the lodging of an opposition. This situation changed after Law 60/2001, which amended Art. 460 CCP-Italy by requiring penal orders to be provided not only to the convicted persons but also to a court-appointed lawyer, if they have not appointed a counsel of their confidence. Before this reform, however, the Italian Constitutional Court had already acknowledged that a court-appointed lawyer should in any case be ensured for defendants without residence in Italy who have not appointed a counsel of their confidence (see Constitutional Court, judgment 225/1993).

21 ECJ, *Covaci*, § 60.

22 *Ibid.*, § 61.

23 *Ibid.*, § 62.

24 *Ibid.*, § 63.

25 In Italy, the 1988 code of criminal procedure, departing from the approach of the 1930 codification that required a special power being given to the counsel, enabled lawyers to lodge an opposition on their own initiative. This raised the question of whether a court-appointed lawyer could also autonomously oppose a penal order. Over the last several years, the Supreme Court has increasingly acknowledged this power. See Corte di Cassazione, 4 March 2005, *P.m. in proc. Singh*, in *Archivio della nuova procedura penale*, 2006, p. 330. For some criticism on the risks of this solution, see S. Ruggeri, *Il procedimento per decreto penale. Dalla logica dell'accertamento sommario alla dinamica del giudizio*, Giappichelli, 2008, pp. 98 ff.

26 Art. 8(6) DPIPT.

27 To be sure, also this formulation is rather unclear as significant differences emerge from a comparative analysis of linguistic versions. Some of them relate to

the sole trial phase: see in this sense, alongside the English version (*trial*), the German one that, while mentioning the concept of *Verhandlung*, may seem to concern the *Hauptverhandlung*, that is, the trial hearing. Other linguistic versions broaden the scope of the new rules by relating to any “process” or “proceeding” aimed at a decision on guilt: in this sense cf. the Greek version (*δίκη*) as well as almost all the versions in Roman languages, such as those in Italian (*processo*), French (*procès*), Portuguese (*julgamento*), Romanian (*proces*) and Spanish (*juicio*). This issue is of utmost importance since various EU countries allow special types of criminal judgments on the merits of the case to be issued prior to the trial phase. It is probable that the question will need the intervention of the European Court of Justice in the near future, also because the definition of the scope of the new rules impinges on that of the right to a retrial.

28 Art. 47(2) CFR

29 Art. 53 CFR. Concerning the relationship of the EU Charter with national law, the Luxembourg Court has instead opted for an interpretation of Art. 53 based on the primacy of EU law, even over constitutional law. See ECJ, Grand Chamber, 26 February 2013, *Melloni v. Ministero Fiscal*, Case C-399/11, §§ 55 *et seqq.* More recently, the German Federal Constitutional Court expressed the opposite opinion in that national courts should reject a surrender request in line with EU law if it entails a violation of the constitution. See BVerfG, Decision of 15 December 2015, Az. 2 BvR 2735/14 (see also news section “European Arrest Warrant” in this issue).

30 Art. 52(3) CFR. This provision has led to various reactions and very different suggestions for interpretation. For a strong interpretation of this clause, whereby the EU Charter incorporated the ECHR set-up of human rights protection, see M. Borowsky, ‘Artikel 52’, in: J. Meyer, (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd ed., Baden-Baden, 2011, p. 687.

31 See, *inter alia*, ECtHR, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Appl. No. 11855/85, § 66.

32 Directive 2013/48/EU. See, *inter alia*, S. Cras, in *eucrium* 1/2014, pp. 32 ff.; C. Amalfitano, ‘La terza tappa della tabella di marcia per il rafforzamento dei diritti processuali di indagati o imputati in procedimenti penali: la direttiva 2013/48/UE sul diritto di accesso al difensore’, *La Legislazione penale* (2014) pp. 21 ff.; L. Bachmaier Winter, ‘The EU Directive on the Right to Access to a Lawyer: A Critical Assessment’, in S. Ruggieri (ed.), *Human Rights in European Criminal Law. New Developments in European Legislation and Case-Law after the Lisbon Treaty*, Heidelberg, 2015, pp. 111 ff.

33 Art. 3(1) DAL.

34 Art. 2(1) DAL.

35 Art. 2(4) DAL.

36 Art. 3(4) DAL.

37 ECtHR, *Colozza v. Italy*, judgment of 12 February 1985, Appl. No. 9024/80, § 29.

38 Art. 9 DPIPT.

39 Art. 103(1) German Const.

40 BVerfGE, 3, 248 (253).

41 BVerfG, 2 BvR 2211/97.

42 Italian Constitutional Court, judgment 46/1957, in [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

43 In Italy, the justification invoked by the Constitutional Court mixes the doctrine elaborated by two outstanding scholars of civil procedure during last century, i.e., *Calamandrei*, who advocated the idea of subsequent involvement of the other parties, and *Carnelutti*, who focused on the eventual nature of their participation. See, respectively, P. Calamandrei, *Il procedimento monitorio nella legislazione italiana*, Unitas, 1926, and F. Carnelutti, ‘Nota intorno alla natura del processo monitorio’, in *Rivista di diritto processuale civile* (1924), pp. 270 ff. Carnelutti’s doctrine was first imported to penal order procedures by *Bellavista*. Cf. G. Bellavista, *Il procedimen-*

*to penale monitorio*, 2nd ed., Milano, 1952, p. 47.

44 Constitution Amendment Law 2/1999. On this reform, see, *inter alia*, E. Marzaduri, ‘Commento all’art. 1 legge costituzionale 2/1999’, in *La Legislazione penale*, 2000, pp. 762 ff.

45 Italian Constitutional Court, Decisions 8/2003, 32/2003, 131/2003, 257/2003, in [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

46 V. Grevi, ‘Processo penale, “giusto processo” e revisione costituzionale’, in *Cassazione penale*, 1999, p. 3320; E. Marzaduri, *op. cit.*, pp. 767 f.

47 According to Art. 111(5) Italian Const., a Law may “govern the cases in which evidence is not to be taken in the presence of both parties with the consent of the defendant or when it is objectively proven to be impossible, or as a result of proven unlawful conduct.”

48 In Italian law, the objection does not aim at a review of the penal order, which must be revoked anyway. See Art. 464(3) CCP-Italy.

49 Italian Constitutional Court, Decision 323/2007, in [www.cortecostituzionale.it](http://www.cortecostituzionale.it). In the present case, the problem was the loss of judicial control in the intermediate phase, since the objection leads directly to the trial.

50 Italian Constitutional Court judgment 23/2015, in [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

51 Above, fn. 28.

52 It has been noted that, unlike Germany, Italy requires the competent authority to notify not only the defendants of the penal order but also their lawyers or a court-appointed lawyer. Notwithstanding its merits, this legislative reform has not solved the problem of whether lawyers can contact their clients.

53 ECtHR, *Colozza v. Italy*, § 29.

54 This reform was implemented by Law Decree 17/2005, converted into Law 60/2005, in response to the convictions of Italy by the Strasbourg Court in the *So-mogyi* and *Sejdovic* cases, dropping the exigent requirements originally laid down by the 1988 code of criminal procedure for the accused to be relieved of the effects of the expiration of the time in order to file an appeal against a judgment rendered *in absentia*.

55 ECtHR, *Cat Berro v. Italy*, decision of 25 November 2008, Appl. No. 34192/07.

56 Thus, the 2005 reform maintained the original solution of the 1988 code, which made the full exercise of the defendants’ right to evidence at second instance dependent on the difficult proof that their absence in court had not been their fault. More recently, Law 67/2014, while abolishing default proceedings, also dropped the limits on the right to evidence that absent defendants suffered from in second instance. For an analysis of this legislative reform, see S. Quattrocchio, ‘Il contumace cede la scena processuale all’assente, mentre l’irreperibile l’abbandona. Riflessioni a prima lettura sulla nuova disciplina del procedimento senza imputato’, [www.penalcontemporaneo.it](http://www.penalcontemporaneo.it).

57 ECtHR, *Gray v. Germany*, judgment of 22 May 2014, Appl. No. 49278/09.

58 *Ibid.*, § 3.

59 *Ibid.*, § 61.

60 *Ibid.*, § 87.

61 *Ibid.*

62 ECtHR, *Hugh Jordan v. United Kingdom*, judgment of 4 May 2001, Appl. No. 24746/94, § 109.

63 ECtHR, *Gray v. Germany*, § 87.

64 *Ibid.*, § 91.

65 *Ibid.*

66 For a critical assessment of this approach to the right to information on the charge, see S. Trechsel, ‘Human rights in criminal proceedings’, Oxford University Press, 2005, p. 194 f.

67 ECtHR, *Gray v. Germany*, § 91.

68 *Ibid.*, § 91.

# Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud

## An Introduction to Regulation (EU) 2015/1525

Emilia Porebska\*

### I. Introduction

Customs fraud is a growing phenomenon, which causes significant damage to the Union's financial interests. The losses resulting from some of the most common types of customs-related fraud (i.e., misdeclaration of origin, misdescription of goods, and misuse of the transit system) are estimated at around €185 million per year.<sup>1</sup> Under Art. 325 of the TFEU, it is the responsibility of the Union – as well as its Member States – to protect the EU's financial interests.

Given the scale of the problem, coupled with the growing threat of transborder crime, the importance of combating customs fraud and ensuring effective enforcement is critical. This has led to greater awareness that strengthened and enhanced cooperation is essential at both the national and European level.

In the customs area, a central theme for this cooperation is the gathering and sharing of information and intelligence within the framework of mutual assistance. In this context, Regulation (EC) 515/97<sup>2</sup> is considered a cornerstone that provides a legal basis for the exchange of information between Member States as well as between Member States and the Commission on matters relating to detection, prevention, and investigation of customs fraud.<sup>3</sup>

A good example of how the regulation seeks to facilitate the information sharing is the establishment of centralised databases, which include information on customs-related fraud cases and ongoing cross-border investigations (Customs Information System “CIS” and File Identification Database “FIDE”). Both CIS and FIDE are managed by the European Anti-Fraud Office (“OLAF”) and used by Member States in their day-to-day operational activities relating to breaches of customs legislation.

Despite the successful application of Regulation (EC) 515/97, in the years following its adoption, quick changes in the way trade operates and has adjusted to new computerised conditions on the market prompted the need to reform the Act. Since the last amendment of Regulation (EC) 515/97 in 2008, the

necessity for advancing and expanding the tools available to the authorities when identifying fraud cases became apparent. In its Impact Assessment,<sup>4</sup> the Commission acknowledged that the limited availability of data was suboptimal for detection of customs fraud, given the volume of trade and rapidly improving methods of operation by fraudsters. In addition, a number of deficiencies in the mutual assistance framework were identified, including the following:

- Legal uncertainty regarding the use of information obtained by means of mutual assistance as evidence in criminal proceedings;
- Delays in OLAF investigations caused by impeded access to supporting documents.<sup>5</sup>

Recognising these shortcomings, the Commission adopted a proposal to amend the legislative act of 1997 on 25 November 2013.<sup>6</sup> The proposal put forward key ideas designed to tackle the existing loopholes. The intention was as follows:

- To clarify that information obtained via mutual assistance may be used as evidence in criminal proceedings;
- To allow OLAF to request supporting documents directly from the economic operators;
- To create new centralised directory containing data on physical movements of containers and new centralised directory including data relating to goods entering, leaving and transiting the EU.

The legislative negotiations, which were conducted throughout 2014, resulted in the amending Regulation (EU) 2015/1525 being adopted on 9 September 2015.<sup>7</sup> The following sections will give a summary of and rationale behind the changes introduced by the amendment.

### II. Admissibility of Evidence

Arts. 12 and 16 of Regulation (EC) 515/97 provide scope for using information obtained on the basis of mutual assistance as evidence. During recent years, however, the question emerged as to in what type of proceedings such information may be relied upon. In particular, it was disputed whether the avail-

able legal bases permit Member States to use the information not only in an *administrative* but also in a *criminal* context. A number of national prosecutors voiced their concerns over the lack of legal certainty in this regard and indicated that the legal text is not sufficiently clear to allow them to rely on the evidentiary value of the materials obtained under Regulation (EC) 515/97 in criminal cases.

In order to address this problem, Regulation (EU) 2015/1525 amended both articles, clarifying that information obtained may be used as evidence not only in administrative but also in judicial (criminal) proceedings – provided that the Member State sending the information does not explicitly object.

It is important to emphasise that the adopted modifications *allow* and by no means oblige Member States to rely on the results of mutual assistance in criminal cases. It remains within the competence of national courts to decide whether or not the information in question satisfies the procedural requirements laid down in the national law. This is confirmed by the inclusion in Arts. 12 and 16 of references to Art. 51 of Regulation (EC) 515/97, which stipulates that the regulation “shall not affect the application in the Member States of rules on criminal procedure.”

The amendment to Arts. 12 and 16 is a welcome change that introduces legal certainty. It is hoped that it will further facilitate and increase the utilisation of the results of customs mutual assistance in national courts. However, given the conditionality imposed, the effectiveness of these provisions will ultimately depend on the attitudes of Member States and their willingness to facilitate the cooperation with and use of their findings by other national authorities.

### III. Access to Supporting Documents by OLAF

The EU’s mutual assistance framework covers not only cooperation between Member States but also cooperation between the Commission and the Member States. The latter is important in the context of OLAF’s mandate to protect the EU’s financial interests.

OLAF regularly relies on the information obtained from the national authorities in its customs-related investigations. This often includes supporting documents such as invoices, certificates of origin, etc. The problem with the exchange of these documents came up with the introduction of the e-Customs initiative designed to replace paper format customs procedures with EU wide electronic ones. Prior to this, supporting documents were held by the national authorities, and it was relatively easy for OLAF investigators to obtain them, by means

of a simple request, within a short period of time. However, since the e-Customs was put in place, the process has been prolonged by several months. The delay was caused by the fact that Member States were no longer in possession of the relevant documentation and needed to approach the economic operator first, before transmitting it to OLAF.

The importance of fast procedures in the context of customs investigations is linked to the possibility of proving breaches of legislation and recovering financial losses before they are time-barred.<sup>8</sup> Therefore, the delay in obtaining crucial pieces of evidence was indeed problematic.

To remedy the situation, the Commission included in its original proposal a provision allowing OLAF to request relevant documents directly from the economic operators concerned, thereby eliminating any unnecessary delays in obtaining critical information necessary for efficient and effective completion of customs-related investigations.

This part of the proposal, however, proved to be particularly controversial during subsequent legislative negotiations. Many Member States feared that such far-reaching power could potentially interfere with their competences. There were also concerns that the possibility of directly contacting the economic operators without the national authorities serving as interlocutors could undermine ongoing national investigations. A request from OLAF could in many cases serve as a red flag for those companies who might also be involved in a parallel investigation.

Ultimately, a compromise was reached that prescribes specific deadlines for the Member States in providing relevant documentation. The uniform deadlines across the EU seem to offer an optimal, balanced solution to preventing unnecessary delays without jeopardising national investigations.

### IV. Improved Availability of Data

The key and most far-reaching part of the amendment of Regulation (EC) 515/97 is the creation of two new data directories that will contain valuable information for detecting customs fraud.

#### 1. CSM directory

Art. 18a of Regulation (EC) 515/97 (as amended) provides for the creation of a “CSM directory.” CSM stands for Container Status Message and refers to data relating to physical movements of containers that can be useful in detecting potential

fraud patterns and suspicious shipments. Such messages are collected by most major international container lines in the ordinary course of business dealings.

The potential use of CSMs has already been explored in other jurisdictions. For instance, the U.S. Customs and Border Protection has been relying on CSMs since January 2009 as part of security filing (“10+2 rule”), in particular for safety and security purposes.<sup>9</sup>

The added-value offered by CSMs was also studied by OLAF, together with the Commission’s Joint Research Centre, in the so-called “Contraffic project”. This initiative was developed on the basis of CSMs obtained from open sources (i.e., the Internet). A special IT system was created to automatically detect potential fraud cases related to misdeclaration of origin. The underlying analysis relies on the automatic comparison of information included in CSMs (actual physical movements of containers) and information declared in the import declarations known as “SAD” data (Single Administrative Document). Any discrepancy between the two sets of data are considered abnormal, flagged as potentially fraudulent, and sent for information to the customs authorities participating in the pilot project.

With the new Regulation (EU) 2015/1525, the concept initially developed as part of the Contraffic project will now reach its full potential. Instead of relying on incomplete data available on the Internet, the directory will be completed with CSMs provided directly by maritime carriers. The obligation to submit CSMs will apply from 1 September 2016 and will cover import CSMs as well as export CSMs for sensitive goods (i.e., energy products, tobacco, and alcohol).

## 2. Import, export and transit directory

The second new data directory provided for in Regulation (EU) 2015/1525 is the “Import, export and transit directory.” It is closely interlinked with the CSM directory and constitutes an integral part of the new analytical instrument to be used for operational activities. The sets of data covered relate to importation, exportation, and transit including, *inter alia*, SAD data that will be compared with CSMs and will facilitate the conduct of the analysis outlined above.

The creation of these two new directories has the potential to provide the Member States and OLAF with an effective weapon in the fight against customs-related fraud. As long as data analysis is properly interpreted and applied, it is expected that changes brought about by Regulation (EU) 2015/1525 will allow authorities to better target suspicious shipments, thus

facilitating the smooth flow of legitimate trade. This, in fact, is the ultimate purpose of mutual assistance in the area of customs.

## V. Conclusion

Regulation (EU) 2015/1525 constitutes an important development in the area of customs mutual assistance. Whilst it was proposed with a view to closing off the loopholes in the existing framework, it aims to go one step further by way of ensuring that the system for detecting customs-related fraud can aptly respond to the challenges posed by the use of increasingly sophisticated *modus operandi* by fraudsters.

Regulation (EU) 2015/1525 addresses several problems that had come up during the implementation of Regulation (EC) 515/97 since the 2008 amendment, such as the use of information collected in mutual assistance procedures in criminal cases and impeded access to supporting documents. What is more, it equips the relevant authorities with a powerful tool to detect fraud cases: the utilisation of modern technology and well developed IT-based analysis.

With the legislative basis in place, the real challenge will lie in managing the voluminous data contained in the new data directories and using it in a resourceful way. This is by no means an easy task, but the experience gathered from the Contraffic project proves that the benefits of coming up to speed with technological advancements in order to be better able to conduct targeted investigations can be significant.

The provisions of Regulation (EC) 2015/1525 will start applying from 1 September 2016 together with the related implementing acts and a delegated act.<sup>10</sup> Importantly, the effectiveness and added value of this initiative will be reviewed relatively soon. Pursuant to the new Art. 43b of Regulation (EC) 515/97, the Commission is obliged to publish a report, by 9 October 2017, assessing the necessity of expanding the two new directories to export data not limited to sensitive goods and to explore the feasibility of enlarging the project to include transportation by land and air.

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\* The content of this article does not reflect the official opinion of the European Union.

1 SWD(2013) 483 final.

2 Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1

- 3 Regulation (EC) No. 515/97 is supplemented by Council Decision 2009/917/JHA, which applies in the areas of Member State's competences.
- 4 SWD(2013) 483 final
- 5 In this context supporting documents include any documentation held by economic operators which relate to the potentially fraudulent operation (e.g., invoices).
- 6 COM(2013) 796 final
- 7 Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, O.J. L 243, 18.9.2015, p. 1–12
- 8 Art. 103 of Regulation (EU) 952/2013
- 9 Importer Security Filing and Additional Carrier Requirements (commonly known as "10+2 rule") apply to import cargo arriving to the United States by vessel. Under this rule, before merchandise can be imported into the United States certain advance cargo information must be first submitted to CBP.

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- 10 Commission Implementing Regulation (EU) 2016/345 of 10 March 2016 setting out the frequency of reporting of container status messages, the format of the data and the method of transmission, O.J. L 65, 11.3.2016, p. 38–39; Commission Implementing Regulation (EU) 2016/346 of 10 March 2016 determining the items to be included in the Customs Information System, O.J. L 65, 11.3.2016, p. 40–48.

## Können die Regelungen über die Zusammenarbeit der EU-Mitgliedstaaten bei der Strafverfolgung kurzerhand aufgehoben werden?

Ulrich Schulz

The European Union performs numerous tasks. In order to carry out these tasks, the Union relies on money that is provided for by the Member States, including customs duties. This article initially describes the principles of the legal framework within which Member States levy customs duties, investigate criminal offences committed in this context, and cooperate with one another. In particular, the article stresses that the levying of customs duties, on the one hand, and criminal prosecution, on the other, serve different purposes, for which the European Union and the national legislators have established separate legal rules. As a consequence, different regulations for administrative procedure, on the one hand, and criminal procedure, on the other, must be simultaneously observed. The article subsequently deals with Art. 12 of Regulation (EC) No. 515/97 as amended by Regulation (EU) 2015/1525 of 9 September 2015. This new provision seeks to establish that information collected as part of administrative procedure is admissible as evidence in criminal proceedings. The new provision does away with the previously described principle that administrative and criminal proceedings are strictly separate. The author views the amendment critically and explains his reasoning in this regard.

### I. Gegenseitige Abhängigkeiten von Verwaltungs- und Strafverfahren im Zollbereich

#### 1. Grundzüge des Zollverwaltungsverfahrens

Bei der Erhebung der Zölle wird üblicherweise wie folgt verfahren:

- Der Einführer („Wirtschaftsbeteiligter“) stellt bei einer EU-Zollverwaltung einen Antrag, eine Ware in den zollrechtlich freien Verkehr der EU zu überführen.
- Die Zollverwaltung prüft den Antrag sowie die beigefügten Unterlagen, setzt die Zölle fest und kassiert sodann das Geld.

- Die Zollverwaltung gibt die Ware frei. Danach darf der Einführer nach seinem Ermessen über die Ware frei verfügen.

Anschließend führt die Zollverwaltung die gezahlten Zölle, gekürzt um 25 % für die entstandenen Verwaltungsaufwendungen, an die Europäische Kommission ab.

Die Zollverwaltungen führen diese Maßnahmen im Rahmen eines administrativen Verwaltungsverfahrens durch. Rechtsgrundlage sind die Zollvorschriften der Europäischen Union und ergänzende nationale Gesetze, zum Beispiel die Abgabenordnung (AO) in der Bundesrepublik Deutschland. In der



Abbildung 1

Praxis unterliegt dieses Verfahren verschiedenen Abweichungen, zum Beispiel:

- der Anforderung ergänzender Unterlagen bei dem Wirtschaftsbeteiligten,
- der Durchführung von Betriebsprüfungen,
- der Durchführung von administrativen Zwangsmaßnahmen, wenn der Wirtschaftsbeteiligte, der die Zölle schuldet, nicht zahlt.

Das Verwaltungsverfahren folgt grundsätzlich dem in *Abbildung 1* dargestellten Schema. Dieses Schema läuft jedoch nicht immer reibungslos ab, da einige Wirtschaftsbeteiligte vermeiden wollen, die Zölle in der zutreffenden Höhe zu zahlen. Deshalb machen sie beispielsweise in ihrem Zollantrag unzutreffende Angaben über die Beschaffenheit der Ware, den Wert der Ware oder den Warenursprung. In der Folge setzt die Zollverwaltung die Zölle nicht in der gesetzlichen Höhe fest.

Die Zollverwaltung, welche die Zollabfertigung durchgeführt hat, erhält bisweilen erst nach der Abfertigung konkrete Hinweise darauf, dass die Wirtschaftsbeteiligten (ggf. unter Mitwirkung von Firmen in Drittstaaten) unzutreffende Angaben gemacht haben. In der Folge muss sie die Angaben der Wirtschaftsbeteiligten widerlegen und zum Beispiel beweisen, wo und wie eine Ware in einem Drittland hergestellt worden ist. Dieser Nachweis ist oft sehr schwer zu führen, zumal staatliche Stellen in den Drittländern bisweilen nicht daran interessiert sind, diese administrativen Ermittlungen zu unterstützen, weil dies ihren eigenen fiskalischen und wirtschaftlichen Interessen widerspricht. Sobald die Zollverwaltung mit der gebotenen Belastbarkeit nachweisen kann, dass die Angaben der Wirtschaftsbeteiligten unzutreffend waren und die Zölle nicht ordnungsgemäß festgesetzt worden sind, muss sie die Zölle nacherheben.

## 2. Strafverfahren wegen unzutreffender Angaben im Verwaltungsverfahren

Unzutreffende Angaben der Wirtschaftsbeteiligten bei der Zollabfertigung können einen Straftatbestand darstellen. In der Bundesrepublik Deutschland ist dies die Straftat der Steuerhinterziehung nach § 370 Abgabenordnung (AO). Diese Strafnorm schützt als Rechtsgut das zutreffende Steueraufkommen. Hierzu gehören auch die Zölle. Straftäter ist die natürliche Person, die den Zollantrag stellt oder ggf. (über eine Spedition) stellen lässt. Strafbare Handlung ist die pflichtwidrige Täuschung der Zollbeamten über steuerlich erhebliche Tatsachen,

zum Beispiel über den Ursprung oder den Wert einer Ware. Der Erfolg der Straftat tritt ein, wenn die Zölle nicht, nicht in voller Höhe oder nicht rechtzeitig festgesetzt werden (§ 370 Abs. 4 AO). Diese Straftat wird auch in Form organisierter Kriminalität begangen. Der Straftatbestand „Steuerhinterziehung“ kann also nur dann vorliegen, wenn Zölle verkürzt wurden, weil die Beteiligten ihre Pflichten, die ihnen nach dem Verwaltungsrecht obliegen, verletzt haben.

## II. Verhältnis zwischen Verwaltungsverfahren und Strafverfahren

Das Verwaltungsverfahren und das Strafverfahren betreffen zwar denselben Lebenssachverhalt, unterscheiden sich jedoch z.B. in den Punkten

- Zweckbestimmung,
- Rechtsgrundlagen,
- Datenschutzregelungen (bereits innerhalb des Unionsrechts),
- ggf. Behördenzuständigkeit (je nach dem Recht des betreffenden Mitgliedstaates).

Verwaltungsverfahren und Strafverfahren sind dennoch untrennbar miteinander verwoben. Für einen effektiven und sachgerechten Schutz der finanziellen Interessen der EU ist es deshalb erforderlich, dass sowohl die Verwaltungsbehörden einerseits als auch die für die Strafverfolgung zuständigen Behörden andererseits so eng, schnell und umfassend wie möglich zusammenarbeiten.

Verwaltungsverfahren und Strafverfahren werden deshalb zeitgleich und parallel im Rahmen der für diese Verfahren jeweils anwendbaren verwaltungsrechtlichen und strafprozessualen Rechtsvorschriften geführt. Das Verwaltungsverfahren dient fiskalischen Zwecken, nicht der Strafverfolgung; das Strafverfahren dient der Strafverfolgung, nicht aber fiskalischen Zwecken (*Abbildung 2*).

Dennoch müssen die Verwaltungsbehörden bei ihren administrativen Ermittlungen strafrechtliche Aspekte berücksichtigen. Umgekehrt müssen die für strafrechtliche Ermittlungen zuständigen Behörden die administrativen Aspekte berücksichtigen. Dabei sollte beachtet werden, dass die Straftäter von einer nicht optimalen Abstimmung zwischen den Verwaltungsbehörden und den Strafverfolgungsbehörden profitieren können. Dies kann zum Beispiel dann der Fall sein, wenn Aspekte eines Sachverhaltes ermittelt werden, auf die



Abbildung 2

es verwaltungsrechtlich nicht ankommt. Oder wenn zollrechtlich eine Festsetzungsverjährung eingetreten ist, weil den Beschuldigten kein Vorsatz nachgewiesen werden konnte. Insbesondere sollte auch berücksichtigt werden, dass der wirtschaftliche Vorteil der Straftat im Wesentlichen darin besteht, dass die Zollbehörden die Zölle nicht erheben konnten. Wenn dieser Betrag feststeht, müssen die Zollverwaltungen die Zölle im Verwaltungsverfahren (!) fiskalisch betreiben.

Für diesen Betrag kann es entbehrlich sein, auf strafrechtliche Maßnahmen der Vermögensabschöpfung zurückzugreifen. In jedem Fall sollte aber versucht werden, den Straftätern die Vorteile, die sie aus ihren Handlungen erlangt haben, sowohl mit verwaltungsrechtlichen Maßnahmen als auch mit strafrechtlichen Maßnahmen zu nehmen.

### III. Zusammenarbeit der EU-Mitgliedstaaten

Die Parallelität von Verwaltungsverfahren und Strafverfahren, welche in der Bundesrepublik Deutschland in § 393 AO geregelt ist, ist nicht nur bei einzelstaatlichen Verwaltungs- und Strafverfahren, sondern auch bei der Zusammenarbeit zwischen den EU-Mitgliedstaaten bzw. der Zusammenarbeit zwischen den EU-Mitgliedstaaten und der Europäischen Kommission zu beachten. Die Anwendung der in Betracht kommenden Rechtsgrundlagen richtet sich auch hier maßgebend nach dem Zweck des Informationsaustauschs.

#### 1. Zusammenarbeit in Verwaltungsverfahren

Die Verordnung (EG) Nr. 515/97 des Rates vom 13. März 1997 über die gegenseitige Amtshilfe zwischen den Verwaltungsbehörden der Mitgliedstaaten und die Zusammenarbeit dieser Behörden mit der Kommission im Hinblick auf die ordnungsgemäße Anwendung der Zoll- und der Agrarregelung enthält detaillierte Vorschriften über die Zusammenarbeit bei der Ermittlung von Sachverhalten für die Zwecke der Verwaltungsverfahren. Die Verordnung regelt zum Beispiel, dass ein ersuchter Mitgliedstaat eingehende Amtshilfeersuchen bearbeitet wie ein Verwaltungsverfahren in eigener Sache. Somit muss ein Mitgliedstaat administrative Zwangsmaßnahmen anwenden, wenn nur so Informationen erlangt werden können, die ein anderer Mitgliedstaat benötigt, um die Zollvorschriften der Europäischen Union zutreffend anzuwenden.

Die Verordnung enthält keine Regelungen zur Zusammenarbeit zum Zwecke der Strafverfolgung. Dies ergibt sich aus folgenden Bestimmungen der Verordnung (EG) Nr. 515/97:

- Art 51 stellt klar, dass die strafprozessualen Vorschriften der Mitgliedstaaten und die Vorschriften über die Rechtshilfe in Strafsachen unberührt bleiben.
- Art. 3 legt fest, dass ein Informationsaustausch für Verwaltungszwecke grundsätzlich auch dann durchgeführt werden muss, wenn der Informationsaustausch Elemente enthält, die nur mit Genehmigung oder auf Antrag von Justizbehörden durchgeführt werden können. Dies umfasst die Fälle, in denen die Justizbehörden strafrechtliche Ermittlungen führen. Die Justizbehörden müssen aber zustimmen, wenn Auskünfte aus Strafverfahren für Zwecke der VO (EG) Nr. 515/97, also für Verwaltungszwecke, verwendet werden sollen.
- Art. 45 Abs. 3 (in der durch VO (EG) 766/2008 geänderten Fassung) erlaubt, dass Informationen, die für Verwaltungszwecke erbeten wurden und die für Verwaltungszwecke erteilt worden sind, in einem Strafverfahren zu dem selben Lebenssachverhalt verwendet werden dürfen, sofern dieses Strafverfahren später (!) eingeleitet wurde („subsequently initiated“). In diesem Zusammenhang ist unklar, auf welchen Zeitpunkt sich das Merkmal „später eingeleitet“ bezieht. Ohne Zweifel ist damit ein Zeitpunkt gemeint, der nach der Stellung des administrativen Amtshilfeersuchens liegt. Denn ansonsten hätte der ersuchende EU-Mitgliedstaat ein Rechtshilfeersuchen um Informationen in einer strafrechtlichen Angelegenheit stellen müssen.

#### 2. Zusammenarbeit in Strafverfahren

Die für Strafverfolgung zuständigen Behörden der Mitgliedstaaten arbeiten im Wesentlichen auf der Grundlage des EU-Rechtshilfeübereinkommens von 2000 zum Zwecke der Strafverfolgung zusammen. Alternativ steht den für die Strafverfolgung zuständigen Verwaltungs- und Justizbehörden aber auch eine weitere, gleichrangige Rechtsgrundlage zur Zusammenarbeit zur Verfügung, nämlich das Übereinkommen aufgrund von Artikel K.3 des Vertrags über die Europäische Union über gegenseitige Amtshilfe und Zusammenarbeit der Zollverwaltungen. Dieses auch unter dem Kürzel „Neapel II“ bekannte Übereinkommen hat das sogenannte „Neapel-I-Übereinkommen“ aus dem Jahre 1967, das die sechs EG-Gründerstaaten abgeschlossen hatten, fortentwickelt. Das „Neapel-II-Übereinkommen“ ist in der Praxis der Justizbehörden wenig bekannt oder seine Vorteile werden bisweilen nicht

erkannt. Es hat das Ziel, die VO (EG) Nr. 515/97, die nur Vorschriften über die Zusammenarbeit der Zollverwaltungen im administrativen Verfahren enthält, mit Rechtsgrundlagen über die Zusammenarbeit zum Zwecke der Strafverfolgung zu ergänzen.

Im Wesentlichen enthält Neapel II folgende Regelungen:

- Informationsaustausch zum Zwecke der Strafverfolgung.
- Festlegung, dass die übermittelten Informationen und Unterlagen als Beweismittel in Strafverfahren verwendet werden. Der Beweiswert richtet sich nach dem Recht des ersuchenden Staates.
- Wahl des Mitgliedstaates, ob er ein ausgehendes Ersuchen auf Neapel II oder auf (andere) Vorschriften über die Rechtshilfe in Strafsachen stützt. Falls die Justizbehörden die Federführung bei den Ermittlungen haben, können sie die Zollbehörden beauftragen, Ersuchen auf der Grundlage des Neapel-II-Übereinkommens zu stellen.
- Verpflichtung, dass die ersuchte Behörde bei der Vornahme von Ermittlungen so tätig wird, als ob sie in Erfüllung eigener Aufgaben oder auf Ersuchen einer anderen Behörde ihres Mitgliedstaats handeln würde. Hierzu gehört auch die Anwendung von Zwangsmaßnahmen der Strafverfolgung, ggf. nach Beteiligung der Justizbehörden.

### 3. Abstimmung der Zusammenarbeit in Verwaltungs- und Strafverfahren

Wenn die EU-Zollverwaltungen ihr Ersuchen sowohl auf die VO (EG) Nr. 515/97 als auch auf das Neapel-II-Übereinkommen stützen, können sie untereinander in einem (!) Vorgang sowohl zum Zwecke der Durchführung von Verwaltungsverfahren als auch der Strafverfolgung zusammenzuarbeiten. Damit können parallele Geschäftswege im Bereich der Zoll- und Justizverwaltungen vermieden werden, einschließlich des damit verbundenen Abstimmungsaufwandes im ersuchten und im ersuchenden EU-Mitgliedstaat. Die ersuchte Behörde weiß damit genau, für welchen Zweck die ersuchende Behörde die Informationen verwenden will. Sie kann die erbetenen Feststellungen dann im Rahmen von administrativen und strafprozessualen Ermittlungen treffen und die ersuchende Behörde in dem für den jeweiligen Verwendungszweck geltenden rechtlichen Rahmen unterrichten.

### IV. Künftige gesetzliche Vermischung der Zweckbestimmung

Hinsichtlich der zukünftigen Rechtsanwendung ist jedoch eine Vermischung zwischen (verwaltungsrechtlichem) Amtshilfe- und (strafjustiziellem) Rechtshilfeverfahren festzustellen, die im Widerspruch zu den zuvor genannten Grundsätzen steht.

Im Folgenden wird zunächst die Rechtsgrundlage dieser Vermischung dargestellt und sodann einer Bewertung unterzogen.

### 1. Inhalt der künftigen Änderung der VO (EG) Nr. 515/97

Die VO (EU) Nr. 2015/1525 wird ab dem 1. September 2016 gelten. Sie ändert Artikel 12 VO (EG) Nr. 515/97 in folgender Weise:

„Unbeschadet des Artikels 51 können Informationen, darunter Unterlagen, beglaubigte Abschriften, Bescheinigungen, alle Verwaltungsakte oder Entscheidungen der Verwaltungsbehörden, Berichte sowie alle Auskünfte, die von Bediensteten der ersuchten Behörde eingeholt und der ersuchenden Behörde im Wege der Amtshilfe gemäß den Artikeln 4 bis 11 übermittelt werden, in der gleichen Weise zulässige Beweismittel darstellen, als wären sie in dem Mitgliedstaat, in dem das Verfahren stattfindet, erhoben worden:

- a) in Verwaltungsverfahren in dem Mitgliedstaat der ersuchenden Behörde, einschließlich anschließender Widerspruchsverfahren;
- b) in Gerichtsverfahren in dem Mitgliedstaat der ersuchenden Behörde, sofern die ersuchte Behörde bei der Übermittlung der Informationen nicht ausdrücklich etwas anderes bestimmt hat.“

Der zweite Erwägungsrund der VO (EU) Nr. 2015/1525 erläutert die Änderung in Art. 12 lit. b) wie folgt:

„Um die verwaltungsrechtlichen und strafrechtlichen Verfahren zur Behandlung von Unregelmäßigkeiten weiter zu verbessern, ist dafür Sorge zu tragen, dass im Wege der gegenseitigen Amtshilfe eingeholte Beweismittel in den Verfahren der Verwaltungs- und Justizbehörden des Mitgliedstaats der ersuchenden Behörde als zulässige Beweismittel angesehen werden können.“

Die VO (EU) Nr. 2015/1525 hat damit den Vorschlag der Kommission weitgehend übernommen. Die Kommission hatte ihren Vorschlag für Buchstabe b) wie folgt begründet:

„Die vorgeschlagene Änderung von Artikel 12 stellt darauf ab, die Rechtsunsicherheit, die zurzeit in Bezug auf die etwaige Verwendung von im Rahmen der gegenseitigen Amtshilfe eingeholten Informationen als Beweismittel in nationalen Strafverfahren herrscht, zu beseitigen.“

Der Europäische Rechnungshof hatte den Vorschlag der Kommission unterstützt und in seiner Stellungnahme 1/2014 ausgeführt:

„Zu diesem Zweck werden drei weitere Punkte der bestehenden Verordnung präzisiert:

- i) ...
- ii) ...
- iii) ... die Rechtsunsicherheit hinsichtlich der Zulässigkeit von im Rahmen der gegenseitigen Amtshilfe eingeholten Informationen als Beweismittel in nationalen Strafverfahren wird beseitigt.

... Außerdem vertritt der Hof die Auffassung, dass die Präzisierung in Artikel 12, wonach im Rahmen der gegenseitigen Amtshilfe eingeholte Informationen zulässige Beweismittel in Strafverfahren der Mitgliedstaaten darstellen können, sinnvoll ist. Aus diesen Gründen begrüßt der Hof den Vorschlag der Kommission.“

Konsequenz der Regelungsänderung ist, dass durch Artikel 12 VO (EU) Nr. 515/97 n.F. ab dem 1. September 2016 folgendes Verfahren zulässig ist (schematisch dargestellt in *Abbildung 3*):

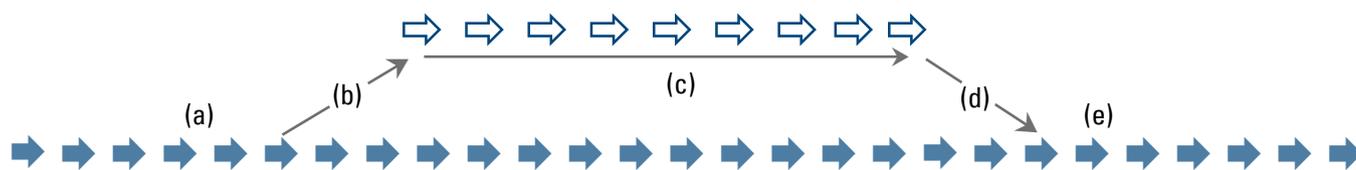


Abbildung 3

- (a) Der ersuchende Mitgliedstaat führt administrative und steuerstrafrechtliche Ermittlungen. Er benötigt Auskünfte aus einem anderen Mitgliedstaat für Zwecke der Strafverfolgung.
- (b) Er bittet einen anderen Mitgliedstaat nur um die Durchführung von administrativen (!) Ermittlungen auf der Grundlage der VO (EG) Nr. 515/97.
- (c) Der ersuchte Mitgliedstaat trifft die erbetenen administrativen Feststellungen, ggf. unter Verwendung von administrativen Zwangsmaßnahmen.
- (d) Der ersuchte Mitgliedstaat erteilt die erbetenen Auskünfte auf der Grundlage der VO (EG) Nr. 515/97.
- (e) Der ersuchte Mitgliedstaat verwendet die erteilten Auskünfte für das Strafverfahren.

Die neue Regelung streicht damit de facto die Bestimmung des Artikels 45 Abs. 3 VO (EG) 515/97, dass für Verwaltungszwecke erteilte Auskünfte nur für „später eingeleitete“ (strafrechtliche) Ermittlungsverfahren verwendet werden dürfen. Denn eine Verwendung der Erkenntnisse in der dargestellten Art wird künftig für *alle* strafrechtlichen Ermittlungsverfahren zulässig sein, auch wenn sie vor der Stellung des Ersuchens nach der VO (EG) Nr. 515/97 eingeleitet worden sind.

## 2. Bewertung

In der Zusammenarbeit der EU-Mitgliedstaaten wird mit der Änderung der VO (EG) Nr. 515/97 ab dem 1. September 2016 die Trennung von Verwaltungs- und Strafverfahren zumindest in Teilen aufgehoben. Die strafrechtlichen Aspekte der Ermittlungen werden dem Verwaltungsverfahren zugeschlagen. Diese Änderung ist jedoch aus folgenden Gründen kritisch zu würdigen.

Zunächst ist zweifelhaft, ob Artikel 12 VO (EG) Nr. 515/97 in der durch die VO (EU) 2015/1525 geänderten Fassung nicht gegen die Europäische Menschenrechtskonvention verstößt. Zweifel sind vor allem im Hinblick auf den durch Art. 6 EMRK garantierten fair trial-Grundsatz im Strafverfahren angebracht. Ist ein Strafverfahren „fair“, wenn ein EU-Mitgliedstaat

- ein Strafverfahren wegen der Hinterziehung von Zöllen führt,
- einen anderen EU-Mitgliedstaat nicht um Unterstützung in

- einer strafrechtlichen Angelegenheit, sondern um Unterstützung in dem Verwaltungsverfahren in gleicher Sache ersucht,
- der ersuchte Mitgliedstaat die erforderlichen Feststellungen unter Anwendung der dortigen verwaltungsrechtlichen Vorschriften trifft (und dabei unter Umständen Personen zu Aussagen zwingt, zu denen diese Person im ersuchenden EU-Mitgliedstaat ein Aussageverweigerungsrecht aus strafverfahrensrechtlichen Gründen hätte<sup>1)</sup>),
- der ersuchte Mitgliedstaat die erbetenen Auskünfte nach verwaltungsrechtlichen Vorschriften erteilt und
- der ersuchende Mitgliedstaat sodann die erteilten Auskünfte für Zwecke der Strafverfolgung verwendet?

Zweitens kann die von den EU-Institutionen vorgebrachte *ratio* nicht nachvollzogen werden. Die Europäische Kommission hat in ihrer Begründung für die neue Bestimmung mitgeteilt, es herrsche zur Zeit eine Rechtsunsicherheit in Bezug auf die etwaige Verwendung von im Rahmen der gegenseitigen Amtshilfe eingeholten Informationen als Beweismittel in nationalen Strafverfahren.

Dagegen ist einzuwenden, dass die bestehenden Rechtsvorschriften eindeutig sind: wenn Auskünfte zum Zwecke der Strafverfolgung verwendet werden sollen, muss ein Rechtshilfeersuchen nach den geltenden Vorschriften gestellt werden, z.B. dem EU-Rechtshilfeübereinkommen von 2000 oder dem Neapel-II-Übereinkommen. Dass einzelne Stellen möglicherweise nicht mit der gebotenen Genauigkeit zwischen den unterschiedlichen Zweckbestimmungen unterscheiden, sollte nicht die Annahme einer „Rechtsunsicherheit“ und damit eine Änderung qua neuem Unionsrecht rechtfertigen.

Mit der Neuregelung wird drittens mit einem Federstrich auf den Rechtshilfeverkehr in Strafsachen für die Strafverfolgung von Zollvergehen verzichtet. Fraglich ist, ob dies so ohne weiteres möglich und sinnvoll ist. Denn eine konsequente Anwendung des neuen Artikels 12 VO (EG) Nr. 515/97 kann Rechtshilfeersuchen im Zollbereich schlichtweg entbehrlich machen. Die verwaltungsrechtlichen und strafrechtlichen Verfahren zur Behandlung von Unregelmäßigkeiten sind insofern weiter „verbessert“, als keine Rechtshilfevorschriften mehr anzuwenden sind. Es gibt dann nur noch die Amtshilfe nach der VO (EG) Nr. 515/97 für Zwecke der Verwaltungsverfahren und Zwecke der Strafverfolgung.

Viertens ist folgendes zu bedenken: Aus welchem Grund sollte ein Mitgliedstaat ein Ersuchen an andere Mitgliedstaaten um Informationen zur Förderung strafrechtlicher Ermittlungen auf administrative Rechtsvorschriften stützen, wenn doch im Zeitpunkt des Ersuchens feststeht, dass die erbetenen Informationen für Zwecke der Strafverfolgung verwendet werden sollen? Eine solche Verfahrensweise kann meines Erachtens nur den Zweck haben, die Information, dass die Auskünfte zum Zwecke der Strafverfolgung verwendet werden sollen, zurückzuhalten und den ersuchten EU-Mitgliedstaat über diese tatsächliche Zweckbestimmung im Unklaren zu lassen. Ein solches Verhalten ist jedoch wenig geeignet, eine vertrauensvolle Zusammenarbeit der EU-Mitgliedstaaten zu vertiefen.

Es bleibt ferner abzuwarten, ob die Strafgerichte in den Mitgliedstaaten Auskünfte und Unterlagen anderer EU-Mitgliedstaaten als zulässige Beweismittel in Strafverfahren anerkennen, wenn diese Beweise auf dem Wege der administrativen Zusammenarbeit erlangt wurden. Strafverfahren könnten „platzen“, wenn die zuständigen Strafgerichte Zweifel haben, dass die Beweismittel strafprozessual rechtmäßig erlangt wurden. In der Folge könnte eine Festsetzungsverjährung in dem fiskalischen Verwaltungsverfahren eingetreten sein.<sup>2</sup>

Durch die Neuregelung entstehen auch vielfältige Probleme zum Datenschutz. Welche EU-Datenschutzregelung gilt im Zeitpunkt der Datenerhebung für Zwecke der Strafverfolgung durch die ersuchte Verwaltungsbehörde (die diese tatsächliche Zweckbestimmung nicht kennt)? Ab wann gelten die EU-Datenschutzvorschriften für Strafverfahren?

Schließlich erscheint der neue Artikel 12 VO (EG) Nr. 515/97 im Detail unschlüssig. Insbesondere ist sein Verhältnis zu anderen Vorschriften der VO nicht abgestimmt. Nach Artikel 51 berührt diese Verordnung weder die Anwendung der strafprozessrechtlichen Vorschriften in den Mitgliedstaaten noch die Vorschriften über die Rechtshilfe in Strafsachen, einschließlich der Vorschriften über das Ermittlungsgeheimnis. Andererseits greift der neue Artikel massiv in das Verfahren

der Rechtshilfe ein, indem er zulässt, dass die im Verwaltungsverfahren erteilten Informationen als Beweismittel in Strafverfahren verwendet werden dürfen. Somit regelt Art. 12 im Ergebnis die Rechtshilfe, die die VO gem. Art. 51 aber ausdrücklich nicht regeln will.

#### V. Wie geht es weiter?

Es mag Mitgliedstaaten geben, denen die Anwendung der neuen Regelung unüberwindbare rechtliche Probleme bereitet. Diese Mitgliedstaaten können den Zusatz in Artikel 12 Buchstabe b) VO (EG) Nr. 515/97 anwenden, wonach die künftige Regelung in Bezug auf die (strafrechtlichen Gerichtsverfahren) nur dann Anwendung findet,

„... sofern die ersuchte Behörde bei der Übermittlung der Informationen nicht ausdrücklich etwas anderes bestimmt hat“.

Jeder Mitgliedstaat, der Informationen übermittelt, hat demzufolge das Recht, grundsätzlich oder im Einzelfall zu optieren, ob er die neue Regelung anwendet.<sup>3</sup> Jeder Mitgliedstaat kann also das Verbot aussprechen, die Informationen für Zweck der Strafverfolgung zu verwenden.

Es bleibt somit abzuwarten, wie die neue Regelung in der Praxis ab dem 1. September 2016 angewendet wird. Möglicherweise wird ein Mosaik von Erklärungen der EU-Mitgliedstaaten entstehen, die die anderen Mitgliedstaaten bei der Verwendung der erteilten Auskünfte (Beweise) beachten müssen. Dann wird sich auch herausstellen, ob die neue Regelung tatsächlich das propagierte Ziel erreicht, bestehende Rechtsunsicherheiten zu beseitigen und damit die Zusammenarbeit der Verwaltungsbehörden zu verbessern.

Dieser pragmatische Lösungsweg kann jedoch nur ein vordergründiger sein. Insbesondere für den Fall, dass die Kommission Artikel 12 Buchstabe b) VO (EG) Nr. 515/97 als Vorbild für künftige EU-Regelungen in anderen Verwaltungsbereichen heranziehen sollte, dürfte es erforderlich sein, die oben skizzierten grundsätzlichen Fragestellungen zu diskutieren.

#### Ulrich Schulz

Sachbearbeiter in der Zollabteilung des Bundesministeriums der Finanzen

1 Ferner stellt sich die Frage, ob der Person, von der die Auskünfte verlangt werden, der verwaltungsrechtliche oder der strafrechtliche Rechtsweg gegen das Auskunftsverlangen offen steht.

2 Siehe Endnote 3.

3 Es ist unklar, ob diese Bestimmung dem Mitgliedstaat, der die Informationen übermittelt, das Recht gibt, dem anderen Mitgliedstaat auch die Verwendung der Auskünfte in Strafverfahren, die erst nach der Übermittlung eingeleitet worden sind, zu untersagen. Ermöglicht der neue Artikel 12 Buchstabe b) VO (EG) Nr. 515/97, die Anwendung des Artikel 45 Absatz 3 einzuschränken, der eine Verwendung der Auskünfte in diesen Fällen ausdrücklich vorsieht?

# Vollstreckungshilfe zwischen Deutschland und Taiwan auf neuer Grundlage

Dr. Ralf Riegel / Dr. Franca Fülle \*

One of the main goals of imprisonment is to facilitate the reintegration of offenders into society. This is better achieved if offenders are sent to prison where they would like to settle upon release. Since German nationals are serving prison sentences in Taiwan and Taiwanese nationals are serving prison sentences in Germany, for a number of years both countries have been interested in reaching an agreement that permits the execution of custodial sentences in the other state. Because of Germany's One-China policy, the conclusion of a binding treaty under international law is not an option. Instead, transfers must be regulated in each country's domestic legislation. Taiwanese law additionally requires an agreement with the executing state, which is now contained in the arrangement between the German Institute Taipei and the Taipei Representative Office in Berlin on the Transfer of Sentenced Persons and Cooperation in the Enforcement of Penal Sentences, signed on 15 November 2013. German law permits transfers to Taiwan on the basis of Section 71 of the Act on International Legal Assistance in Criminal Matters (IRG); the enforcement of Taiwanese judgments can be taken pursuant to Sections 48 *et seqq.* of the same act. The agreement between Germany and Taiwan will place the transfer of sentenced persons for the execution of criminal sentences on a sound footing by means of coordinated transfer requirements, conditions, and consequences, thus facilitating international cooperation in the execution of criminal law judgments between the two countries.

Die Ziele der Strafvollstreckung sind vielfältig: Schuld soll vergolten, Spezial- und Generalprävention sollen erreicht werden. Wesentlich ist der Aspekt der Resozialisierung: Durch die Tatbegehung hat sich der Täter außerhalb der gesellschaftlichen Ordnung gestellt. Er soll wieder eingegliedert werden, um künftig straffrei leben zu können.<sup>1</sup> Resozialisierung ist ein therapeutischer Prozess, der voraussetzt, dass alle Beteiligten auf der Grundlage der gleichen Lebenswirklichkeit arbeiten, aber auch, dass sie die gleiche Sprache sprechen. Ziel ist die Eingliederung in die Gesellschaft, in der der Gefangene nach der Haftentlassung leben wird. Dieses Ziel ist oberste Prämisse der internationalen Vollstreckungshilfe in Strafsachen, wenn der Täter eine Freiheitsstrafe im Ausland verbüßen muss. Die Resozialisierung soll im Heimatstaat des Gefangenen durchgeführt werden, in diesen Staat soll er vom Urteilsstaat überstellt werden.

Die Überstellung setzt eine Vereinbarung zwischen Urteilsstaat und Vollstreckungsstaat voraus. Diese kann vorrangig<sup>2</sup> auf völkervertraglicher Grundlage, also bilateralen oder multilateralen Verträgen, beruhen, die den Rahmen für die Einzelfallvereinbarung setzen. Die Einzelfallvereinbarung wird regelmäßig jedenfalls konkludent durch Übersendung der Exequatursentscheidung und Überstellung des Gefangenen geschlossen. Fehlt es an einer völkervertraglichen Basis, kann das jeweilige nationale (Rechtshilfe-)Recht der beteiligten Staaten die Vollstreckungshilfe zulassen.

Deutschland hat beispielsweise einen Vollstreckungshilfevertrag mit Thailand geschlossen.<sup>3</sup> Der am 29. Juni 2015 unter-

zeichnete, aber noch nicht ratifizierte Vertrag mit der Republik Kosovo enthält eine vollstreckungshilferechtliche Regelung, die im Grundsatz die Regelungen des Überstellungsübereinkommens des Europarates (ÜberstÜbk) für anwendbar erklärt. Vertragsverhandlungen mit der Föderativen Republik Brasilien stehen vor dem Abschluss. Die meisten Überstellungen erfolgen auf der Grundlage des ÜberstÜbk, dem auch eine Vielzahl von Staaten außerhalb Europas beigetreten sind.<sup>4</sup> §§ 48 ff. und 71 IRG ermöglichen es, im Ausland verhängte Freiheitsstrafen in Deutschland und in Deutschland verhängte Freiheitsstrafen im Ausland zu vollstrecken. §§ 84 ff, 85 ff IRG enthalten Sonderregelungen für den Vollstreckungshilfeverkehr zwischen Mitgliedstaaten der Europäischen Union, die am 25. Juli 2015 in Kraft getreten sind. Insgesamt sind im Jahr 2013 69 Personen nach Deutschland und 167 Personen aus Deutschland zur weiteren Vollstreckung von Freiheitsstrafen überstellt worden.<sup>5</sup>

Da deutsche Staatsangehörige in Taiwan Haftstrafen verbüßen und umgekehrt und weil auf beiden Seiten die Einsicht besteht, dass die Resozialisierung – ein wesentlicher Strafzweck – dort gelingen muss, wo sich der Verurteilte nach der Haftentlassung aufhalten wird, bestand auf Seiten Deutschlands und Taiwans ein Interesse, eine Regelung zu finden, die eine Vollstreckung von Freiheitsstrafen im jeweils anderen Staat zulässt. Deutschland war der erste Staat, mit dem Taiwan 2009 Verhandlungen darüber aufgenommen hat. Eine gemeinsame Absprache haben das Deutsche Institut Taipeh und die Taipeh-Vertretung in Deutschland am 15. November 2013 unterzeichnet.

Ein völkerrechtlicher Vertrag im Sinn von § 1 Abs. 3 IRG konnte nicht geschlossen werden. Denn Deutschland hat Taiwan nicht als selbständiges Völkerrechtssubjekt anerkannt. Deutschland unterhält keine diplomatischen Beziehungen zu Taiwan. Die deutschen Interessen in Taiwan werden durch das Deutsche Institut Taipeh wahrgenommen. Taipeh wiederum unterhält Vertretungen in Berlin, Hamburg, München und Frankfurt. Taiwan, in Ostasien gelegen, besteht zu über 99 % aus der Insel Taiwan und den ihr vorgelagerten kleineren Inseln. Es ist die einzige Provinz der 1912 gegründeten Republik China, die sich noch unter vollständiger Kontrolle der Regierung dieser Republik befindet und zu keinem Zeitpunkt unter der Kontrolle der Volksrepublik China stand. Die Volksrepublik China betrachtet Taiwan einschließlich der von der Republik China ausgegliederten regierungsunmittelbaren Städte als eine Provinz ihres Staatsgebietes. Zwar war Taiwan Gründungsmitglied der Vereinten Nationen, musste jedoch 1971 ausscheiden. Mit Annahme der Resolution 2758 der Vereinten Nationen übernahm die Volksrepublik China deren Platz bei den Vereinten Nationen. Die von allen EU-Staaten praktizierte Ein-China-Politik führt dazu, dass der völkerrechtliche Status Taiwans seither unverändert ist. Taiwan ist allerdings seit 2002 unter der Bezeichnung „Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)“ Mitglied der Welthandelsorganisation WTO.

Mangels Völkerrechtssubjektivität Taiwans kann eine Überstellung zur weiteren Strafvollstreckung nur erfolgen, wenn das jeweilige nationale Recht dazu ausreichende Grundlagen bietet. Das war im Recht Taiwans zunächst nicht der Fall. Im Sommer 2013 wurde jedoch ein Gesetz verabschiedet, das eine Überstellung an Staaten, mit denen eine besondere Vereinbarung getroffen wurde, zulässt. Eine solche Vereinbarung stellt die jetzt getroffene Absprache mit Deutschland dar.

Auch nach deutschem Recht sind Überstellungen nach Taiwan und die Übernahme der Vollstreckung von Urteilen aus Taiwan möglich. §§ 48 und 71 IRG lassen die Übernahme und Abgabe der Vollstreckung allerdings nur an einen „ausländischen Staat“ zu. Legt man den Begriff nach seinem Wortlaut und der Systematik des Rechts internationaler Beziehungen aus, ist an die völkerrechtliche Definition anzuknüpfen: Voraussetzung für einen Staat sind nach der herrschenden „Drei-Elemente-Lehre“ von *Georg Jellinek* ein Staatsgebiet, ein Staatsvolk und eine Staatsgewalt.<sup>6</sup> Die Konvention von Montevideo fügt als weiteres Staatsmerkmal die Fähigkeit hinzu, in Beziehungen zu anderen Staaten zu treten.<sup>7</sup> Faktisch sind diese Elemente Taiwan betreffend vorhanden, rechtlich aber umstritten, weil die Volksrepublik China das Gebiet als zum eigenen Territorium gehörend ansieht. Allerdings hält die Volksrepublik China diese Sicht nicht konsequent durch: De facto werden Handelsbeziehungen mit Taiwan wie mit an-

deren Staaten geführt, auch strafrechtliche Zusammenarbeit ähnlich der Auslieferung, Vollstreckungshilfe und sonstigen Rechtshilfe ist möglich. Sinn und Zweck erlauben jedenfalls im Vollstreckungshilferecht des IRG ein weiteres Verständnis: Gerichte in Taiwan sprechen dort vollstreckbare Urteile aus. Für die verurteilten Personen und die Gesellschaft ist dann von Bedeutung, dass die Resozialisierung gelingt. Wenn also das Gericht unabhängig und das Verfahren nicht zu beanstanden ist, vgl. § 49 IRG, und von einem verlässlichen staatlichen Gebilde auszugehen ist, kommt es für den Zweck der strafrechtlichen Zusammenarbeit nicht auf den völkerrechtlichen Status des ausländischen Staates im Sinn von §§ 48, 71 IRG an.<sup>8</sup>

Weitere Herausforderungen stellen sich im deutschen Recht aufgrund der unterschiedlichen Rechtssysteme und Rechtspraxis in Taiwan und in Deutschland. Das Strafverfahrensrecht Taiwans ist so ausgestaltet, dass Verfahren vor unabhängigen Gerichten unter Wahrung der Verfahrensrechte der Angeklagten nach Art. 6 EMRK erfolgen.<sup>9</sup> Herausfordernd ist das andersartige Sanktionssystem in Taiwan, es stellt jedoch im Ergebnis kein Hindernis einer vollstreckungshilferechtlichen Zusammenarbeit dar.<sup>10</sup> In Taiwan wird die Todesstrafe verhängt und vollstreckt. Die Todesstrafe ist für über 50 Delikte angedroht und wird meist bei Kapitalverbrechen, Entführungen mit Todesfolge oder Rauschgiftdelikten ausgesprochen.<sup>10</sup> Die in Taiwan für bestimmte Straftaten angedrohten zeitigen Höchststrafen liegen im Vergleich oft erheblich höher als die in Deutschland drohenden Strafen. So ist für bestimmte Betäubungsmitteldelikte lebenslange Haft angedroht. Zum Zweck der weiteren Vollstreckung in Deutschland sind die Strafen auf das in Deutschland für vergleichbare Taten maximale Strafmaß zu kürzen, § 54 IRG. Der 2015 in Kraft getretene § 54a IRG ermöglicht es, auf Antrag der verurteilten Person, nach qualifizierter Belehrung und unter Hinzuziehung eines Rechtsbeistandes ausnahmsweise eine längere Vollstreckungsdauer zuzulassen. Praktische Anwendungsfälle dieser Norm gab es noch nicht. Bedeutung kann die Regelung gewinnen, weil die Haftbedingungen teilweise sehr hart sind<sup>11</sup> und verurteilte Personen daher eine Überstellung anstreben, auch wenn es zu einer in Deutschland vergleichsweise langen Vollstreckungsdauer kommen wird.

Die nebenstehend abgedruckte Absprache enthält in Art. III–VI ferner Regelungen, die die praktische Zusammenarbeit vereinfachen sollen. Dazu zählen die Bestimmung von Kontaktbehörden zur Verschlinkung des Geschäftsweges, die deklaratorische Zusammenstellung der Voraussetzungen einer Überstellung und der Hinweis auf das bei der Strafvollstreckung nach Überstellung anwendbare Recht.

Nachdem die Absprache den deutschen Bundesländern bekanntgemacht und durch das taiwanische Parlament gebilligt

## Die Absprache über die Überstellung verurteilter Personen im Wortlaut

Das Deutsche Institut Taipei und die Taipeh Vertretung in der Bundesrepublik Deutschland (kurz: die beiden „Seiten“)

haben den Wunsch, bei der Überstellung von verurteilten Personen und bei der Vollstreckung von Strafurteilen zusammenzuarbeiten, um die erfolgreiche Resozialisierung von verurteilten Personen in die Gesellschaft zu erleichtern, und

haben folgende Absprache getroffen:

### I. Zweck

Beide Seiten teilen die Auffassung, dass dieses Ziel erreicht werden kann, indem Ausländern, denen wegen der Begehung von Straftaten ihre Freiheit entzogen ist, Gelegenheit gegeben wird, die gegen sie verhängte Strafe in ihrer Heimat zu verbüßen.

Beide Seiten erklären daher ihre Bereitschaft, verurteilte Personen, die eine Überstellung wünschen, in Übereinstimmung mit den einschlägigen Gesetzen und sonstigen Vorschriften und im Einklang mit den Grundsätzen der Menschlichkeit, Sicherheit, Zügigkeit, Einfachheit und Gegenseitigkeit zu überstellen, indem sie hinsichtlich der Vollstreckung der gegen die verurteilten Personen verhängten Strafurteile in deren Heimat zusammenarbeiten.

### II. Begriffsbestimmungen

- (1) „Strafe“ bezeichnet eine von einem Gericht der überstellenden Seite verhängte lebenslange oder zeitlich begrenzte Freiheitsstrafe.
- (2) „Verurteilte Person“ bezeichnet eine Person, die aufgrund einer von einem Gericht der überstellenden Seite wegen der Begehung einer Straftat erlassenen Entscheidung in einer Vollzugsanstalt oder anderen Strafvollzugseinrichtung dieser Seite festzuhalten ist.
- (3) „Überstellende Seite“ bezeichnet die Seite, von der die Strafe verhängt wurde und von welcher die verurteilte Person überstellt werden kann oder überstellt worden ist.
- (4) „Übernehmende Seite“ bezeichnet die Seite, an die die verurteilte Person zur Verbüßung der Strafe überstellt werden kann oder überstellt worden ist.

### III. Kontaktbehörden

Die für die Durchführung dieser Absprache zuständigen Kontaktbehörden sind

- a) das Deutsche Institut Taipei;
- b) die Taipeh Vertretung in der Bundesrepublik Deutschland.

### IV. Anwendung

- (1) Die Überstellung von verurteilten Personen und die Zusammenarbeit bei der Vollstreckung von Strafurteilen unterliegen den folgenden Voraussetzungen:
  - a) die verurteilte Person ist Inhaber eines Reisepasses der übernehmenden Seite;
  - b) die Entscheidung ist rechtskräftig und auf der überstellenden Seite ist wegen dieser oder einer anderen Straftat kein anderes Gerichtsverfahren anhängig;
  - c) sowohl die überstellende und die übernehmende Seite als auch die verurteilte Person oder eine Person, die für diese zu handeln berechtigt ist, stimmen der Überstellung zu;
  - d) die Handlungen oder Unterlassungen, derentwegen die Strafe verhängt worden ist, erfüllt nach dem Recht der übernehmenden Seite die wesentlichen Tatbestandsmerkmale einer Straftat oder würden sie erfüllen, wenn sie im Anwendungsbereich der Gesetze der übernehmenden Seite begangen worden wären.
- (2) Das den Gesetzen beider Seiten und dieser Absprache entsprechende

Überstellungsersuchen kann von jeder Seite schriftlich in deutscher oder chinesischer Sprache mit einer Übersetzung in die jeweils andere Sprache gestellt werden. In dem Ersuchen soll Folgendes enthalten sein:

- a) eine Darstellung des Sachverhalts, welcher der Strafe zugrunde liegt;
  - b) der Zeitpunkt, zu dem die Strafe verbüßt sein wird, derjenige Teil der Strafe, den die verurteilte Person bereits verbüßt hat, sowie etwaige Zeiten, die wegen guter Führung, Untersuchungshaft oder aus sonstigen Gründen auf die Strafe anzurechnen sind;
  - c) eine beglaubigte Abschrift aller die verurteilte Person betreffenden Entscheidungen sowie der angewendeten Gesetze.
- (3) Die überstellende Seite soll der übernehmenden Seite Gelegenheit geben, sich vor der Überstellung durch einen von der übernehmenden Seite bezeichneten Beamten zu vergewissern, dass die erforderliche Zustimmung der verurteilten Person oder einer Person, die für diese zu handeln berechtigt ist, zu der Überstellung freiwillig und im vollen Bewusstsein der rechtlichen Folgen gegeben wurde.

### V. Strafvollstreckung

- (1) Beide Seiten erklären ihre Bereitschaft, die zuständigen Behörden dazu aufzufordern, alle erforderlichen Maßnahmen zu ergreifen, sofern beide Seiten der Überstellung von verurteilten Personen beziehungsweise der Zusammenarbeit bei der Vollstreckung von Strafurteilen zustimmen.
- (2) Die Fortsetzung der Vollstreckung der Strafe nach der Überstellung soll sich nach den Gesetzen und Verfahren der übernehmenden Seite richten.
- (3) Die Strafe darf von der übernehmenden Seite nicht über die im Urteil des Gerichts der überstellenden Seite festgesetzte Dauer hinaus vollstreckt werden. Die verhängte Strafe kann nicht in die Todesstrafe umgewandelt werden, und Strafen, die auf der Todesstrafe beruhen, können nicht vollstreckt werden.
- (4) Die übernehmende Seite soll die überstellende Seite unterrichten, wenn die verurteilte Person nach Verbüßung der Strafe entlassen wird oder wenn diese bedingt entlassen wird.

### VI. Fortbestand der rechtlichen Zuständigkeit

- (1) Sofern Strafen nach den Gesetzen der übernehmenden Seite und nach dieser Abmachung vollstreckt werden, ist davon auszugehen, dass nur die überstellende Seite eine Überprüfung oder Aufhebung der Entscheidungen ihrer Gerichte und eine Überprüfung der von ihnen verhängten Strafen vorschlagen kann.
- (2) Eine Begnadigung der verurteilten Person durch die übernehmende Seite soll nur mit Zustimmung der überstellenden Seite gewährt werden.

### VII. Schlussbestimmungen

- (1) Beide Seiten teilen die Auffassung, dass alle bei der Überstellung einer verurteilten Person oder bei der Vollstreckung einer Strafe nach der Überstellung entstehenden Kosten von der übernehmenden Seite getragen werden sollen.
- (2) Diese Absprache kann auf die Vollstreckung von Strafen, die vor oder nach ihrem Wirksamwerden verhängt worden sind, Anwendung finden.
- (3) Beide Seiten werden die nach dieser Absprache vorgesehene Zusammenarbeit am dreißigsten Tage beginnen, nachdem beide Seiten einander schriftlich informiert haben, dass sie bereit sind, diese Zusammenarbeit aufzunehmen.

Diese Absprache wird in zweifacher Ausfertigung, jeweils in deutscher, chinesischer und englischer Sprache unterzeichnet, wobei jeder Wortlaut verbindlich ist.

Bei unterschiedlicher Auslegung des deutschen und des chinesischen Wortlauts kann der englische Wortlaut als Auslegungshilfe dienen.

wurde, hat die konkrete Zusammenarbeit in Überstellungsfällen 2014 begonnen. Deutsche Staatsbürger, die sich zur Verbüßung von Haftstrafen in Gefängnissen in Taiwan befinden, können den Justizbehörden in Taiwan den Wunsch mitteilen, nach Deutschland überstellt zu werden. Die taiwanischen Justizbehörden prüfen dann, ob eine Überstellung in Betracht kommen kann und leiten in diesem Fall die Erklärung des Gefangenen, das zu vollstreckende Urteil und weitere erforderliche Unterlagen über die Vertretung Taipehs in Deutschland weiter an das Auswärtige Amt, welches die Unterlagen über das Bundesamt für Justiz an die jeweiligen Landesjustizverwaltungen übersendet. In einem Fall ist 2015 bereits eine Überstellung nach Deutschland erfolgt, weitere Fälle sind anhängig. Die Absprache gilt jedoch nur für Gefangene in Taiwan, welche die deutsche Staatsangehörigkeit besitzen. Eine Ausweitung der Überstellungsmöglichkeit auf Personen, die ihren gewöhnlichen Aufenthalt in Deutschland hatten, ohne deutsche Staatsangehörige zu sein, sehen weder das deutsche noch das taiwanische Recht vor.

Auch in der Bundesrepublik Deutschland befinden sich rechtskräftig verurteilte Personen im Strafvollzug, die aus Taiwan stammen. Diese Gefangenen können gleichfalls den Wunsch nach Überstellung äußern. Einem förmlichen Ersuchen um Vollstreckungsübernahme sind nach dem Recht Taiwans Kopien von Pass oder Geburtsurkunde, das zu vollstreckende

Gerichtsurteil und eine Auflistung von Familienmitgliedern beizufügen. Die Reststrafe muss mehr als 1 Jahr betragen, weitere, neue Straftaten oder Strafverfahren dürfen nicht vorliegen. Der Staat, aus dem der Gefangene überstellt werden soll, muss eine Gegenseitigkeitszusage abgeben. Eine Überstellung gegen den Willen der gefangenen Person ist nicht zulässig. Über die Haftbedingungen in Taiwan werden Verurteilte in Deutschland qualifiziert zu belehren sein, bevor sie zur Zustimmung zu ihrer Überstellung befragt werden.

Die Überstellung verurteilter Personen zur Verbüßung der gegen sie verhängten Strafe wird durch die neue Absprache insgesamt erleichtert und auf eine einheitliche und abgestimmte Grundlage gestellt, was die Überstellungsvoraussetzungen, -bedingungen und -folgen betrifft.

Auf der Grundlage der Absprache gab es bislang einen ersten erfolgreichen Überstellungsfall. Drei weitere werden derzeit geprüft; die in Taiwan verhängten Strafen sind länger als die in Deutschland wegen der Tat möglichen Freiheitsstrafen.

Beide Seiten sind davon überzeugt, mit der Absprache eine gute Grundlage für die Intensivierung der vollstreckungshilferrechtlichen Zusammenarbeit gefunden zu haben. Entscheidend wird aber sein, ob diese Erwartungen in der Praxis erfüllt werden.



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\* Die Ausführungen stellen die persönliche Auffassung der Autoren dar.  
 1 Vgl. zum Beispiel Regel 4 der am 08. Oktober 2015 verabschiedeten United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules).  
 2 Vgl. § 1 Abs. 3 IRG.  
 3 BGBl. 1995 II 1011; 1996 II 1220.  
 4 Unter anderem Australien, Kanada, Israel, Japan, USA und viele mittel- und südamerikanische Staaten, vgl. die Übersicht unter <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=112&CM=7&DF=29/01/2014&CL=GER>.  
 5 Auslieferungsstatistik BAnz vom 25.02.2015.  
 6 Georg Jellinek, „Allgemeine Staatslehre“, 3. Auflage, 1914, S. 396 ff.  
 7 Konvention von Montevideo über die Rechte und Pflichten der Staaten von 1933 (LNTS No. 165, S. 19)  
 8 Ähnlich für die Auslieferung aus dem Vereinigten Königreich an Taiwan High Court of Judiciary, Appeal Court vom 24. Juni 2015, (2015) HCJAC (52).  
 9 High Court of Judiciary Appeal Court, a.a.O.  
 10 Vgl. Bardenhagen in FAZ vom 06.06.2014, <http://www.faz.net/aktuell/politik/ausland/asien/todesstrafe-warum-asiens-vorzeigestaaten-menschen-toeten-12984217.html>; <https://www.amnesty.de/jahresbericht/2015/taiwan>.  
 11 Vgl. zum Beispiel den Bericht von drei Rechtsanwälten, die Gefangene in Taiwan besucht haben, unter: <http://www.stcoll.de/Rechtsgebiete/Strafrecht/Internationales-Strafrecht/Reisebericht-Taiwan/index.html>;

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