

# eucrim

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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



**Focus: Protection of Financial Interests of the European Union**

**Dossier particulier: Protection des intérêts financiers de l'Union européenne**

**Schwerpunktthema: Schutz der finanziellen Interessen der Europäischen Union**

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The Use of Inside Information

*Anna Blachnio-Parzych, Ph.D.*

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

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### 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.

# Guest Editorial

Dear Readers,

EU money must not be pocketed by criminals. We have a federal budget – with money coming from the 28 EU Member States – and, as a consequence, we also need federal laws to protect this budget.

This is why the European Commission proposed a Directive on the protection of the EU's financial interests in July 2012. The new EU-wide rules aim to achieve two objectives: First, to introduce common definitions of fraud throughout the EU, making sure that fraud against the EU budget is considered a crime everywhere in the EU. Second, to set a minimum level of sanctions for fraud against the EU budget, including imprisonment, in order to deter fraudsters. We are also creating a level playing field for periods within which it is possible to investigate and prosecute offences – the so-called statutes of limitation.

With the creation of the European Public Prosecutor's Office, we are delivering on a commitment. A commitment that we first made at our hearing before the Parliament in January 2010: to make full use of the Treaty of Lisbon to fight fraud against the EU budget and to uphold the rule of law across the Union.

Member States report an average of about €500 million in suspected fraud each year. But the real amount with regard to fraud is likely to be significantly higher. Member States' response to fraud is inconsistent because of divergent rules, lack of resources, and the difficulty of gathering evidence in cross-border cases. As a result, the conviction rate for fraud offences against EU resources varies greatly across Member States, with an EU average of just 42.3%.

We know that our proposal of establishing a European Public Prosecutor's Office is ambitious. But we need to be ambitious to ensure effective and uniform protection of the EU budget across the EU. At the same time, we are determined to set up an office that is fully embedded in national systems, relying to a large extent on national structures and national law. Independence, accountability, and decentralisation are the keywords.



Viviane Reding



Algirdas Šemeta

We opted for a solution that is respectful of the justice systems and legal traditions of the Member States without compromising on our aim to better protect the Union's financial interests. The groundwork (gathering evidence, prosecuting, bringing to court) will be carried out by so-called "European delegated prosecutors" who are fully integrated into the national justice systems. They will wear a "double hat:" they will be national prosecutors and part of the European Public Prosecutor's Office. They will use national staff, apply national rules, and address national courts.

The European Public Prosecutor's Office will go hand in hand with a comprehensive set of procedural safeguards. These rules offer an additional layer of protection compared to national law so that suspects can benefit directly from protection at the Union level.

Negotiations on the proposal started under the Lithuanian Presidency and will continue under the Greek Presidency in the Council. We were pleased to note that a vast majority of Member States agreed to the need for a European Public Prosecutor's Office at the Justice Council in October. We are also

receiving strong encouraging signals from the European Parliament; the October plenary clearly endorsed the project.

Finally, national parliaments have also contributed and made use of their possibilities under the Treaty to contribute reasoned opinions on the compatibility of the EPPO with the principle of subsidiarity. Having carefully analysed these reasoned opinions, the Commission has decided to maintain the proposal, in line with Article 7(2) of Protocol No 2 to the Treaties, as we are confident that it complies with the subsidiarity principle. Of course, the opinions of the national parliaments will be taken into account in the ongoing legislative process.

With the proposal for the establishment of a European Prosecutor's Office that will show zero tolerance towards fraud

against the EU budget, the European Commission is delivering on its promise. We now call on Member States and the European Parliament to rally behind this important project so that the European Public Prosecutor's Office can assume its function as of 1 January 2015.

*Viviane Reding*

Vice-President of the European Commission,  
EU Commissioner responsible for Justice, Fundamental Rights and Citizenship

*Algirdas Šemeta*

EU Commissioner responsible for Taxation and Customs Union, Audit and Anti-Fraud



## European Union\*

Reported by Dr. Els De Busser (EDB), Cornelia Riehle (CR), and Mika Kremer (MK)

### Foundations

#### The Stockholm Programme

##### Discussion Papers on the Successor to the Stockholm Programme

On 21-22 November 2013, the Commission hosted a conference in Brussels entitled “Assises de la Justice” to discuss and shape the future of EU justice policy. Before the conference, the Commission published five papers to initiate debate on EU civil law, EU criminal law, EU administrative law and national administrations, the rule of law, and fundamental rights. These papers were in preparation for the debate at the Assises de la Justice event, their purpose being to reflect on the justice policy of the EU.

The discussion paper on EU criminal law lists the main achievements and the challenges that lie ahead. The latter are:

- Ensuring fundamental rights to strengthen mutual trust;
- Ensuring the effectiveness of EU criminal law;
- Ensuring that EU criminal law policy is linked to the developments in crime;
- Accompanying other EU policies.

Citizens were invited to feed the debate by submitting written contributions or participating in the conference.

Commissioner for Justice Viviane Reding concluded the event by focusing on the vision for EU justice policy by 2020. This vision is founded on a European area of justice at the service of citizens that is built on mutual trust as well as on growth. She envisions one voice representing Europe at the global level as a key element for the future, especially regarding the “external relations of justice policies” once the transitional phase of the Lisbon Treaty ends in 2014. (EDB)

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### Schengen

#### Schengen Governance Package Adopted

On 7 October 2013, the Council adopted the so-called Schengen Governance Package that had been proposed in 2011 (see eucrim 2/2013, pp. 34-35). The package consists of a regulation on establishing an evaluation and monitoring mechanism to verify the application of

the Schengen acquis and an amendment to the Schengen Borders Code (Regulation (EC) No. 562/2006) regarding the rules for the temporary reintroduction of border controls at internal borders in exceptional circumstances.

Both regulations are binding in their entirety and directly applicable in the Member States. They entered into force on 26 November 2013. (EDB)

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### Enlargement

#### Enlargement Package 2013

On 16 October 2013, the Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, presented the so-called Enlargement Package. This set of documents consists of the progress reports on the achievements made by the candidate and potential candidate countries in 2013 as well as the Commission’s enlargement strategy and main challenges for 2013-2014.

The accession process today is more comprehensive than in the past and reflects the evolution of EU policies as well as lessons learned from previous enlargements. With the rule of law at the heart of the enlargement process, countries need to focus on improvements in their justice systems and their fight against specific types of crime earlier in the accession process. The need for stronger economic governance and for reinforcing democratic institutions has been highlighted by recent events in many countries.

\* If not stated otherwise, the news reported in the following sections cover the period September – December 2013.

Moreover, regional cooperation and good neighbourly relations are essential elements of the stabilisation and association process. Bilateral disputes should not delay this process.

In 2014, the Commission will launch the second Instrument for Pre-Accession Assistance, covering the period to 2020. This instrument means that the EU provides substantial support to the enlargement countries in their preparations for accession.

For Montenegro, reforming public administration is key to implementing the EU *acquis*, to tackle politicisation, and to increase transparency and the professionalism of the civil service. Adequate follow-up to the work of the parliamentary group on the electoral process is also needed.

Accession negotiations with Serbia were opened in June 2013, and the Stabilisation and Association Agreement entered into force in September 2013. Once the negotiation framework has been adopted, the first intergovernmental conference on Serbia's accession can be organised for January 2014.

The Former Yugoslav Republic of Macedonia has already reached a rela-

tively high level of alignment at this stage of the accession process. For 2014, the country should focus on the effective implementation and enforcement of existing legal and policy frameworks; the rule of law, including the independence of the judiciary; and further progress in the fight against corruption and organised crime. The Commission has already recommended the opening of accession negotiations five times. The Council, however, has so far not taken a decision.

Albania has implemented key judicial, public administration, and parliamentary reform measures with cross-party consensus and has taken initial steps towards improving the efficiency of investigations and prosecutions as well as strengthening the cooperation between law enforcement bodies. In money laundering and corruption cases, the number of convictions has increased. In addition, trafficking in human beings and in drugs is being increasingly investigated.

Bosnia and Herzegovina urgently need to address the Sejdić/Finci judgement of the ECtHR (see *eucri* 3/2013, p. 76), which is not only essential for the country to move closer to EU accession but also for the legitimacy and cred-

ibility of the Presidency and the House of Peoples of Bosnia and Herzegovina, which are to be elected in 2014. The Commission decided to postpone further discussions on the second Instrument for Pre-Accession Assistance until Bosnia and Herzegovina is back on track in the integration process. Further, the Commission called on Bosnia and Herzegovina to revise its position on adapting the Interim Agreement/Stabilisation and Association Agreement and take into account its traditional trade with Croatia.

The start of the negotiations for a Stabilisation and Association Agreement on 28 October 2013 represented the start of a significant new phase in EU-Kosovo relations. The progress report for Kosovo concludes that the implementation of the legal framework, particularly in the areas of trade, competition, and the internal market, should be focused on. Kosovo also should enhance its efforts in the fight against the illegal trade and slaughter of animals.

In the talks with Turkey, a new chapter was opened on 22 October 2013. With the accession negotiations spread over 35 policy fields or chapters, the opening of chapter 22 on regional policy and the coordination of structural instruments signifies a next step in Turkey's accession process, together with the tenth meeting of the Accession Conference with Turkey at the ministerial level (held on 5 November in Brussels). (EDB)

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### Common abbreviations

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

## Institutions

### Commission

#### Work Programme for 2014

On 22 October 2013, the Commission presented its work programme for 2014 that is focused on results. With the key words being delivery and implementation, the focus will be on finalising the banking union, the single market, and the digital agenda as well as new meas-

ures to combat youth unemployment.

President Barroso said that the Commission will actively help the EP and the Council to complete work on all the important proposals that are still pending. Among the priority areas related to the field of criminal matters are the fight against money laundering, network and information security, the data protection reform, and the establishment of the EPPO. (EDB)

➤eucrim ID=1304005

## OLAF

### New Cooperation Agreement with Italian Corte dei Conti

On 25 September 2013, OLAF signed a new cooperation agreement with the General Prosecutor of the Italian Corte dei Conti. The Corte dei Conti, the Italian Court of Auditors, has been cooperating with OLAF since an agreement was concluded in 2006. The new text replaces the existing agreement and provides an enhanced exchange of information and data, mutual assistance during investigations, and the sharing of strategic analysis. Staff training activities are also included.

Since the Italian Supreme Court recently recognised the jurisdiction of the Corte dei Conti in Italian cases involving direct EU expenditure, the agreement is considered a significant tool in the fight against EU fraud. (EDB)

➤eucrim ID=1304006

### OLAF and Guardia di Finanza Discover €9 Million Fraud Scheme

On 19 November 2013, OLAF announced that the Italian Guardia di Finanza, in cooperation with OLAF, had discovered a company responsible for a €9 million fraud against the EU budget.

The operation by the Italian authorities called “Rain in the Desert” was inspired by two OLAF investigations carried out in 2010 and 2011. These investigations led to an Italian company based in Rome that received funds from

the European Development Fund intended for infrastructure development projects in several African countries. Fictitious partnerships and replacing qualified experts with less qualified persons were among the methods used to win tenders and obtain EU funding. OLAF recommended that administrative financial penalties be imposed on the company involved besides contractual damages.

The Judge for Preliminary Investigations of Rome ordered the seizure of the company’s buildings, as well as the freezing of assets and current accounts. Judicial proceedings are currently ongoing. (EDB)

➤eucrim ID=1304007

### Ombudsman Recommends OLAF to Explain Closing of Investigation to Whistle-Blower

On 25 November 2013, the European Ombudsman made a case public in which a whistle-blower reported irregularities at an EU agency to OLAF but was not informed of the reasons why OLAF closed the case after investigating it.

According to the European Ombudsman, “All EU institutions should encourage and support people who help them to identify and tackle problems that could weaken citizens’ trust in the EU. OLAF’s position in this case is discouraging for whistle-blowers.” In reaction, OLAF stated that the decision to close the case in 2009 was based on the legal framework and the relevant case law applicable at the time, notably regarding the protection of the confidentiality of OLAF investigations. For OLAF’s relations with whistle-blowers the new Regulation that entered into force on 1 October 2013 is applicable as well as the Commission Communication on whistle-blowing guidelines of December 2012.

OLAF announced that it would carefully examine the recommendation and reply to the Ombudsman as requested by 15 February 2014. (EDB)

➤eucrim ID=1304008

## Agency for Fundamental Rights (FRA)

### Report on Fundamental Rights in the EU

In the context of the EP’s LIBE Committee report on the situation of fundamental rights in the EU, the FRA participated in a hearing before MEPs on 5 November 2013. The FRA Director stressed the topic of hate crime as “an early indicator of society’s failure to respect fundamental rights values.”

The draft report, written by rapporteur Louis Michel, was presented on 18 September 2013. A plenary sitting is planned for February 2014. (EDB)

➤eucrim ID=1304009

### FRA Opinion on the Framework Decision on Racism and Xenophobia

Following a request of the Council’s Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons (FREMP) on 22 October 2013, the FRA presented an opinion on the 2008 Framework Decision on Racism and Xenophobia. The opinion focuses on the impact of this Framework Decision on the rights of the victims of crimes motivated by hatred and prejudice, including racism and xenophobia. It draws on the FRA’s work on hate crime and illustrates how hate crime can vary – from acts by individuals in everyday settings, whether on the street or on the Internet, to large-scale criminal acts by extremist organisations or totalitarian regimes.

Recommendations formulated by the FRA include raising awareness, improving data collection, and enhancing penalties and judicial review. (EDB)

➤eucrim ID=1304010

## European Court of Justice (ECJ)

### General Court Strengthens Transparency and Access to Documents

On 12 February 2013, the General Court ruled in Case T-331/11 Beselink v. Council. Regulation (EC) No. 1049/2001 of the EP and the Council of

30 May 2001 state that, subject to certain exceptions, any citizen of the EU has the right of access to documents of the institutions. Relying on this regulation, the Dutch professor for constitutional law, Leonard Besselink, claimed access to a draft decision of the Council of the EU authorizing the Commission to negotiate accession of the EU to the ECHR, which included the Commission's negotiating directives. This set of negotiation directives are included in the annex to document 9689/10.

The Council granted access only to a partly declassified version, arguing that its disclosure would undermine protection of the public interest in the field of international relations, as it would reveal the EU's strategic objectives and weaken its negotiating position. It also argued that future international negotiations of the EU could be endangered.

The General Court held that the Council made a manifest error of assessment in refusing access to Negotiating Directive No. 5, relating to additional protocols to the ECHR, as had already been communicated to the negotiating partners. With regard to the other negotiating directives included in the annex to document 9689/10, the Court considered that the Council was entitled to take into account that disclosure of the detailed contents thereof could undermine the public interest as regards international relations. Still, it was obliged to limit its refusal solely to the information covered by the exception on which it relied.

With this judgment, the Court has underlined the importance of the principle of transparency in administration by restricting the possibility to deny access. (MK)

►eucrim ID=1304011

## Europol

### Discussion Paper on Europol's Agreements with Third Countries

On 17 September 2013, the Lithuanian Presidency published a discussion paper on the procedure envisaged under the

proposal for a new Europol Regulation (see eucrim 2/2013, pp. 36-37). The paper outlines the current procedure and gives an overview of the existing operational and strategic agreements that Europol has concluded with third countries.

Under Arts. 23 and 26 of the current Europol Decision, the Council determines, after consulting the European Parliament, the list of third states and organisations with which Europol shall conclude agreements. Then, the Director of Europol negotiates the agreement with the third country or organisation. For operational agreements relating to the exchange of personal data, the Director proceeds only after Europol's Management Board has agreed. This decision depends on whether the Board sees an adequate level of data protection ensured by that third party. In the end, the Director submits the draft agreement to the Management Board for endorsement, after which it is submitted to the Council for approval. Once approved, the agreement can be signed by the Director and the third party. This procedure turned out to be very lengthy, currently taking an average of 14 months for strategic agreements and approx. 3 years for operational agreements.

Under the proposed new regulation, no cooperation agreements or working arrangements would be needed for the exchange of non-personal data with law enforcement authorities of third countries (Art. 29(2)). Remarkably, the draft regulation includes no further details as to how this would be achieved in practice.

For the exchange of personal data, Art. 31 of the proposed regulation specifies that this could be carried out only on the basis of an adequacy decision by the Commission or by means of an international agreement concluded between the EU and the third country pursuant to Art. 218 TFEU. As set out in Art. 218(6) TFEU and depending on the type of international agreement, the Council would adopt the decision concluding the agreement after obtaining the consent of the European Parliament or after

consulting it. According to Art. 218(10), the European Parliament is immediately and fully informed at all stages of the procedure. Art. 53 of the draft regulation also specifies that Europol shall transmit – for information purposes – to the European Parliament and to the national parliaments the working arrangements adopted pursuant to Art. 31(1) relating to the transfer of personal data to third countries as mentioned above, taking into account the obligations of discretion and confidentiality.

Concerns regarding this new procedure include the questions of whether the proposed regulation would allow for the same level of cooperation with third countries as foreseen in Europol's current cooperation agreements and whether Member States would, to the same degree, be involved in the decision on the need for cooperation with a certain third country.

Hence, the discussion paper asks delegations to outline the operational needs for cooperation between Europol and third countries, to describe what kind of control the Council (or the Commission) should have in this regard, and to consider whether the procedure envisaged under Art. 218 on concluding international agreements would affect the possibilities for operational activities by Europol in relation to third countries. (CR)

►eucrim ID=1304012

### First Europol-Interpol Cybercrime Conference

From 24-25 September 2013, Europol and Interpol held their first joint Cybercrime Conference at Europol headquarters in The Hague. The conference aimed at enhancing international cooperation to tackle existing and future challenges in policing cyberspace. It was attended by representatives of law enforcement authorities but also by cyber professionals from NGOs, private industry, and academia. Participants came from 42 countries, representing over 80 different organisations. The conference examined opportunities for improving coop-



eration between police cyber departments around the world. Presentations included case studies about different types of cybercrime, legislation, training and capacity building, as well as coordination initiatives. It also dealt with the “2020 Project,” a project to inform citizens and businesses about future cybercrime developments and to trigger discussions on how we share our information and with whom.

At the end of the conference, the following conclusions were agreed upon:

- To meet regularly and work in a different way, through a combination of key factors, e.g., prevention, (joint) investigations/prosecution, capacity building, disruption, and regulation.
- To build inclusive partnerships incorporating cross-border police cooperation, international partners/agencies, the private sector, NGOs, and the scientific community.
- To establish a global cyber community consisting of a single virtual environment for all experts, using EC3 SPACE and I-SPACE, interconnected with interoperable services.
- To foster privacy over anonymity, which will entail an adequate level of registration, end-user traceability, access only under strict conditions, and robust compliance supervision.
- To align priorities between partners, to include the sharing/combining of threat assessments, to identify joint priorities and the orchestration of joint actions.
- To invest in advanced technology to handle large quantities of data, to compensate for the lack of human resources, and to investigate and disrupt cybercrime more effectively. This would also minimise the duplication of efforts and maximise complementarity between the partners involved.

The annual Europol-Interpol Cybercrime Conference is an innovative joint initiative to be held alternately in The Hague and in Singapore, where the new Interpol Global Complex for Innovation (IGCI) is currently being built. (CR)

►eucrim ID=1304013

### Opinions of the Joint Supervisory Body

In June 2013, the Joint Supervisory Body of Europol (JSB) published its opinion on the proposed Europol Regulation. In this first assessment, the JSB concludes that the new regulation results in a much weaker data protection regime as it lacks specific provisions on data processing and responsibilities in relation to each task and each data processing facility. Regarding supervision, the JSB does not support the envisaged idea of the European Data Protection Supervisor (EDPS) being solely responsible for the supervision of Europol but pleads instead for the creation of an independent and effective joint supervision structure, with equal participation of each national Data Protection Authority (DPA) and the EDPS.

Regarding Europol’s new role and responsibilities that foresee a coordinating role in investigations, the JSB regrets that the new regulation does not provide for rules on how the different responsibilities involved in such coordinated actions are to be distributed between Europol and the participating Member States.

Looking at Europol’s mandate, the JSB observes that, on the one hand, the draft regulation extends Europol’s competences to crimes which affect a common interest covered by a Union policy. On the other hand, the list of crimes referred to in Art. 3(1) of the regulation includes some crimes that are difficult to relate to a Union policy (e.g., murder, grievous bodily injury).

The JSB also wonders why the Commission decided to depart from the definition of serious crime that has been practice for the last decade in order to introduce the criterion “forms of crime which affect a common interest covered by a Union policy” instead.

Another criticism refers to some of Europol’s tasks regarding its service-provider role and the exchange of information with Member States and third parties that seem to have no legal basis in the draft regulation.

On 9 October 2013, the JSB published its second opinion, focusing on the consequences of the proposed regulation on Europol’s operational activities and on data protection. The second assessment confirms in detail the conclusion of the first opinion underlining the weakened level of data protection presented in the draft regulation. (CR)

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### 2013 European Police Chiefs Convention

The annual European Police Chiefs Convention (EPCC) took place in The Hague from 11-12 September 2013. The event was organized by Europol and the Lithuanian Police.

Following the preparatory work of four expert working groups in 2013, participants discussed the experts’ findings on the following core issues in policing:

- The influence of scientific research and the industry on the development of the implementation of modern technology in the field of ensuring safety;
- The benefit of international cooperation, peculiarities of the implementation of witness protection, and informant handling;
- Police leadership;
- Data protection.

The convention attracted high-level representatives from 36 European countries as well as from Australia, Colombia, Israel, the Russian Federation, Turkey, Ukraine, and the USA. Representatives from Interpol and EU institutions, including the European Parliament, also attended. (CR)

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### EU Operation against Vehicle Crime

From 10-13 September 2013, Europol hosted vehicle crime experts from 15 EU countries in order to target vehicle crime in the European Union and Switzerland. Interpol was also present during the operation and offered access to its international databases and worldwide law enforcement network.

Operation “LitCar” was supported

by Europol's coordination centre, where intelligence was exchanged with police, customs, and border guards in their efforts to track down specialist criminal gangs stealing high-value vehicles.

The operation resulted in the recovery of a high number of stolen vehicles and parts as well as the arrests of suspects connected to organised vehicle crime. Furthermore, the operation helped identify new trends, modus operandi, and potential trafficking routes. (CR)

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### Intercontinental Network of Card Fraudsters Dismantled

At the end of October 2013, Canadian, French, and German police authorities, supported by Europol's European Cybercrime Centre (EC3) were able to dismantle a major intercontinental network of card fraudsters. The international criminal group was involved in the manipulation of point-of-sale (POS) terminals in shopping centres across Europe and North America. The network is alleged to have orchestrated fraud with a potential loss of €9 million outside Canada. Criminals were able to compromise card data from at least 30,000 debit cards. By tampering with POS terminals, customers' bank data were intercepted without their knowledge. The data was then transferred through Quebec to be decrypted and rerouted abroad where counterfeit cards were made to exploit the stolen data connected to individual customer bank accounts.

Operation "Spyglass" was initiated in Canada in August 2012. It has so far resulted in the arrest of 29 people in Canada, Germany, and France. (CR)

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### Large-Scale Document Forgery Dismantled

During a joint action at the end of October 2013 between law enforcement authorities from Germany, the Czech Republic, Greece, and Europol, Greek law enforcement authorities raided the potentially biggest illicit document print-

shop ever found in Greece and seized over 1100 altered or falsified passports, 800 ID cards, 100 driving licences, 65 residence permits, and 50,000 holograms, stamps, foils and other equipment used in document forgery. During further house searches in the Czech Republic and Greece, a number of mobile phones, SIM cards, cameras, computers, hard disks, additional forged documents, a large amount of photos, and supporting documents were seized.

The organised criminal group (OCG) had been cooperating with a network of pickpockets, stealing passports and ID cards from tourists in the EU. The stolen documents were then sent to Greece to be altered in printshops operated by the OCG. In some cases, completely falsified documents were produced. The illicit documents were then provided to irregular migrants, mainly from Syria and Afghanistan, in order to enable their travel from Greece to Germany and other EU Member States or to legalise their stays. It is estimated that the overall profit of the OCG for this illegal business was more than €3,000,000. (CR)

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## Eurojust

### Vice-President Elected

On 29 October 2010, the Eurojust National Member for Spain, Mr. Francisco Jiménez-Villarejo, was elected Vice-President of Eurojust for a three-year term. He replaces Mr. Raivo Sepp, National Member for Estonia. Mr. Jiménez-Villarejo was appointed National Member for Spain in December 2012 (see [eucrim 1/2013](#), p. 5). (CR)

► [eucrim ID=1304019](#)

### New National Members for Greece and Luxembourg and First National Member for Croatia Appointed

On 8 October 2013, Mr. Nikolaos Ornerakis and Mr. Olivier Lenert were appointed National Members at Eurojust for Greece and Luxembourg. Prior to

joining Eurojust, Mr. Ornerakis was a Public Prosecutor with the Court of First Instance in Athens, where he primarily dealt with cases of organised crime and cybercrime. Mr. Lenert served as Deputy State Prosecutor with the Financial Intelligence Unit of the State Prosecution Service in Luxembourg.

On 5 November 2013, the first National Member for the Republic of Croatia at Eurojust was appointed. The position was taken by Mr. Josip Čule who already held the position as Liaison Prosecutor for the Republic of Croatia at Eurojust since 2009. Before joining Eurojust, he was Head of the International Legal Assistance and Cooperation Unit in Croatia. From 2006 to 2010 and 2011 to 2015, Mr. Čule was President of the State Attorney Council, a specialised body responsible for disciplinary measures and the appointment of prosecutors. (CR)

► [eucrim ID=1304020](#)

### Liaison Prosecutor for Norway Appointed

In accordance with Art. 5 of the Agreement between the Kingdom of Norway and Eurojust, Mr. Petter Sodal was appointed Liaison Prosecutor for Norway at Eurojust on 1 November 2013. Mr. Sodal began his career as a police officer and investigator. After obtaining a degree in law, he worked as a public prosecutor in various branches of the Public Prosecution Service in Telemark. (CR)

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## Frontex

### FRAN Quarterly 2013: Second Issue Published

Frontex has published the second FRAN Quarterly covering April-June 2013 (Q2 2013).

The FRAN Quarterly aims at providing regular overviews of irregular migration at the EU's external borders. The reports are prepared by the Frontex Risk Analysis Unit and based on the data exchange on irregular migration among

Member State border-control authorities within the cooperative framework of the Frontex Risk Analysis Network (FRAN) and its subsidiary, the European Union Document-Fraud Risk Analysis Network (EDF-RAN).

One of the main findings of the Q2 2013 is the detection of 24,805 illegal border-crossings along the external borders of the EU, representing a 7.4% increase in relation to the same quarter in 2012 and a 155% increase compared to the previous quarter. According to the Q2 2013, this increase between two consecutive quarters is the sharpest ever recorded since 2008. Factors for this increase include better weather conditions in the Mediterranean Sea, which triggered an increase at the sea border as well as a sharp increase in detections at the land border between Serbia and Hungary, mainly concerning the detection of migrants from Kosovo. Once again, the number of Syrians detected during illegal border-crossing increased strongly and totalled 2784 in the second quarter of 2013.

Regarding other cross-border crimes, cigarette smuggling remained the most often reported criminal activity in Q2 2013.(CR)

► eucrim ID=1304022

### **Ombudsman Calls Upon Frontex to Set Up Complaint Mechanism**

On 14 November 2013, the European Ombudsman, Emily O'Reilly, presented a special report to the EP, asking for its support in convincing Frontex to change its approach towards complaints.

The Ombudsman conducted an investigation of and public consultation on Frontex' respect of human rights standards while carrying out its task of coordinating the cooperation between EU Member States in the field of border security and illegal immigration. Based on this analysis, the Ombudsman concluded that Frontex was making good progress on its compliance with human rights but recommended the establishment of a mechanism to handle com-

plaints. Frontex's argument that Member States' authorities are competent to react to individual complaints is not shared by the Ombudsman and motivated her to submit a special report to the EP requesting support. (EDB)

► eucrim ID=1304023

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

### **Protection of Financial Interests**

#### **Yellow Card Procedure on the EPPO Proposal**

On 27 November 2013, the Commission reacted in a communication to the so-called "yellow card" procedure that had been initiated by the national parliaments against the Commission's proposal for a regulation on the establishment of the EPPO (see eucrim 2/2013, pp. 41-42).

This type of procedure is foreseen in Protocol 2 annexed to the EU Treaties. The draft must be reviewed, pursuant to Arts. 6 and 7 of this Protocol, in which reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity are sent within eight weeks from the date of their transmission and represent at least one third of all the votes allocated to the national Parliaments,. This threshold shall be one quarter in the case of a draft legislative act submitted on the basis of Art. 76 TFEU on the area of freedom, security and justice. After such review, the Commission, the group of Member States, or the institution that initiated the proposal can decide to maintain, amend, or withdraw the draft and must give reasons for this decision.

On 28 October 2013, 14 national chambers, totalling 19 votes, issued "reasoned opinions" on the EPPO proposal, i.e., negative votes, stating that they found it in breach of the subsidiarity principle. These opinions were is-

sued by the Dutch Senate, Czech Senate, Dutch House of Representatives, Cyprus House of Representatives, UK House of Commons, Hungarian Parliament, Swedish Parliament, Irish Parliament, Romanian Chamber of Deputies, Slovenian Parliament, French Senate, Maltese Parliament, and the UK House of Lords. In general, their concerns focused on the Commission not sufficiently demonstrating the need for or added value of the proposed EPPO and not satisfactorily exploring alternative mechanisms or existing ones. Another complaint was that the protection of the EU financial interests could be better obtained by strengthening and deepening existing mechanisms of cross-border cooperation between criminal justice authorities.

The Commission refuted these objections by stating that the impact assessment report is also relevant in the context of respect for the principle of subsidiarity, supplementing the reasons given in the explanatory memorandum and in the legislative financial statement. With regard to considering existing or alternative measures, the Commission replied that proposed changes to the existing structures of Eurojust and Europol are expected to lead to some improvements, but they cannot address the insufficient level of investigations and prosecutions in the Member States.

According to the Commission, the OLAF reform also cannot be expected to have a substantial impact on the level of criminal investigation and prosecution of offences in the area of EU fraud. Additionally, none of the existing mechanisms or bodies can address the shortcomings identified in relation to the admissibility of cross-border evidence, the identification of cross-border links, or getting assistance from Member States' authorities, nor can these issues be addressed through measures taken solely at the Member State level.

Among the elements demonstrating the added value of the proposed EPPO, the Commission mentions the pooling of

expertise and know-how, the avoiding of time-consuming mutual legal assistance procedures, and the proposed way of handling cross-border evidence.

Besides the organisational structure of the proposed EPPO, the Commission also considers the nature and the scope of the competences of the proposed EPPO to be compatible with the principle of subsidiarity for the following reasons. Including all cases of EU fraud in the EPPO's competence has been proposed because this is the most effective way of ensuring a consistent investigation and prosecution policy and it avoids parallel action at the EU and national levels. Moreover, the exclusive competence follows from the crimes in question having an intrinsic EU dimension affecting the EU budget.

Due to the fact that crimes against the EU budget are often inseparably linked to other crimes, the Commission stresses that the rule concerning ancillary competence does not exclusively favour the competence of the proposed EPPO to the detriment of national competence but may work in both directions, depending on the factor of preponderance.

The Commission decided to maintain the proposal concerning the EPPO for the above-mentioned reasons. (EDB)

►eucrim ID=1304025

## Counterfeiting & Piracy

### General Approach on Protection of Currencies against Counterfeiting by Criminal Law

During the JHA Council of 7-8 October 2013, a general approach was reached on the proposed directive on the protection of the euro and other currencies against counterfeiting by means of criminal law. The proposed directive will replace Framework Decision 2000/383/JHA and aims at establishing common definitions and minimum sanctions regarding the criminal act of counterfeiting currencies.

The general approach constitutes the basis for negotiations with the EP. Ireland has decided to take part in the adop-

tion of this legal instrument; the UK and Denmark will not participate. (EDB)

►eucrim ID=1304026

## Organised Crime

### Resolution on Report by the Special Committee on Organised Crime, Corruption and Money Laundering

The Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) was mandated to investigate the extent of organised crime, corruption and money laundering. Support was provided by the best available threat assessments at the international, European, and national levels.

The resolution containing the report was approved on 17 September 2013 (with 29 votes in favor, none against, and 8 abstentions) and outlines essential threats to the EU and the Member States as well as the actual extent of monetary damage from organised crime. The monetary losses are estimated to be more than €670 billion, while corruption represents 5% of global GDP.

It also outlines the complex transnational structures that enable organised crime, corruption, and money laundering to take advantage of open borders in the EU and new technological opportunities. Criminal organisations are increasingly active in various criminal fields, sometimes even supporting international terrorism. But apart from the well-known fields of organised crime, the report also reveals completely new areas of organised crime like the trade in rare minerals or toxic waste.

As a common Europe-wide approach, the Special Committee introduced an EU action plan for 2014-2019, focusing on the most important steps to be taken in the fight against organised crime, corruption, and money laundering.

In support of more accountable politics and a more honest business practice, the MEPs are demanding that anyone convicted of organised crime, corruption, or money laundering by a final

judgment should be excluded from any public procurement contract anywhere in the EU and barred from running for or holding any public office. To avoid the phenomena of “revolving doors” between the private and public sectors, a defined time should elapse before starting the new post to avoid the risk of conflicts of interest. Corruption could also be fought by means of better public access to documents and the obligation of public officials to reveal their income, responsibilities, and (business) interests.

To ensure that crime does not pay, banking secrecy and EU tax havens should be abolished, which, according to CRIM, should help crack down on criminal assets that are to be subsequently used for social objectives. A possibility for non-conviction based confiscation should be introduced. The liability of legal entities, a black list of already convicted economic players, and the duty to reimburse any public subsidy could help prevent economic crimes.

Through EU-wide witness and informer protection and a common legal definition of mafia-type criminal activity, the prosecution of corruption and money laundering could be facilitated. Match-fixing and illegal sports betting, an important financial source for organised crime, have to be eliminated by introducing appropriate penalties. According to CRIM, in order to eradicate trafficking in human beings, sanctions should be tightened and victim protection and assistance should be improved. The Committee also backs the plan for a well-equipped EPPO to coordinate the fight against crimes against the EU budget more effectively.

It is now up to the Commission and the Member States to bring forward the proposed measures. (MK)

►eucrim ID=1304027

### Report on Risk-Based Supervision by Joint Committee of the European Supervisory Authorities

In October 2013, the Joint Committee of the European Supervisory Authorities

released a preliminary report on the use of risk-based supervision in the areas of AML and CFT.

Upon adoption of the proposed fourth money laundering directive (see eucrim 1/2013, p. 6), all national supervisory authorities for the financial sector will have to make sure their supervisory model is in compliance with this legal instrument. If these authorities have a risk-based approach in place, this also needs to comply with the requirements of the proposed directive.

The report by the Joint Committee aims at helping the national supervisory authorities when designing, enhancing, or revising their own risk-based supervision model. The Joint Committee has structured the report into four sections containing non-binding questions that supervisory authorities could ask themselves when considering how their risk-based supervision functions. The questions are intended to help them identify the strengths of their supervision models and any aspects that could be improved in order to bring them in line with the new requirements. (EDB)

► eucrim ID=1304028

### Commission Puts Forward Ideas on Fighting Illegal Trafficking of Weapons

On 21 October 2013, the Commission released a communication on firearms and the internal security of the EU, aiming at protecting citizens and fighting the illegal trafficking of weapons.

Many Member States have legislation on gun control in place but it differs to some extent. These differences can be exploited by organised criminal groups or terrorist organisations for illegal trafficking in weapons as well as ammunition. In this context, the Commission identified four priorities listing several concrete actions. The four priorities are:

- Safeguarding the licit market for civilian firearms;
- Reducing the diversion of legal firearms into criminal hands;
- Increasing the pressure on criminal markets;

### Annual Forum on Combatting Corruption in the EU 2014

New Prevention and Investigation Techniques

ERA, Trier, 27 – 28 February 2014

This Annual Forum on Combatting Corruption in the EU will debate how best to ensure effective detection, investigation, and prosecution of corruption, with special regard to new prevention and investigation techniques.

The tackling of corruption, especially in an international context, suffers from a lack of effective investigation techniques and means of enforcement, resulting in inadequate compliance.

International regulation is slowly recognising these deficits and is attempting to address them through new initiatives, notably the United Nations Convention against Corruption. Within the European Union, several initiatives have already been taken. In 2011, the European Commission adopted the so-called “anti-corruption package,” a set of measures to more vigorously address the serious harm generated by corruption at economic, social, and political levels. One year later, in March 2012, the new proposal for a Directive on freezing and confiscation was published and, in 2013, OLAF published a study aimed at collecting information and developing methodologies to assist both the Commission and Member States’ authorities with the implementation of the new EU anti-corruption policies.

Key topics are:

- The European and international legal framework for combatting corruption and protecting the EU’s financial interests;
- National experiences and new techniques in prosecuting offences affecting the EU’s financial interests and key challenges for prosecution;
- Assisting Member States’ authorities with the implementation of the new EU anti-corruption policies;
- Developing a comprehensive methodology to measure the real costs of corruption in selected sectors of the economy;
- New investigation techniques in criminalising active and passive corruption carried out during the course of business activities.

Who should attend? Judges, prosecutors, ministry officials, lawyers in private practice, police officers, and policymakers. The conference will be held in English, French, and German. Simultaneous interpretation is provided.

This event has been co-financed by the European Commission (OLAF) under the Hercule II Programme.

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

- Improving the collection of intelligence.

The Commission’s communication is accompanied by the results of a Eurobarometer study conducted in September 2013 and published in October 2013 on the level of firearm ownership among European citizens, the perceptions of firearms-related crime, and whether stricter regulation is the most effective way to address the problem. Eurobarometer is the EU’s bureau that carries out public questionnaires on specific topics.

The study revealed that most people owning guns use them for hunting

purposes or for professional reasons, but this differs from country to country. Most respondents believe the level of gun-related crime will increase over the next five years while only 6% think it will decline. 58% of Europeans think that common minimum standards should be developed with respect to firearms legislation. 53% of the respondents think that stricter regulation on who is allowed to own, buy, or sell guns is the answer, while 39% say that firearm-related crime can be reduced in other ways. (EDB)

► eucrim ID=1304029

**Study****“Identifying and Reducing Corruption in Public Procurement in the EU”**

On 1 October 2013, OLAF launched the results of research on corruption in public procurement. The study “Identifying and reducing corruption in public procurement in the EU” had been commissioned by the European Commission (OLAF) and was conducted between March 2012 and June 2013 by PricewaterhouseCoopers and Ecorys, with the support of the University of Utrecht.

The study analysed the overall direct costs of corruption in public procurement in 2010 for the following five sectors:

- Road & rail construction;
- Water & waste;
- Urban & utility construction;
- Training;
- Research & development/high tech/medical products).

It found out that, in 8 selected Member States (Spain, France, the Netherlands, Italy, Romania, Hungary, Poland, and Lithuania), the overall direct costs of corruption constituted between 2.9% to 4.4% of total procurement value (published in the Official Journal and the Tender Electronic Daily database, TED) or between €1470 million and €2247 million. It also discovered that two thirds of all performance problems in “corrupt/grey” procurements (13% of budgets involved) can be attributed to corruption.

The findings indicate that public procurement is an activity which is at higher risk in the economy and in the public administration. It seems that the most problematic issue for prevention and detection of corruption is the way information on public procurement is recorded and stored.

*Martin Přiborský*

► eucrim ID=1304001

**Cybercrime****New Eurobarometer Study on Cybercrime**

On 22 November 2013, the results of a new Eurobarometer study were released. During this study, more than 27,000 EU citizens were asked about their concerns related to cybercrime.

The results show that 76% of Internet users think that the risk of becoming a victim of cybercrime has increased since 2012. Remarkably, 70% of Internet users are confident in their ability to shop or do online banking, while only 50% do so. The two main concerns for online activities are the potential misuse of personal data and the security of online payments. In comparison to the previous study on this topic, more respondents (44% now, 38% in 2012) now claim to

feel well informed of the risks of cybercrime. (EDB)

► eucrim ID=1304030

**New Assessment on the Sexual Exploitation of Children Online**

On 15 October 2013, Europol’s Cybercrime Centre (EC3) presented a new Strategic Assessment of the Commercial Sexual Exploitation of Children Online. One of the key conclusions of this assessment is the fact that the majority of child abuse material continues to be distributed non-commercially over the open Internet, even though commercial distribution persists. An emerging trend deserving particular attention from law enforcement is the live streaming of abuse for payment. The fact that this is organised via live stream poses new challenges for law enforcement.

The European Financial Coalition against Commercial Sexual Exploitation of Children Online (EFC) brings together key actors from law enforcement, the private sector, and civil society in Europe. This coalition was set up with the common goal of fighting the commercial sexual exploitation of children online and taking action on the payment and ICT systems that are used to organise and operate these illegal operations. (EDB)

► eucrim ID=1304031

**Procedural Criminal Law****Procedural Safeguards****Commission Launches Five Proposals on Strengthening Procedural Safeguards**

On 27 November 2013, the Commission presented a large package of five proposals aiming to enhance procedural rights for citizens in criminal proceedings. The package contains three proposals for directives and two proposed recommendations:

- A proposed directive on strengthening the presumption of innocence and the right to be present at trial in criminal proceedings. This proposal includes provisions safeguarding that guilt cannot be inferred from any official decisions or statements prior to a final conviction and that the burden of proof is placed on the prosecution. The right to remain silent and the right to be present at the trial are also provided for.
- A proposed directive on special safeguards for children suspected or accused of a crime. These safeguards range from mandatory access to a lawyer at each level of a criminal proceeding to being kept separated from adult inmates when deprived of liberty.
- A proposed directive on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to an EAW;

- A recommendation on procedural safeguards for vulnerable persons who are suspects or the accused in criminal proceedings. The needs of persons with, for example, physical or mental disabilities require specific protection in criminal proceedings in order to ensure the equal arms principle;
- A recommendation on the right to legal aid for suspects or accused persons in criminal proceedings containing common guidelines on who has the right to legal aid and how the quality of legal aid can be ensured.

This package is the continuation of legislative proposals originating from the 2009 Stockholm Programme and the roadmap on procedural rights (see eucrim 4/2009, pp. 122-123). A Directive on the right to interpretation and translation was adopted in 2010 (see eucrim 4/2010, pp. 138-139). In 2012, a Directive on the right to information in criminal proceedings was the second legal instrument to be adopted (see eucrim 2/2012, p. 58). The third and most recent step was the Directive on the right of access to a lawyer and the right to communicate upon deprivation of liberty, which was adopted on 22 October 2013 (see eucrim 3/2013, p. 83).

The package of five new proposals released on 27 November 2013 is accompanied by a communication on “Making Progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice.” This set of documents reflects common minimum standards for the right to a fair trial in the EU, making progress in the Commission’s procedural rights agenda. (EDB)

►eucrim ID=1304032

## Data Protection

### LIBE Committee Supports Data Protection Reform Package

With a large majority of 49 votes in favour, 1 against, and 3 abstentions, the

LIBE Committee endorsed the Commission’s proposals for reforming the data protection legal framework of the EU (see eucrim 2/2013, p. 45). Both the general data protection regulation and the directive on data protection in criminal matters received the green light from the LIBE Committee on 22 October 2013.

This vote means that the two rapporteurs, MEPs Jan-Philipp Albrecht for the regulation and Dimitrios Droutsas for the directive, can start negotiations with the Council. (EDB)

►eucrim ID=1304033

### Discussion on EDPS as Supervisory Authority for Europol

The proposed Regulation on Europol (see eucrim 2/2013, pp. 36-37), which is intended to replace the 2009 Europol Decision, provides for the EDPS to take care of the data protection supervisory role of Europol’s data processing, together with the national supervisory bodies. Under the Europol Decision, the national supervisory bodies and the Joint Supervisory Body (JSB) take up this task.

During the Law Enforcement Working Party of 9-10 October 2013, different opinions were expressed by delegations as to which authority should be responsible. The Commission replied that the choice for the EDPS was based *inter alia* on the consistency of the data protection oversight of the EU agencies and the need for independent supervision.

The EDPS states that Regulation (EC) No. 45/2001 should be fully applicable to administrative, personal, and staff data at Europol and welcomes clarification of the text of the proposed regulation. He regrets that the Commission has chosen not to apply Regulation (EC) No. 45/2001 to operational personal data of Europol and to limit the proposal to additional specific rules and derogations, which duly take account of the specificities of the law enforcement sector. Yet, the EDPS also recognises that the substantive elements of Regulation (EC)

No. 45/2001 have been included in the proposed regulation.

The preferred solution of the JSB is to combine the supervision by the national authorities with the EDPS rather than make the EDPS exclusively responsible. (EDB)

►eucrim ID=1304034

### EDPS Opinion on the PNR Agreement with Canada

On 30 September 2013, the EDPS presented his opinion on proposals for Council decisions on the conclusion and the signature of the Agreement between Canada and the EU on the transfer and processing of PNR data (see eucrim 3/2013, p. 84).

Besides questioning the legal basis of these proposed decisions, the EDPS expressed his concerns on the necessity and proportionality of mass transfers of PNR data under such agreement. Other concerns include the limited availability of independent administrative redress and full judicial redress for EU citizens not present in Canada, data retention periods, and the access to the data by other Canadian authorities. (EDB)

►eucrim ID=1304035

### MEPs Call for Suspension of EU-US TFTP Agreement

On 23 October 2013, the EP voted for a resolution to suspend the EU-US Terrorist Finance Tracking Programme (TFTP) Agreement, based on the revelations of the US National Security Agency (NSA) with regard to using the data held by SWIFT for non-terrorism related purposes.

The TFTP Agreement has been in force since 1 August 2010 (see eucrim 2/2010, pp. 48-50) and regulates the transfer of data from money transfers related to the EU from the Belgian-based company SWIFT to the US Department of the Treasury for the purpose of investigations into the financing of terrorism. The resolution mentions press reports indicating that the NSA had direct access to the IT systems of a number of

private companies and gained direct access to financial payment messages referring to financial transfers and related data held by SWIFT.

The EP calls upon the Council and the Member States to authorise an investigation into these allegations by the Europol Cybercrime Centre and calls for a special inquiry by the LIBE Committee into the mass surveillance of EU citizens in order to further investigate the allegations of unlawful access to financial payment messages covered by the TFTP Agreement. The MEPs realise that they do not have formal powers under Art. 218 TFEU to initiate the suspension or termination of an international agreement but state that the Commission will have to act if the EP withdraws its support for a particular agreement. The possibility of not giving consent to future international agreements is also mentioned. The Commission has thus been requested to suspend the TFTP Agreement.

On 27 November 2013, the Commission came forward with a package of documents to restore trust in the EU-US data flows. The package consists of:

- A communication on transatlantic data flows covering the challenges and risks, following the disclosure of several US intelligence gathering programmes;
- An analysis of the functioning of “Safe Harbour;”
- A report on the findings of the EU-US Working Group on Data Protection;
- Reviews of the PNR agreement and the TFTP Agreement regulating data exchanges in these sectors for law enforcement purposes.

Based on this set of documents, the Commission calls for action in six areas:

- Adopting the data protection reform by spring 2014;
- Improving the Safe Harbour scheme;
- Strengthening data protection provisions in law enforcement;
- Using the existing mutual legal assistance and sectoral agreements to obtain data;
- Addressing European concerns regarding the transatlantic data flows;

- Promoting data protection standards in international agreements.

After the release of these documents, several MEPs were unsatisfied and called for proof that the collected data were necessary for terrorism investigations. They complained that the Commission was “ignoring” the EP’s call for suspension of the TFTP Agreement.

In the meantime, the LIBE Committee has organised a series of hearings on several aspects of the electronic mass surveillance of EU citizens. These hearings will continue throughout December 2013 and January 2014. (EDB)

► eucrim ID=1304036

## Cooperation

### European Crime Prevention Network Meeting

On 12-13 September 2013, the Board of the European Crime Prevention Network (EUCPN) held a meeting in Vilnius dedicated to the prevention of domestic violence. Discussions focused on the following:

- Tactics and primary steps in response to domestic violence factors;
- Social aid mechanisms for victims of violence;
- Mediation activities to prevent violence.

Part of the meeting foresaw visits to institutions and organisations providing assistance to victims of domestic violence. (CR)

► eucrim ID=1304037

### Statistics on Prüm Decisions

On 1 October 2013, the Lithuanian Presidency published an overview of the declarations and notifications made by the Member States under the Prüm Decisions. It also addressed the state of play of implementation regarding the automated exchange of DNA data, dactyloscopic reference data as well as Vehicle Registration Data (VRD). (CR)

► eucrim ID=1304038

## Law Enforcement Cooperation

### International Conference “Eastern Partnership Cooperation”

On 17-19 September 2013, the Lithuanian police, together with CEPOL, other EU Member States, and Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine) held an international conference in Vilnius dedicated to the “Eastern Partnership law enforcement cooperation: way forward.” Special attention was given to the issues of the fight against organised crime, drugs, cybercrime, and smuggling. (CR)

► eucrim ID=1304039

### European Network of Law Enforcement Technology Services (ENLETS) Meeting

On 24-25 October 2013, a meeting of the European Network of Law Enforcement Technology Services (ENLETS) took place in Vilnius. The ENLETS aims at strengthening police activities and the inter-cooperation and exchange of information, knowledge, and experience in the field of applying modern technology.

The meeting was attended by representatives of the EU Member States’ law enforcement, the European Commission, Frontex, Europol, and science and business representatives. Topics of discussion included:

- Technology use and development in law enforcement activity;
- Technological needs of the police, other law enforcement institutions, and customs, border guard, and migration officers;
- The involvement of internal security authorities in security-related research and industrial policy;
- The latest technological achievements and possibilities.

Furthermore, a prototype of a new technical device that enables the identification of a moving person by the eye iris, even from a five-meter distance, was presented. (CR)

► eucrim ID=1304040





## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

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

##### Successful Reduction of the Backlog of Cases

On 24 October 2013, the ECtHR confirmed the successful reduction of backlogged cases since the entry into force of Protocol No. 14 to the ECHR on 1 June 2010 (see eucrim 1-2/2009, pp. 27-28). The protocol introduced the method of single judge formations to decide cases that are clearly inadmissible to the Court (see eucrim 4/2009, p. 147). At its highest (on 1 September 2011), the total number of cases pending had reached 160,200. This number dropped to 111,350 by 1 October 2013.

► eucrim ID=1304041

##### HUDOC Case Law – Database Available in Turkish

On 14 November 2013, the Turkish version of the ECtHR's case-law database was launched, including translations of many of the Court's judgments and publications. The president of the Court highlighted that the translations were partly funded by the Turkish government, which may serve as a model for other states.

Furthermore, the Court commissioned translations into Bulgarian, Greek, Hungarian, Russian, and Spanish.

► eucrim ID=1304042

\* If not stated otherwise, the news reported in the following sections cover the period September – December 2013.

#### Stricter Conditions for Lodging Applications to the ECtHR

From 1 January 2014, with the entry into force of the new Rule 47 of the Rules of Court, the conditions for lodging an application to the ECtHR will be stricter. According to the two major changes, any form sent to the Court must be duly completed and accompanied by copies of the relevant documents. Further, incomplete files will no longer be taken into consideration for the purpose of interrupting the six-month period within which an application must be made to the Court following the final decision of the highest domestic court with jurisdiction.

The Court provides for a new and simplified application form (available on its website from 1 January 2014) as well as information to help applicants comply with the new rules in the official languages of the State Parties to the ECHR.

► eucrim ID=1304043

#### Other Human Rights Issues

##### Austerity Measures Across Europe Have Undermined Human Rights

On 4 December 2013, Nils Muižnieks, the CoE Commissioner for Human Rights, released a research paper about the impact of the economic crisis on the protection of human rights, including access to justice. The Commissioner pointed out that national decisions on austerity measures often lack transparency, public participation, and consideration of their impact on human rights.

Inter alia, the Commissioner stressed the need to grant effective access to justice to all during economic downturns by maintaining the judiciary and the legal aid system. The Commissioner also called for systematic human rights and equality impact assessments for social and economic policies and budgets. Finally, he issued a reminder that, despite the key role of ombudsmen and human rights institutions in identifying human rights complaint-responses to the crisis, these institutions have experienced budget and staff cuts themselves.

► eucrim ID=1304044

##### Human Rights, Freedom of Expression, and Democracy at Risk through Widespread Surveillance in the Digital Age

The Commissioner offered criticism both on the recent disclosure of the US and UK mass surveillance measures and on their effect on media freedom and human rights (see eucrim 3/2013 pp. 86-87).

On 24 October 2013, the Commissioner emphasized the severe threat to the right of privacy by the topical mix of fear of terrorism, rapid development of technology, and the gathering of personal information by private companies and state security agencies. The Commissioner stated that – despite the original intentions – secret surveillance to counter terrorism can destroy democracy rather than defend it. The Commissioner stressed that the cooperation between the National Security Agency, Government Communications Headquarters, and (other) European countries (explicitly mentioning the UK, Germany, and Sweden) allowed these agencies to circumvent legislation banning domestic surveillance, despite the fact that the European states are obliged to protect individuals from unlawful surveillance carried out by any other state and should not actively support, participate, or collude in such surveillance. The Commissioner acknowledged the states' duty to ensure security by undertaking secret

surveillance, but called for adequate and effective guarantees against abuses. By doing so, the Commissioner emphasized three main safeguards delivered by the ECtHR rulings. These consist of precise and clear law, rigorous procedures by which to order the examination, and the independence of the bodies supervising the use of surveillance.

Further, on 7 November 2013, the Commissioner criticized the spying on individuals on a massive scale without strict legal rules and stressed the detrimental effects on investigative journalism and their sources.

He stated: “Maintaining an open Internet, without undue restrictions by the authorities (or the private industry) is therefore an important dimension of my work on freedom of expression”.

►eucrim ID=130404045

## Specific Areas of Crime

### GRECO: Fourth Evaluation Round on Sweden

On 12 November 2013, GRECO published its Fourth Round Evaluation Report on Sweden with eight recommendations addressed to the country. The fourth and latest evaluation round was launched in 2012 in order to assess how states address issues such as conflicts of interest or declarations of assets with regard to Members of Parliament, judges, and prosecutors (for further reports, see eucrim 2/2013, pp. 47-48, 1/2013, p. 13, 3/2013, p. 87). The report refers to Sweden as one of the least corrupt countries in Europe but highlighted conflicts of interest among parliamentarians as a field with room for improvement. The report

recommends, inter alia, adopting a code of conduct for parliamentarians that is easily accessible for the public as well. The possibility of ad hoc disclosure was recommended for cases when a conflict emerges between the private interests of MPs and a matter under consideration.

With regard to judges, the report recommends offering proper guidance to all judges on ethics and to ensure the independence, impartiality, and integrity of lay judges, inter alia, by introducing specific background checks and organizing mandatory initial and follow-up trainings. In respect of the prosecutors, the report suggests making a set of clear ethical standards applicable to all prosecutors, which would be easily accessible to the public as well, with complementary measures involving dedicated training.

►eucrim ID=1304046

## Previous Issues of eucrim

### 3/2013 | Financial Crime

- Guest Editorial by *Michel Barnier*
- In Memoriam Joachim Vogel – Prof. Dr. Dr. h.c. mult. *Ulrich Sieber*
- The Reform of the Fight against Money Laundering in the EU – *Alexandre Met-Domestici*, PhD
- The Revision of the EU Framework on the Prevention of Money Laundering – *Delphine Langlois*
- Civil Asset Recovery: The American Experience – *Stefan D. Cassella*
- Confiscation by Equivalent in Italian Legislation – *Massimiliano Mocchi*

### 2/2013 | Confiscation, Freezing and Recovery of Assets

- Guest Editorial by *Monica Macovei*
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# An Overall Analysis of the Proposal for a Regulation on Eurojust

Prof. Dr. Anne Weyembergh

As explicitly mentioned in the Treaty of Nice,<sup>1</sup> and preceded by a provisional unit (“pro-Eurojust”),<sup>2</sup> Eurojust was established through a Decision of 28 February 2002.<sup>3</sup> The latter was amended by the Decision of 16 December 2008 on the strengthening of Eurojust.<sup>4</sup> Shortly after the celebration of its 10th birthday in 2012, Eurojust became the subject of a new reform. On the 17th of July 2013, the Commission presented a proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), based on Art. 85 of the Treaty on the Functioning of the EU (TFEU).<sup>5</sup> This initiative was introduced at the same time as the proposal for a Regulation establishing the European Public Prosecutor’s Office (EPPO).<sup>6</sup>

As stated in the title of this article, this analysis aims to give an overall review of the proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust). It will be divided into two parts. The first part will be devoted to the main innovative features of the initiative and to the main improvements it brings (I). The second part will highlight some disappointing features or sources of concern (II).

## I. Main Innovative Features and Improvements

The proposal certainly contains some interesting innovative features. Among them, six important improvements are worth underlining. But all of them raise questions, doubts, or suffer from limits.

**A.** A first major improvement results from the entry into force of the Lisbon Treaty and from the communitarization it realizes: the new instrument – namely a regulation directly applicable in the EU Member States – has a much stronger legal impact than the current Eurojust decision, and it will be subject to the full range of the ECJ’s competences. This is essential in order to ensure the effectiveness of the future regulation, its uniform interpretation, and the judicial control of Eurojust’s acts. There is a price to pay, however, namely the rise of variable geometry – what about the UK, Ireland, and Denmark? – and the numerous questions concerning especially the scope of the ECJ’s control of Eurojust’s acts.

**B.** A second major improvement consists in the intensification of the development launched by the Decision of 16 December 2008 on the strengthening of Eurojust. It introduced important amendments, mainly aimed at reinforcing the effectiveness of Eurojust and its capacity to deal with its task.<sup>7</sup> As it is well known, however, these amendments remained limited<sup>8</sup> and disappointed many observers. The draft Eurojust regulation constitutes an intensification of the development launched by the 2008 decision in three main respects:

- It further reduces the characteristic asymmetry of Eurojust (1);
- It further strengthens the provisions on the exchange of information between national authorities and national members of Eurojust (2);
- It further clarifies Eurojust’s relations with some partners (3).

1) The existing differences between national members of Eurojust have considerably impeded its work.<sup>9</sup> This is why the 2008 decision aimed to approximate the national members’ powers, their place of work, their staff, and their term of office. The draft Eurojust regulation goes further in this direction. This is particularly clear<sup>10</sup> regarding the national members’ powers when one compares, on the one hand, the current Art. 9b to 9e) of the Eurojust decision and, on the other hand, Art. 8 of the draft Eurojust regulation. The same difference is made between three categories of powers: ordinary powers, powers exercised in agreement with a competent national authority, and powers exercised in urgent cases. However, *new ordinary powers* have been added, mainly the power to issue and execute requests.<sup>11</sup> Such power is provided for in the current Eurojust decision, but it can only be exercised in agreement with the competent national authority.<sup>12</sup> *New powers in urgent cases* have been added as well, namely the power to order investigative measures.<sup>13</sup> In addition, the national safeguard clause, which is currently provided for in Art. 9e), has been abolished. This is a wide-scale and vague exemption allowing the powers exercised in agreement with a competent national authority or the powers exercised in urgent cases not to be granted, in cases in which granting any such powers to the national member is contrary to constitutional rules or fundamental aspects of the criminal justice system.

These changes should allow for more consistency in the powers conferred to national members and should also, generally speaking, lead to a strengthening of the national members' powers. However, they raise three questions:

- The first question is whether these changes would lead to a strengthening for all national members? Does a risk of reduction of powers for some national members exist,<sup>14</sup> and, consequently, a risk of regress? How can it be ensured that the Member States are free to go beyond these minimum powers? A solution could be to add a sentence making clear that these are minimum standards but that the Member States are free to grant their national members additional powers. The question is then, of course, whether such a provision would be in line with the legal nature of a regulation. In answering such question, one should not be too formalistic considering the existence of similar provisions in regulations adopted in other EU policies, e.g., common agricultural policies. One should, however, be aware of the fact that the insertion of such a sentence, according to which the Member States are free to grant their national members additional powers, would restrict the approximation impact of the text accordingly.

- The second question concerns the term “in accordance with national legislation,” which are used in Art. 8 of the proposal. What is the exact meaning of these words and why are they used only once, namely concerning controlled deliveries?

- The third question results from the abolition of the current exemption clause of Art. 9 e) and the loss of flexibility it entails: wouldn't this create difficulties in some Member States as to the division of competences and the balance of powers between judges, prosecutors, and the police? When assessing such difficulties, however, one should not forget the impact of the new proposed text, which is the instrument of a new generation for cooperation in criminal matters, i.e., a regulation.

A missed opportunity needs to be highlighted as well: further steps could have been taken down the road towards more approximation between national members and especially towards the definition of a common profile. The silence of the proposal concerning the appointment criteria of the national members is quite surprising. It is neither consistent nor understandable to approximate the national members' powers but not their appointment conditions. It would, for example, be necessary to require a high level of and longstanding practical experience in the field of criminal justice.<sup>15</sup>

2) The 2008 Eurojust decision enhanced the national authorities' duties in terms of the transmission of information to Eurojust.<sup>16</sup> The draft Eurojust regulation pursues such a shift.<sup>17</sup> The need for Eurojust to receive proper information is, of course, essential. From the first national reports of the 6th round of peer evaluation, however, it appears that the implementation of Art. 13 of the Eurojust decision raises difficulties and that Eurojust's feedback on the basis of Art. 13a) could be improved.<sup>18</sup>

Consequently, the question arises as to whether it is a good idea to aim for a strengthening of the duties of national authorities in this respect without first analyzing these difficulties.

3) The 2008 decision already brought specifications regarding Eurojust's relations with some partners<sup>19</sup> but they were limited. The draft Eurojust regulation offers more clarifications. Art. 40 about the Eurojust-Europol relations is one example: it foresees the access for Europol to Eurojust information. In fact, it ensures reciprocity, since it more or less mirrors Art. 27 of the draft Europol regulation.<sup>20</sup> But the precisions are still too limited. For instance, Art. 42, para 2 of the draft Eurojust regulation regarding its relations with OLAF is even more restricted than the current Art. 26 of the Eurojust decision.

The articulation and complementarity between the existing actors need to be further reflected upon. Two examples can be mentioned. The first example concerns the relations between Eurojust and Europol. Eurojust's role in the joint investigative teams (JITs) is strengthened,<sup>21</sup> which is positive. These provisions are quite similar, however, to the provisions on Europol's role in the JITs as proposed in the draft Europol regulation.<sup>22</sup> This creates a risk of overlap of mandates and tasks between the two agencies. The second example is related to the relations between Eurojust and the EPPO: both draft regulations<sup>23</sup> show a lack of vision as to the implementation of the expression in Art. 86 TFEU “from Eurojust.” One can even wonder whether such expression is implemented by the proposal, Eurojust and the EPPO clearly being conceived as two different bodies. If the growing idea is to “nationalize” the EPPO as much as possible, then I plead for much more integration between the two bodies.

There is also a lack of consistency between the respective instruments. Two examples can be mentioned here as well. First, there are discrepancies between the lists of types of offences, which Eurojust and Europol are competent for, in spite of the Commission's will to ensure that they are identical.<sup>24</sup> Second, the articulation of competences between Eurojust and the EPPO regarding PIF crimes is unclear. Art. 3, para 1 of the draft Eurojust regulation excludes Eurojust's competence in the field of protection of the EU's financial interests (PIF), which is problematic, since it should support the EPPO in the PIF field anyway. Besides, there is a contradiction between Art. 3, para 1 excluding Eurojust's competence in the PIF field and in Annex 1 of the proposal on Eurojust, which mentions PIF among its fields of competence. A missed opportunity should also be emphasized: the draft regulation does not organize a clear distribution of tasks and of cases between Eurojust and the European Judicial Network (EJN).<sup>25</sup> Consequently, the problematic and usual issue of the complementarity between

both actors remains. This is regrettable, all the more so as this issue was explicitly mentioned in nearly every national report published within the framework of the 6th round of evaluation.

**C.** A third major improvement is the strengthening of the European nature of Eurojust, which is particularly represented by the abolition of the distinction between the national members' powers exercised as competent national authorities and as Eurojust national members. According to the proposal, national members should always be acting as "Eurojust" when exercising their operational functions<sup>26</sup> and no longer as national authorities. This is, of course, an important novelty if it favors the emergence of European interests and if it allows the national members to better serve the EU criminal justice area.

Two remarks are permitted in this context. First, such a change does not result in the end of Eurojust's hybridity.<sup>27</sup> The national members would still wear "two hats:" they would only act as members of the college of Eurojust in their *operational* functions but continue to be national representatives in their *management* functions. Second, the abolition of the distinction between the national members' powers exercised as competent national authorities and as Eurojust national members could be "une arme à double tranchant," i.e., entail a "perverse effect," namely the loss of their embedment in the national judicial landscape. It is essential to have national members with a double anchorage, both at the national and European levels.

**D.** A fourth major improvement is the better "readability" of numerous provisions. One example is the draft Art. 8 concerning national members' powers. It is much easier to read and understand than Art. 9 b) and f. of the current Eurojust decision. Of course, however, as previously stressed, such changes raise numerous questions. A second example concerns the types of offences for which Eurojust is competent, which are listed in Annex 1 to the draft regulation and are no longer defined by reference to Europol's scope of competences. As seen previously, however, the proposed text is not exempt from criticism either.

**E.** A fifth major improvement is the taking into consideration of the specific and judicial nature of Eurojust. In this respect, an important change concerns the rules on transparency and access to documents. According to the current applicable regime, all Eurojust documents are submitted to the general EU regime for access to documents, namely Regulation 1049/2001 of 30 May 2001.<sup>28</sup> Such a regime creates major trouble as to the case-related documents. Hence, the proposal improves the situation: its Art. 60 maintains the application of the general EU regime but only to Eurojust documents that relate to Eurojust *administrative tasks* and no longer to the case-related documents. Such a specific judicial nature should be taken into consideration in other respects as well. One should, for

example, avoid granting the Commission a potential influence on the nature and focus of the operational work of Eurojust.

**F.** A sixth and last major improvement is the strengthening of the democratic control of Eurojust. But is Art. 85, para 1, subpara 3 TFEU correctly implemented? In spite of its title,<sup>29</sup> Art. 55 of the draft Eurojust regulation mainly organizes the involvement of the European Parliament in the evaluation of Eurojust activities, whereas the treaty mentions the involvement of both the European Parliament *and the national parliaments*.

## II. Main Sources of Disappointment or Worry

Five disappointing features or sources of worry will be addressed in the following.

**A.** A first source of disappointment is the circumvention of the "good governance timeline." The simultaneous introduction of the two proposals for the Eurojust regulation and for the EPPO regulation is not easily understandable. Many academics, including the author of this article, are quite impatient to see the EPPO be established: it is one of the most interesting prospects in the EU criminal law field to date. A more logical and reasonable timeline would have been the following: (i) assessment of the changes introduced by the 2008 Decision on Eurojust and final report of the sixth round of peer evaluation; (ii) if justified on the basis of such assessment, use of the possibilities to strengthen Eurojust's powers, as provided for by Art. 85 TFEU, including competences in the PIF field; (iii) assessment of the added value of such a reform; (iv) if the latter is not sufficient, then recourse to Art. 86 TFEU and establishment of an EPPO. Such circumvention of the "good governance timeline" unfortunately deeply impacts the Commission's proposal for an EPPO regulation. It also impacts the proposal for a Eurojust regulation. The latter could not be grounded on the conclusions of the 6th round of evaluation, as this round is still ongoing,<sup>30</sup> and will only be concluded in 2014. The negotiators should take this evaluation exercise into consideration as much as possible. Consistency between both negotiations and between the two resulting final regulations must be ensured. Coherence should of course also be guaranteed with the final version of the Europol regulation.

**B.** A second source of concern consists in the risks of regress or regresses resulting from the draft Eurojust regulation. Besides the above-mentioned risk of decreasing the powers of some national members, two regresses are worth mentioning. First, Eurojust's scope of intervention is reduced as a result of the abolition of the possibility to extend Eurojust's competence to types of offences not explicitly foreseen, at the request

of a competent authority. Such an option is currently provided for in Art. 4, para 2 of the Eurojust decision. This means that the frequent cases in which Eurojust's support is requested by national authorities – such as requests to facilitate the execution of mutual legal assistance requests or mutual recognition instruments irrespective of the type of crime included in the list – would be excluded from Eurojust's competence. Second, whereas Eurojust administration is mentioned several times in the current Eurojust decision,<sup>31</sup> it is not mentioned anymore in the draft proposal. This is most likely an omission, which should soon be corrected.

**C.** Besides those issues previously mentioned, some other missed opportunities should be highlighted. The proposal is considered too ambitious by some observers and too modest by others. I belong to the second category. The political choice made by the Commission was not to implement Art. 85, para 1, third sentence of the TFEU and to keep Eurojust as a mediator/facilitator, without any decision-making powers vis-à-vis national authorities. I tried to show elsewhere why such move towards vertical cooperation is necessary.<sup>32</sup> I will not come back to this, but I see the Commission's choice as a missed opportunity to improve Eurojust's efficiency. This political choice is understandable on the basis of the “it is not the right time argument.” It is even less justified then to use the possibility provided for by Art. 86 TFEU, which implies a higher level of verticalisation. Second, one of the main purposes of the draft Eurojust regulation is to reform Eurojust's structure and governance. The need for such reform – as the necessity to keep the administrative burden on national members to the minimum – is unanimously accepted. This is indeed one of the explicit objectives of the proposal.<sup>33</sup> Whether the proposal will enable such an objective to be reached is rather unlikely, because national members still have a dual role entailing both management and operational functions and because the college is still heavily involved in administrative matters.<sup>34</sup>

**D.** Besides the lack of vision related to the relations between Eurojust and the EPPO, which has already been highlighted, the proposal also suffers from a lack of vision concerning Eurojust's tasks. The draft Art. 2 remains similar to the current provision. But it inserts the interesting concept of “serious crime requiring a prosecution on common bases” of Art. 85, para 1 TFEU. It does *not*, however, define this new notion. Recital 9 gives further clarifications but it remains quite traditional, since it refers to situations for which Eurojust is already competent, namely cases where investigations and prosecutions affect only one Member State and a third State and cases affecting only one Member State and the EU. To strengthen the European nature of Eurojust, would it not be possible to cover cases where the need for a common strategy is felt, which refers to an EU approach to crime, i.e., to an EU criminal policy?<sup>35</sup>

**E.** Last but not least, according to the explanatory memorandum accompanying the draft regulation, Eurojust should support the EPPO on a “zero cost” basis.<sup>36</sup> Such a formula is understandable considering the need not to frighten the Member States concerning the costs of the proposed system. How it will be realized in practice, however, remains a mystery to me, unless there is a possibility of charging the EPPO for the support services supplied by Eurojust.<sup>37</sup> Such a “zero cost rule” should neither be detrimental to the efficiency of Eurojust itself nor mortgage the EPPO functioning.

### III. Conclusion

These were some observations about the draft Eurojust regulation. Negotiations have been underway since the end of the summer and do not seem to be easy. It remains to be seen what their outcome will be. Let us hope that the final result will allow us to improve the consistency and efficiency of the Area of Freedom, Security and Justice.

\* This is the text of the keynote speech presented by the author at the seminar organised by Eurojust “The new draft regulation on Eurojust: an improvement in the fight against cross-border crime?” in The Hague on 14/15 Oct., 2013.

\*\* The author wishes to thank very sincerely Eurojust, and especially Catherine De Boyser and Laura Surano, for their kind invitation to take part in this quite interesting conference and for the very interesting discussions we had on this occasion.

1 See Arts. 29, para 2, and 31, para 1 (a) and para 2 of the TEU.

2 Council Decision of 14 Dec. 2000 setting up a Provisional Judicial Cooperation Unit, O.J. L 324, 21.12. 2000, p. 2 *et seq.*

3 Council Decision of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. L 63, 6.3.2002, p. 1 *et seq.*

4 O.J. L 138, 4.06.2009, p. 14.

5 COM(2013) 535 final, 17.7.2013.

6 COM(2013)534final, 17.7.2013.

7 G. De Amicis/L. Surano, Il rafforzamento dei poteri di Eurojust a seguito della

nuova Decisione 2009/426/GAI, in Cassazione Penale, November 2009, n. 11, Giuffrè Editore.

8 On these limits, see, for instance, A. Weyembergh, The development of Eurojust: potential and limitations of Art. 85 TFEU in New J. Eur. Crim. Law 2011–2(1), pp. 75 *et seq.*

9 In this respect, see, among others, N. Thwaites, Eurojust autre brique dans l'édifice de la coopération judiciaire en matière pénale ou solide mortier?, in Revue de science criminelle et de droit pénal comparé, 2003, pp. 51-52; A. Suominen, The Past, Present and the Future of Eurojust, in Maastricht Journal of European and Comparative Law, 2008, p. 226.

10 See also the new obligation for the deputy and for the assistant to have their regular place of work at Eurojust (Art. 7, para 2 of the proposal) and the restricting precision added (“renewable once”) concerning the terms of office (see Art. 10, para 2 of the proposal).

11 See Art. 8, para 1, a) *in fine* of the proposal.

12 See Art. 9c, para 1, a) and b) of the Eurojust decision as revised in 2008.



- 13 See Art. 8, para 3 and para 2, a) combined of the proposal.  
 14 See, for instance, the case of the Swedish and Estonian national members who are among the national members that currently have the most extensive powers.  
 15 In this respect, a source of inspiration could be Art. 8, para 2 and Art. 9, para 2 of the draft EPPD regulation.  
 16 See Art. 13 of the Eurojust decision as revised in 2008.  
 17 Compare, especially, Art. 21, para 5 of the proposal with the current Art. 13, para 6 of the Eurojust decision as revised in 2008.  
 18 See, especially, the reports on Sweden, Lithuania, Belgium, Denmark, Finland, Hungary, etc.  
 19 See, especially, Art. 25a of the Eurojust Decision as revised in 2008 about the Eurojust-EJN relations.  
 20 See the proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing decisions 2009/371/JHA and 2005/681/JHA, COM(2013)173 final, 27 March 2013.  
 21 See, especially, Art. 8, para 1 d) but also Art. 4, para 1 e).  
 22 See Art. 4, para 1 e) of the draft Eurojust regulation and Art. 4, para 1 h) of the draft Europol regulation.  
 23 See Art. 41 of the draft Eurojust regulation and Art. 57 of the draft EPPD regulation.  
 24 Compare Annex 1 to the draft Eurojust regulation with Annex 1 to the draft Europol regulation.  
 25 The wording of Art. 39, para 1 of the proposal is nearly identical to Art. 25a of the current Eurojust decision.  
 26 Art. 5 of the draft Eurojust regulation.  
 27 Regarding this hybrid nature, see *D. Flore/S. de Biolley*, Jurisdictional bodies in criminal matters for the EU, in *Cahiers de droit européen*, 2003, p. 623; *D. Flore*, *Droit pénal européen*. Les enjeux d'une justice pénale européenne, Brus-

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- sels: Larcier, 2009, p. 567; *Vlastnik*, "Eurojust – A Cornerstone of the Federal Criminal Justice System in the EU?", in E. Guild/F. Geyer (eds.), *Security versus Justice? Police and judicial Cooperation in the EU*, Ashgate Publishing, 2008, p. 37.  
 28 See Art. 39 of the Eurojust decision.  
 29 "Involvement of the European Parliament and national Parliaments".  
 30 On 15 Oct., 2013, only 10 reports had been published (i.e., Austria, Belgium, Denmark, Estonia, Finland, France, Hungary, Lithuania, Slovakia, Sweden).  
 31 See, especially, Art. 2, para 8 and Art. 28, para 5.  
 32 *A. Weyembergh*, Coordination and initiation of investigations and prosecutions through Eurojust, in *ERA Forum*, Volume 14, Issue 2 (2013), pp. 177 et seq.  
 33 See recital 13.  
 34 See the list of functions in Art. 14 of the draft regulation.  
 35 See *A. Weyembergh*, The development of Eurojust: potential and limitations of Art. 85 TFEU, *op. cit.* (n. 8)  
 36 See COM(2013) 535 final, p. 6.  
 37 See Art. 48, para 3, c) of the draft Eurojust regulation.

## The Dutch Judge of Instruction and the Public Prosecutor in International Judicial Cooperation

Mr. Dr. Jaap van der Hulst

Historically, pre-trial investigations in Dutch criminal cases are largely based upon the cornerstones of French criminal law. Therefore, the basic structure of these investigations is inquisitor-based. As a consequence, the accused is a subject under investigation by the police and the public prosecutor. If necessary, the common methods of investigation could be enlarged by means of a preliminary investigation. This investigation could be installed after and/or during police investigations upon the request of a public prosecutor. The purpose of this request was to involve the judge of instruction in the investigation and herewith widen the scope of the investigation competences, e.g., for a house search as well as more possibilities for the seizure of goods and the interrogation of the accused and witnesses. These competences could only be exercised with the consent of the judge of instruction in order to ensure

that they would not be used without good cause and with respect for the legal interests of the accused. Granting of the request of the public prosecutor meant that control over the preliminary investigation and the exercise of investigative competences would shift from the public prosecutor to the judge of instruction. In addition, requests of the defense concerning the use of investigative competences had to be addressed to the judge of instruction.

This shift in supervision to the judge of instruction was common in national cases as well as in cases with an international dimension in which Dutch authorities were involved in the investigation. In cases of an incoming request for international judicial cooperation, the basic procedure was that the public prosecutor receiving the request would hand it over to the judge of instruction, especially in cases where the request

involved the exercise of coercive means. The handing over of this request would then, in general, have the same legal consequences as a request for the initiation of a preliminary investigation.<sup>1</sup> To guard against involving the requested authorities without good cause and with respect for the legal interests of the person referred to in the request, the control over these incoming requests for international judicial cooperation shifted from the public prosecutor to the judge of instruction. The consent of the judge of instruction was also required as regards certain requests for international judicial cooperation on behalf of the Netherlands. If the request involved, for example, a house search for the seizure of goods, the public prosecutor was obliged to submit a request for a preliminary investigation with the judge of instruction.<sup>2</sup> Since the turn of the century, the leading role of the judge of instruction has changed and, in turn, the role of the public prosecutor.

In this contribution, I will focus on these changing roles, especially when they involve international judicial cooperation.<sup>3</sup> Beside national developments, international developments have also contributed to these changing roles, as can be illustrated in the field of extradition and by the introduction of the European Evidence Warrant and the initiative for the establishment of the European Public Prosecutor's Office.

### **I. The New Role of the Judge of Instruction**

The central role of the Dutch judge of instruction in both national cases and international judicial cooperation was linked to the existence of the preliminary investigation. This type of investigation has gradually become less important for two reasons. First, the scope of the preliminary investigation was redefined by the Law on the revision of the preliminary investigation.<sup>4</sup> This law reduced the number of cases in which a request for the installment for a preliminary investigation was required. Second, the development of new methods of inquiry in practice led to the introduction of the Law on special methods of inquiry.<sup>5</sup> As a result of this law, the public prosecutor obtained a considerable set of new far-reaching competences, e.g., the systematic observation of persons, infiltration, pseudo-sale, and the inspection of private premises. The decision to use these new competences was attributed to the public prosecutor and decreased the need for him to request a preliminary investigation.

Furthermore, the law provided for the wiretapping of and research on confidential communication. This can only be undertaken on order of the public prosecutor with the consent of the judge of instruction. Written consent is required, but it can be given independent of a preliminary investigation. Hence, these new introduced competences could be used without the

need (request) for a preliminary investigation. The next step in this development was a debate on the actual significance of the preliminary investigation. At the beginning of this year, the Dutch legislator took a firm position in this debate with the introduction of the Law on the strengthening of the position of the judge of instruction.<sup>6</sup> In this law, a fundamental change in the structure of the pre-trial investigation in the Netherlands is recognized. This used to be an investigation led by the judge of instruction, but the legislator (also) recognizes that the public prosecutor has increasingly taken over control of pre-trial investigations. And this development is explicitly accepted in the Law on the strengthening of the position of the judge of instruction.<sup>7</sup>

As a consequence, the preliminary investigation as such has been abolished. According to this law, the public prosecutor is the central body during pre-trial investigations. He is the first to decide which acts of inquiry and which competences should be used. The judge of instruction is given the role of supervisor during these inquiries. Upon request of the public prosecutor and/or the defense, he can have certain actions of inquiry carried out. In extraordinary cases where there is a concern for irregularity, incompleteness, or lack of expediency, the judge of instruction can still interfere in the pre-trial investigation by inviting the public prosecutor and the defense to a "management" meeting.<sup>8</sup> Nevertheless, his position during pre-trial investigations has, without a doubt, changed from being the central leader and coordinator of these investigations to being a back-office supervisor who usually only intervenes upon request of the public prosecutor or the defense.

### **II. The Judge of Instruction in International Judicial Cooperation**

The Dutch judge of instruction played a central role not only in national cases but also in international judicial cooperation. In cases of an incoming request for international judicial cooperation, the request was usually dealt with by the receiving Dutch public prosecutor. As a general rule, each request based on a (bilateral) treaty was granted, except in cases where the request led to discrimination, *ne bis in idem*, or interference with an ongoing Dutch criminal investigation.

If the request involved simple actions of inquiry without the use of competences, the public prosecutor could deal with the request himself. However, in cases where the request involved the exercise of competences, the consent of the judge of instruction was required. The public prosecutor was obliged to hand over the request to the judge of instruction if the request would lead to the exercise of competences such as the interrogation of unwilling witnesses, the interrogation of witnesses

and experts by a foreign authority by means of videoconference, the generation of an official declaration of a statement or a statement delivered in front of a judge, or the seizure of documentary evidence. This handing over had the same legal consequences as a request for the initiation of a preliminary investigation.<sup>9</sup>

With the abolition of the preliminary investigation, this link has vanished. Instead, the handing over of this request has the same legal consequences as a request for certain actions of inquiry. These actions of inquiry include the exercise of competences by the judge of instruction involving the interrogation of the accused, witnesses, and experts, the decision to hand over documentary evidence, the carrying out of a DNA test and, to that end, orders that DNA material be removed, the entry and search of premises, and the seizure of documentary evidence. The seizure of this evidence is only possible if the criminal acts that led to the request for international judicial cooperation could lead to extradition to the requesting state if these same acts were to have been committed in the Netherlands.<sup>10</sup> Beside these actions of inquiry, the public prosecutor can use all other competences deemed appropriate for fulfilling the incoming request for international judicial cooperation.

Additionally, the link to the preliminary investigation has also disappeared for the request for international cooperation on behalf of the Netherlands. This means that the public prosecutor can request the exercise of competences in other states if they could be used in the Netherlands. Thus, access to private places in order to seize goods in other states can be requested based on the authority of the public prosecutor. The judge of instruction only plays a role if the request for international cooperation to other states involves competences that can only be used with his consent. This consent is required when the request to the state concerned involves an immediate house search for the seizure of goods without permission of the resident or a search in the office of a person that has the privilege of nondisclosure.<sup>11</sup>

### III. The Public Prosecutor and Extradition

In short, in international judicial cooperation the public prosecutor can use all national competences given to him by the Dutch Code of Criminal Procedure (DCPC) and other national criminal laws. The legal provisions concerning extradition are a good example of the delegation of other competences (outside the DCCP) to the public prosecutor. These provisions can be found in the Dutch Law on Extradition (Uitleveringswet).<sup>12</sup> According to the Uitleveringswet, a request for extradition is dealt with by the Dutch Minister of Justice. The request can only be granted if it refers to criminal acts that have been sen-

tenced with a minimum of four months in the requesting state or that have given probable cause for criminal investigation, based on suspicion of criminal acts that may be sentenced with a minimum of twelve months according to the law in the requesting state as well as according to Dutch law (double criminality).

The latter situation is relevant since it opens up the possibility of extradition during pre-trial investigations. The request may only be granted for the above-mentioned double criminality and if there are no reasons for denial of the request. Reasons for denial are: an existing death penalty in the requesting state for the criminal acts referred to in the request, discrimination, *ne bis in idem*, or interference with an ongoing Dutch criminal investigation. As a general rule, each request that meets these standards is granted, which enables the public prosecutor to exercise certain competences. These competences are the apprehension of the requested person and a subsequent detention period of six days maximum as well as the seizure of (his) goods.<sup>13</sup>

Since 1 May 2004, the Uitleveringswet is no longer applicable to extradition between Member States of the European Union. Since that date, these extraditions are regulated by the Overleveringswet.<sup>14</sup> This Overleveringswet is the result of the introduction of the Framework Decision on the European Arrest Warrant (EAW).<sup>15</sup> A European Arrest Warrant may only be issued for criminal acts that, in the issuing state, have been sentenced with a minimum of four months or that may be sentenced for a period of twelve months. The latter is relevant since it opens up the possibility of extradition during pre-trial investigations. According to the Overleveringswet, the issued European Arrest Warrant is dealt with by the receiving Dutch public prosecutor. The European Arrest Warrant may only be granted if it involves a criminal act listed in Art. 2 of the Framework Decision EAW that may be sentenced with imprisonment of at least three years, according to the criminal law of the issuing state, or for a criminal act that, according to the law of the issuing state as well as that of the Netherlands, may be sentenced with a period of twelve months. As a general rule, each European Arrest Warrant that meets these standards is granted, which enables the public prosecutor to exercise certain competences. They are linked to the apprehension of the person referred to in the European Arrest Warrant and involve the seizure of (his) goods, the preparation of the interrogation of this person by the officials that issued the European Arrest Warrant, and the temporary disposal of this person to the state that issued this warrant in order to give that person the opportunity to make statements. In addition, the public prosecutor may give his consent to the transit of a person referred to in the European Arrest Warrant on behalf of a third Member State of the European Union.<sup>16</sup>

The public prosecutor is also the central body in the reverse situation when a European Arrest Warrant is issued on behalf of the Netherlands. He is entitled to issue a European Arrest Warrant on his own authority and combine it with the following requests: He can request that the apprehension of the person referred to in the European Arrest Warrant involves the seizure of (his) goods, the interrogation of this person in his presence by the competent judicial authorities in the requested state, and the temporary disposal of this person to the Netherlands in order to give that person the opportunity to make statements. He may also request consent to the transit of the person referred to in the European Arrest Warrant to a third Member State of the European Union.<sup>17</sup>

#### IV. The Public Prosecutor and the European Evidence Warrant

The key provisions concerning extradition make clear that the public prosecutor has become the central body dealing with incoming and outgoing requests for extradition, especially in the European Union. Furthermore, he plays a major role in other means of international judicial cooperation in the European Union. This is exemplified by the recent implementation of the Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in criminal matters (EEW).<sup>18</sup> This implementation was transposed into law in 2012.<sup>19</sup> According to this law, the public prosecutor deals with a European Evidence Warrant that is issued by another Member State of the European Union. He is to recognize and implement the European Evidence Warrant within thirty days if it involves the seizure of objects and documents in the Netherlands that contribute to truth finding, obtaining stored and recorded data in the Netherlands or making them accessible to the Netherlands according to Dutch law, and providing for criminal and police information to the issuing state. He will also hand over the aforementioned objects, documents, and data to the issuing state.

The implementation of the European Evidence Warrant is denied if its implementation would be contrary to *ne bis in idem*, if it breaches immunity or privileges for prosecution according to Dutch law, and if the European Evidence Warrant is not issued by a judicial authority in the issuing state in cases in which the implementation of this warrant involves the use of means of coercion. It is also denied if the acts that led to the issuing of the European Evidence Warrant are not punishable in the Netherlands, if implementation of the European Evidence Warrant requires means of coercion, or if the implementation of this warrant requires the use of competences that could not be used if the acts that led to the warrant would have been committed in the Netherlands – unless the warrant refers to criminal acts listed in Art. 14 of the Framework Decision EEW

and these acts may be sentenced with imprisonment of at least three years according to the criminal law of the issuing state. Additionally, the implementation of the European Evidence Warrant may be denied if the acts that led to the issuing of this warrant took place within Dutch territory, outside the territory of the issuing state and the Netherlands would not have jurisdiction if these acts were to have been committed outside Dutch territory, if the implementation of the European Evidence Warrant would conflict with national Dutch interests, or if the issued European Evidence Warrant is incomplete or insufficient.

The implementation of the European Evidence Warrant may involve the use of national competences attributed to the public prosecutor by Dutch criminal law. If the European Evidence Warrant refers to criminal acts listed in Art. 14 of the Framework Decision EEW and these acts may be sentenced with an imprisonment of at least three years according to the criminal law of the issuing state, the public prosecutor is entitled to the use of his competences even if the national Dutch law does not foresee their use for criminal acts referred to in the European Evidence Warrant. The public prosecutor hands over the European Evidence Warrant to the judge of instruction only if the implementation of this warrant involves competences exclusively attributed to the judge of instruction, e.g., an immediate house search for the seizure of goods without permission of the resident. The handing over of the European Evidence Warrant has the same legal consequences as a request for certain actions of inquiry. After having used his requested competences, the judge of instruction hands over the seized objects, documents, and data to the public prosecutor who sends them to the issuing state. This sending is postponed in case a third party files a complaint against it, and it is rejected if a Dutch Court of Justice agrees with the complaint.<sup>20</sup>

In the reverse situation (of a European Evidence Warrant on behalf of the Netherlands), both the public prosecutor and the judge of instruction are authorized to issue a European Evidence Warrant and send it directly to the competent judicial authorities of another Member State of the European Union. This European Evidence Warrant may be issued in order to seize and obtain objects, documents, stored and recorded data, and criminal and police information that contribute to truth finding, that are accessible to another Member State of the European Union, or that are in accordance with the law of another Member State of the European Union.<sup>21</sup>

#### V. The Public Prosecutor and the EPPO Initiative

The implementation of the EEW confirms the changed role of the public prosecutor in international judicial cooperation. He has become the leading body and, in some cases, he needs

the consent of the judge of instruction. This leading role of the public prosecutor is of importance in light of the proposal for the establishment of the European Public Prosecutor's Office (EPPO initiative).<sup>22</sup> This initiative is based on Arts. 86 and 325 of the (consolidated) Treaty on the functioning of the European Union that provide the competence for the European Union to counter fraud and other offences affecting its financial interests. The objective of this initiative is to establish a coherent European system for a more efficient and effective investigation and prosecution as well as to enhance the deterrence of offences affecting the financial interests of the European Union. It also ensures close cooperation and the effective information exchange between the European Union and competent authorities of the Member States.

Therefore, the initiative sets forward the establishment of a European Public Prosecutor's Office that will be exclusively competent in cases of fraud against the European Union. For such cases, the establishment of the European Public Prosecutor's Office includes the introduction of investigative competences, the right to prosecute, and the right to bring a case before the competent national judge in any Member State of the European Union. Each Member State will appoint one or more delegated public prosecutors who, on behalf of the European Public Prosecutor's Office, will bring these cases before the competent national authorities. Much has been said on the EPPO initiative,<sup>23</sup> but it seems appropriate to say that the general approach in this EPPO initiative fits in well with the development of the role of the Dutch public prosecutor. Both the EPPO initiative and this development strengthen the position of the public prosecutor in international judicial cooperation.

## VI. The Public Prosecutor and Ancillary Competence

Nevertheless, the following issue in the context of the EPPO initiative could be problematic when looking at the position of the delegated (Dutch) public prosecutor. This issue concerns the so-called ancillary competence.<sup>24</sup> This means that the competence of the European Public Prosecutor's Office is enlarged to include serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts. This ancillary competence can give rise to competence claims on the part of both the European Public Prosecutor's Office and national prosecuting authorities. If this is the case, the final decision is in the hands of the national judicial authority competent to decide on the attribution of competences concerning prosecution at the national level.

From a Dutch perspective, this can be understood in the sense that the national legislator (Minister of Justice and national

parliament) is competent, but it can also be the head of the public prosecuting office. In both interpretations, it is possible that the Minister of Justice (upon request of the Dutch parliament) may interfere with the final decision on ancillary competence, as he is entitled to give general and specific instructions to the public prosecuting office.<sup>25</sup> This opens up the possibility that this final decision can be influenced by political motives. In the Netherlands, these motives are often influenced by sentiments that are nationally oriented and less European-minded. Moreover, the caseload work for the national public prosecuting office is considered to be overwhelming. This promotes the orientation towards allocating the available prosecution resources to national cases instead of cases linked to Europe. It could all end up to the effect that the final decision on ancillary competence is made with too much consideration for national interests. Even if this final decision would lead to prosecution, it could well be imagined that the delegated public prosecutor would be restricted in his prosecution options (by political motives). Would it then not be a better idea to give the European Public Prosecutor's Office full competence for all serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts? This would also avoid the danger of diverging prosecution strategies on the part of the European Public Prosecutor's Office and the delegated public prosecutor, as it is clear that the latter acts exclusively on behalf of the European Public Prosecutor's Office and within its prosecution strategy.

A related issue is the position of the delegated public prosecutor towards the police. During police investigations, the Dutch public prosecutor is in charge of these investigations and authorized to give the necessary instructions to the police.<sup>26</sup> But the Dutch Minister of Justice is politically responsible for the use of these instructions and therefore, as mentioned earlier, entitled to give general and specific instructions to the public prosecuting office. This can complicate the role of the delegated public prosecutor in supervising the police investigation of serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts if it is not (yet) clear whether the prosecution decisions will be on behalf of the European Public Prosecutor's Office or on the national level. Would it not be better to give the European Public Prosecutor's Office full competence in police investigations that involve serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts? In his relation to the police, it would then be clear that the delegated public prosecutor acts exclusively on behalf of the European Public Prosecutor's Office and that he is only accountable for his actions to this office and, indirectly, to the European Parliament.

## VII. Conclusion

National as well as international developments have changed the role of the Dutch judge of instruction and the public prosecutor, especially in international judicial cooperation. The public prosecutor has become the central player in this cooperation, e.g., extradition and the European Evidence Warrant. Also, in the EPPO initiative, an important role is

foreseen for the (delegated) public prosecutor. With regard to ancillary competence, it seems appropriate to underline his independence towards national authorities. This can be fostered to grant the European Public Prosecutor's Office full competence in police investigations and the prosecution decisions concerning serious criminal offences that are linked to offences affecting the financial interests of the European Union.



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- 1 Art. 552o former Dutch Criminal Procedure Code (DCPC).
- 2 (Dutch) High Court 29 September 1987, NJ (Dutch Jurisprudence) 1988, 302.
- 3 International judicial cooperation is understood in the sense that the Netherlands have interpreted this concept since the ratification of the European Convention on Mutual Assistance in Criminal Matters (Strasbourg 20 April, Trb. (Treaty Series) 1965, 10). This kind of assistance includes assistance on behalf of the Dutch public prosecuting office (and excludes any assistance on behalf of a police authority).
- 4 Wet herziening gerechtelijk vooronderzoek (Stb. (Government Gazette) 1999, 243).
- 5 Wet bijzondere opsporingsbevoegdheden (Stb. 1999, 245).
- 6 Wet herijking positie rechter-commissaris of 1 January 2013 (Stb. 2012/408).
- 7 This development also seems to have occurred in Belgium: *Paul de Hert en Tom Decaigny, Evoluieren het Nederlandse en het Belgische strafproces naar adversaire systemen?*, Strafbld, Sdu, p. 61.

- 8 Arts. 180, 181, 182 and 185 DCCP.
- 9 Art. 552k, l, n and o former DCCP.
- 10 Art. 552n and o DCCP.
- 11 Art. 96c and 97 DCCP.
- 12 Law of 9 March 1967, Stb. 1967, 139.
- 13 Arts. 8-11, 18, 40 and 46 Uitleveringswet
- 14 Law of 29 April, Stb. 2004, 195.
- 15 Framework Decision 2002/584/JBZ (PbEG 2002, L 190).
- 16 Arts. 5, 7, 49-54 Overleveringswet.
- 17 Arts. 55-58 Overleveringswet.
- 18 Framework-Decision 2008/978/JBZ (PbEU L 350).
- 19 Law of 13 December 2012 (Stb. 2013, 10).
- 20 Art. 552ww, xx, yy, aaa, ccc and ggg DCCP.
- 21 Art. 552ddd and fff DCCP.
- 22 COM(2013)534.
- 23 See, e.g., *José Luis Lopes de Mota*, Eurojust – The heart of the Future European Public Prosecutor's Office, *eucri*m 1-2/2008, pp. 62-66, *Simone White*, A decentralised European Public Prosecutor's Office, *eucri*m 2/2012, pp. 67-75, and *Valentina Covol*, From Europol to Eurojust – towards a European Public Prosecutor, *eucri*m 2/2012, pp. 83-88.
- 24 Arts. 12 and 13 EPPO initiative.
- 25 Art. 127 Law on the Organization of the Judiciary (Wet op de rechterlijke organisatie).
- 26 Art. 148 DCCP.

## The Use of Inside Information

### Judgment of the European Court of Justice of 23 December 2009, Case C-45/08, *Spector Photo Group, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen*

Anna Blachnio-Parzych, Ph.D.

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (hereinafter called Directive 2003/6/EC)<sup>1</sup> was enacted to combat these two most dangerous threats to capital markets.<sup>2</sup> The directive has been the subject of examination by the ECJ several times.<sup>3</sup> The point of my interest will be the judgment relating to the nature of the conduct constitut-

ing insider dealing. It was rendered on 23 December 2009 (C-45/08), to the effect of the reference made by the Belgian court in the course of proceedings between Spector Photo Group and one of its managers, on the one hand, and, on the other hand, the Belgian Commission for Banking, Finance and Insurance. The questions referred to in the preliminary ruling concerned an interpretation of Arts. 2 and 14 of Directive 2003/6/EC.<sup>4</sup>

## I. The Case

Spector, a publicly quoted company under Belgian law, implemented a profit-sharing policy addressed to its staff members and offered them stock options. To realize the program, the company planned to use the shares in its possession and, if necessary, to buy the shares on the market. On 21 May 2003, Spector informed Euronext Brussels of its intention to implement the stock option program and to buy a certain number of its own shares. Between 28 May 2003 and 30 August 2003, Spector purchased 8000 shares in four transactions. On 11 and 13 August 2003, Mr. Van Raemdonck placed two purchase orders on behalf of Spector. In effect, Spector bought 19,773 shares at an average price of €9,97. According to the facts, the price of Spector's shares increased. The reasons were good results and the company's commercial policy, which Spector subsequently published information on. On 31 December 2003, the price of its shares had reached the level of €12,50.

The CBFA decided that the purchases made on the basis of the orders of 11 and 13 August 2003 constituted insider dealing and imposed fines of €80,000 on Spector and €20,000 on Mr. Van Raemdonck. They brought an action against this decision before the *hof van beroep te Brussel*. One of the questions submitted by the national court before the ECJ was how to interpret the expression "use of inside information" in Art. 2 (1) of Directive 2003/6/EC for the purposes of that provision. The Belgian court was also uncertain as to what type of evidence could be used to argue that inside information has been used within the meaning of Art. 2 of Directive 2003/6/EC. These issues were strictly connected to each other. In regard to the first issue mentioned above, the Belgian court formulated the following question: "Should Article 2(1) of [Directive 2003/6] be interpreted as meaning that the mere fact that a person as referred to in [the first paragraph of] Article 2(1) of that directive [who] possesses inside information and acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, financial instruments to which that inside information relates, signifies in itself that he makes use of [that] inside information?" The court also assumed that, if the answer to the aforementioned question is negative, then the criterion should be that a deliberate decision has to be taken by the person concerned to use inside information.

## II. Use of Inside Information

Examining the case, the ECJ stated that the issue of the interpretation of the term "use of inside information" has to be examined before other questions are dealt with.<sup>5</sup> The essence of the problem is whether it is necessary to establish that the inside information was decisive in the process of making the

decision to perform the market transaction. This interpretation requires proof of the intention of the perpetrator suspected of insider dealing. In other words, in order to substantiate that a concrete transaction is insider dealing, it would be obligatory to prove that the inside information had an influence on the decision to perform the market transaction and that a primary insider wanted to take advantage of that information. Another way to interpret the term "use of inside information" is that it means that a person who possesses the inside information makes one of the aforementioned market decisions in regard to the financial instruments to which the concrete information relates. According to the second way of understanding the term "use of inside information," it is not necessary to prove that the inside information was the reason for the market decision. It is sufficient to present evidence of the possession of the inside information and the decision to acquire or dispose of the financial instrument to which the information relates (or the attempt to perform such a transaction).

According to the opinion of Advocate General Kokott, a person "makes use" of the inside information when he possess information that he knows, or ought to have known, constitutes inside information and acquires or disposes of financial instruments to which that inside information relates. It is important to emphasize that the Advocate General added that such a situation constitutes "*a rule*." If it is clear *a priori* that inside information does not influence the action of a person, the knowledge of inside information does not in itself imply use of that information.<sup>6</sup>

The ECJ decided that, according to the proper interpretation of Art. 2 (1) of Directive 2003/6/EC, the fact that the primary insider acquires or disposes of, or tries to acquire or dispose of, the financial instruments to which the inside information relates implies that that person has "used that information" within the meaning of this provision. The ECJ also added that the rights of the defense and the right to be able to rebut that presumption have to be respected. Any infringement of the prohibition on insider dealing must be analyzed in the light of the purpose of the directive, which is to protect the integrity of the financial markets and to enhance investor confidence.<sup>7</sup>

## III. The ECJ's Interpretation

The interpretation of Art. 2 (1) of Directive 2003/6/EC by the ECJ raises doubts. To present them, it is necessary to investigate the grounds of the Court's position. The first argument presented in the judgment was that Art. 2 (1) of Directive 2003/6/EC does not include the subjective conditions in relation to the intention behind the material actions. According to the provision, it is not necessary to establish that the inside

information was decisive in the decision to perform the market transaction at issue or that the primary insider was aware that the information in his possession was inside information. Moreover, the ECJ pointed out the difference between Art. 2 (1) of Directive 2003/6/EC and Art. 2 (1) of Directive 89/592/EEC<sup>8</sup> of 13 November 1989 coordinating regulations on insider dealing.<sup>9</sup> *The insider's conduct was defined in Directive 89/592/EEC by the term "by taking advantage of that information with full knowledge of the facts,"* whose transposition into national law gave rise to various interpretation by the Member States.<sup>10</sup> In the new directive, the EU legislature wanted to avoid the problems that had arisen from the implementation of the earlier directive. Therefore, the history of the preparatory work shows that the EU Parliament wanted to remove any element of purpose or intention from the definition of insider trading.

According to the ECJ, the objectivity of the definition of the prohibited behavior (insider dealing) was intended.<sup>11</sup> Thanks to the objective construction of the prohibited behavior, it is easier to ensure the integrity of Community financial markets and to enhance investor confidence in these markets. Therefore, the EU legislature opted for a preventive mechanism. The Court of Justice agreed with the Advocate General that the condition of its effectiveness is a simple structure in which subjective grounds of defense are limited.<sup>12</sup> The solution is strictly connected to the specific nature of insider dealing.<sup>13</sup> The simple structure of the prohibited behavior, which is the effect of the proper interpretation of Art. 2 (1) of Directive 2003/6/EC, enables a presumption that mental elements exist when the perpetrator behaves in such a way. Taking into consideration the position of primary insiders, it is possible to exclude the possibility that the author of the market decision could have acted without being aware of his actions. In principle, the inside information is deemed to have played a role in his decision-making. Therefore, the objective definition of insider dealing is justified. However, the ECJ added that such an interpretation could lead to the prohibition of certain market transactions, which do not necessarily infringe the interests protected by the directive.<sup>14</sup> It follows that the objective definition of insider dealing cannot exclude the rights of defense and the right to be able to rebut the presumption. The 18th recital in the preamble to Directive 2003/6/EC was recalled by the ECJ in order to underline the need to take the mental elements into consideration during examination if the concrete conduct constitutes insider dealing.

Referring to the position of the ECJ taken in the analyzed judgment, it should be emphasized that, on the one hand, the Court derived an objective definition of insider dealing from Art. 2 (1) of Directive 2003/6/EC. On the other hand, how-

ever, the Court is trying to avoid the consequences of such an interpretation of the provision. It remains open whether the interpretation was permissible in the light of the aforementioned provision.

The first reference should be made to the objective definition of insider dealing. According to the position of the ECJ, it is sufficient to prove insider dealing if a primary insider possesses inside information and acquires or disposes of the financial instruments to which the inside information relates. It seems logical, however, that if the legislature wanted to require only these two elements to be proven, Art. 2 (1) of Directive 2003/6/EC would be formulated in another way. There was no need to add the term "use of inside information." The expression seems to point out that the primary insider not only has to possess the information but also make use of it. Thanks to the mentioned term, it seems that the market decision has to be the effect of taking into consideration the inside information. During evidentiary proceedings, the presumption of facts may be used. From the fact that a primary insider possesses the information and he then makes the decision regarding the financial instrument to which the information relates, we may derive that the information was taken into consideration by him. There would still be the difference between the definition of insider dealing in Directive 2003/6/EEC and Directive 89/592/EEC.

Nevertheless, in the light of the analyzed judgment, such an interpretation is not correct. According to the ECJ, the only elements that have to be proven are: possession of inside information and performing the market decision. It raises questions as to what the consequences of the EU legislator decision are if understood in such a way. On the one hand, it enables a more efficient fight against insider dealing abuse and constitutes a preventive mechanism. On the other hand, it causes the risk of punishment for a conduct that contains the two aforementioned elements but does not infringe the integrity of the financial market. In other words, sometimes the conduct of a primary insider may fit the description of insider dealing in Art. 2 (1) of Directive 2003/6/EC, but it may not be harmful for the market. His decision may be independent from the facts that are derived from the information and even have an opposite character than can be expected.<sup>15</sup>

Presenting the argument about the role of the definition of insider dealing as a preventive mechanism, the ECJ emphasized that the EU legislature opted for administrative sanctions against insider dealing.<sup>16</sup> Using administrative measures against behavior that does not infringe market integrity but implies a high probability of this effect, is acceptable. However, this raises doubts as to when a criminal penalty may be imposed for a conduct formulated in such a way. According



to Art. 14 (1) of Directive 2003/6/EC, deciding on the type of responsibility for infringement of prohibition of manipulation, the domestic legislator shall take into consideration whether the nature and severity of the sanction is proportionate and may have an effective and dissuasive effect. Evaluating the consequences of the decision of the EU legislator, it should be underlined that many of the Member States decided on criminalization of insider dealing. Moreover, the ECJ noted in the judgment that, even when the national legislator decided on administrative sanctions, such sanctions may, for the purpose of the application of the ECHR, be qualified as criminal sanctions.<sup>17</sup> The conclusion should effect an even more cautious interpretation of Art. 2 (1) of Directive 2003/6/EC, because it may influence the interpretation of criminal law provisions in force in the Member States.

Nevertheless, when the ECJ noticed negative consequences of Art. 2 (1) of Directive 2003/6/EC interpreted in an objective way, it could only lead the Court to look for another way of interpretation or for formulation proposals regarding changes of the provision. The ECJ did something more, however, in the judgment analyzed. It recalled the concept of presumption, which enables the exclusion of responsibility for conduct that does not result in taking advantage of the benefit gained from the inside information.<sup>18</sup> In consequence, the ECJ presented the scope of conduct treated as insider dealing differently than it can be interpreted from the objective definition of insider dealing in Art. 2 (1) of Directive 2003/6/EC.

Although the motives that influenced the judgment of the ECJ are clear and acceptable, one cannot agree that the solution presented by the ECJ was supported by Art. 2 (1) of Directive 2003/6/EC. The aforementioned provision does not constitute grounds for the possibility of exclusion responsibility of the primary insider who proves that the inside information did not influence his market decision. The lesson of the judgment leads to the conclusion that the ECJ found the grounds for its position in the concept of presumption.<sup>19</sup> The Court underlined that the presumption of law and of facts are permissible, to some extent, in criminal law. The limits derive from the principle of the presumption of innocence, laid down in Art. 6(2) of the ECHR.<sup>20</sup> In principle, one can agree with the position as regards the permissibility of presumptions. The issue is whether the EU legislator contained the presumption of law in Art. 2 (1) of Directive 2003/6/EC. The general permissibility of the presumption of law does not mean that the presumption which can be rebutted is provided for in the concrete provision.<sup>21</sup>

The presumption of law exists in the EU competition law,<sup>22</sup> but the grounds are in the wording of the provisions, in their construction. Moreover, it has to be underlined that

Art. 1 (2)(a) of Directive 2003/6/EC contains a clause, according to which the responsibility is excluded if the orders or transactions, stipulated in the earlier part of the provision, are carried out for legitimate reasons. This clause reverses the burden of proof.<sup>23</sup> Thanks to the regulation, the possibility exists to take into consideration the subjective element of the behavior and change, to some extent, the objective nature of the responsibility.<sup>24</sup> However, there is no such a clause in Art. 2 (1) of Directive 2003/6/EC. Therefore, the analysis of the directive, especially the part dedicated to market manipulation, provides the argument that, if the EU legislature intended to include the presumption that can be rebutted, it would do it in the same way as in Art. 1 (2)(a) of Directive 2003/6/EC.<sup>25</sup>

The argument regarding the presumption of facts is also not convincing. From the facts established in the case, other facts can be presumed, e.g., facts relating to the existence of some mental elements of the behavior, the intent of the perpetrator. The concept of presumption of facts is useful in the process of the establishment of the facts which have to be proven in order to declare that the offense has been committed. In Art. 2(1) of Directive 2003/6/EC, however, the EU legislature has not provided for the mental element of the behavior that would be proven using the presumption of facts.

#### IV. Mixing Two Phases

Summarizing, the interpretation of the term “use of inside information” made by the ECJ raises doubts. The Court emphasized the objective nature of the definition of insider dealing but, to avoid the consequences of the interpretation of Art. 2(1) of Directive 2003/6/EC, it recalled the concept of presumption, which is not supported in the wording of the provision. Whereas the argument regarding the presumption of facts means that the Court is mixing two different phases in the process of the application of law: the establishment of facts and the interpretation of law. The legislator may take into consideration the link between two factual elements during the construction of prohibited behavior. It is not, however, the effect of the concept “presumption of facts.” If the decision of the legislator confines the description of the behavior to some elements, then only these elements must be proven. It is the result of the policy of the legislator, which should not be changed by recalling the concept of presumption without a legal basis for it in the interpreted provision. The disadvantages of the objective definition of insider dealing may lead to a critique of the decision of the EU legislator or the attempts to define the term “use of inside information” in another way. If, according to the ECJ, the proposed objective interpretation of the term may lead to consequences that are inconsistent

with the aim of Directive 2003/6/EC, perhaps the interpretation is incorrect. The 18th recital in the preamble to Directive 2003/6/EC, recalled in the analyzed judgment,<sup>26</sup> in which the EU legislator expressed its understanding of the term “use of inside information,” gives rise to its interpretation in another way, which would still be different from the definition of insider dealing in Directive 89/592/EEC.

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1 O.J. L 96, 12.4.2003, p. 16.

2 For more about the need and the aim of Directive 2003/6/EC, see: *E. Avgouleas*, *The Mechanics and Regulation of Market Abuse. A Legal and Economic Analysis*, Oxford: Oxford University Press, 2005, p. 250.

3 Judgments of the Court of Justice: Case C-445/09 *IMC Securities BV v. Stichting Autoriteit Financiële Markten*, 7.7.2011; Case C-19/11 *Markus Gelll v. Daimler AG*, 28.6.2012; Case C-248/11, criminal proceedings against Rareş Doralin Nilaş and others, 22.3.2012.

4 Commissie voor het Bank-, Financie- en Assurantiewezen, hereinafter called “CBFA”

5 According to Art. 2(1) of Directive 2003/6/EC, “Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.”

6 Par. 69 of the Opinion of the Advocate General.

7 Par. 62.

8 Art. 2 (1) of Directive 89/592/EEC: “Each Member State shall prohibit any person who (...) possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.”

9 O.J. L 334, 18.11.1989, p. 30.

10 Par. 33-34.

11 Par. 35.

12 Par. 37.

13 Par. 36.

14 Par. 46.

15 Par. 46.

16 Par. 37.

17 Par. 42.

18 Par. 53.

19 Par. 43-44.

20 Part. 39, 43.

21 Some authors criticize the position of the ECJ because the Court replaced the presumption of innocence by the presumption of guilt, which does not comply with the objective of strengthening freedom, security and justice in the European Union. See: *I. Seredynska*, *Insider Dealing and Criminal Law. Dangerous Liaisons*, Berlin-Heidelberg: Springer, 2012, p. 26.

22 *M. Böse*, Case C-45/08, *Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurenatiewezen (CBFA)*, Judgment of the European Court of Justice (Third Chamber) of 23 December 2009, *Common Market Law Review* 2011, vol. 48, p. 196.

23 *P.K. Staikouras*, *Four Years of MADness? – The New Market Abuse Prohibition Revisited: Integrated Implementation Through the Lens of a Critical, Comparative Analysis*, *European Business Law Review*, Vol. 17, No. 4, 2008, p. 803.

24 *A. Blachnio-Parzych*, *The Concept of Defining and Combating Market Manipulation in Existing and Proposed EU legislation*, in: *Regulating Corporate Criminal Liability*, edited by D. Brodowski/M. Espinoza de los Monteros de la Parra/K. Tiedemann/J. Vogel, Springer, 2013, forthcoming.

25 *M. Böse*, op. cit. (n. 22), p. 198.

26 Par. 57.

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