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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

Focus: The Implementation of Legal Instruments
Dossier particulier: La mise en œuvre des instruments juridiques
Schwerpunktthema: Die Umsetzung von Rechtsinstrumenten

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Editorial

Dear Readers,

I feel very honoured that I have been asked to introduce this issue of eucrim. Having been appointed as Director-General of the European Anti-Fraud Office (OLAF) in February 2011, I will devote my full attention to creating a new vision for the office and its dedicated staff while taking into account its sound experience as an effective administrative investigative service. OLAF's strengths of both contributing to prevention policies and conducting investigations will be developed by further improving OLAF's operational efficiency and internal governance.

The central topic of this eucrim issue is "implementation of legal instruments" – a point which is also of particular importance to OLAF given the current debate on the further improvement of its efficiency. OLAF's investigative function will be strengthened through a more streamlined and efficient management of the opening of investigations. It will not only help an efficient monitoring of the duration of its investigations but also the consistent de minimis approach, a better clarification of the rights and obligations of the persons affected by an investigation, as well as clearer procedures that enable items of evidence to be safeguarded and preserved. Moreover, Member States should cooperate and report more effectively to OLAF on the follow-up of cases transmitted to them, and they should already cooperate with OLAF during the phase prior to the opening of an investigation. The office will work more efficiently even before new proposals are adopted. The legislative reform of its regulatory framework, which is now the subject of a revised proposal by the European Commission, will ultimately help to further support these developments.

As part of its contribution to fraud prevention, OLAF is playing an active role in raising the anti-fraud standards of the European Union. This will be given further emphasis through the adoption of a Communication on a new anti-fraud strategy. The anti-fraud strategy complements the anti-corruption package of the European Commission and is likely to be adopted in June 2011. It covers prevention policies within the institutions and builds on the establishment of sectoral anti-fraud strategies at Directorate-General level. A simplification of the management of EU funds must not become an achievement at the expense of fraud prevention. Emphasis will be put on actions to be followed within the framework of the multi-annual financial perspectives like modern anti-fraud audit methodologies, enhanced transparency, and better traceability of information on individual projects. In addition to the anti-fraud strategy, an EU Eastern Border Action Plan is currently being developed by OLAF and TAXUD (Taxation and Customs Union Directorate-General) in order to provide a tailored and specific response to the critical problem of smuggling at the Eastern border.

Giovanni Kessler

Further developments of OLAF are necessary and feasible under the Lisbon Treaty. Given especially that, for the period 1999–2010, over half of the judicial follow-up paths created by Member States following an OLAF investigation are still open under the current regime, a future specialised European public prosecutor as set out in the Lisbon Treaty could – together with OLAF – conduct judicial follow-up investigations in accordance with shared recommendations which could increase the likelihood and the speed of them to be followed.

OLAF is looking forward to meeting these challenges of the future. However, I know how difficult and time-consuming it will be to achieve further legislative steps. The protection of the EU's financial interests cannot wait and needs to be organised without any delay in a more determined manner starting with an effective application of the available instruments and use of the potential that is already currently offered by OLAF. OLAF will therefore give its determined contribution to a more effective implementation of the available anti-fraud legal framework including prevention, investigation, and cooperation with all our partners.

Giovanni Kessler
Director General
European Anti-Fraud Office

European Union*

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

Foundations

Reform of the European Union

Framework Agreement on Relations between European Parliament and Commission

The Framework Agreement governing relations between the European Parliament and the Commission that was signed on 20 October 2010 was published in the Official Journal of 20 November 2010 (see also eucrim 4/2010, p. 130).

This Agreement that adapts the previous Agreement to the Lisbon Treaty is, according to the Council, only valid between the two signing parties and thus not opposable to the Council. Therefore, as announced earlier, the Council approved a statement during its meeting on 21 October 2010 (on employment, social policy and customer affairs) that every act or action of the Parliament or the Commission, which applies the provisions of the Agreement and has an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties, will be submitted to the Court of Justice. (EDB)

➤eucrim ID=1101001

The Stockholm Programme

Internal Security Strategy in Action Adopted

On 22 November 2010, the Commission adopted the EU Internal Security Strategy in Action. This strategy, which was a key feature of the Stockholm Programme (see eucrim 4/2009, p. 122-123), features 41 measures focusing on the most urgent security threats to Europe.

Instead of targeting one area at a time, the Commission took a comprehensive approach in the new strategy in order to respond to terrorism, organised crime, cross-border crime and cybercrime, as well as crises and disasters from natural or human causes. Many criminal offences are part of an international network that often stretches beyond the external borders of the EU. Other offences are committed in cyberspace and therefore need a common approach.

The strategy includes five strategic objectives:

- Disruption of international crime networks threatening our society;
- Prevention of terrorism and the addressing of radicalisation and recruitment;
- Raising levels of security for citizens and businesses operating in cyberspace;
- Strengthening security through border management;
- Increasing Europe's resilience towards crises and disasters.

Each of these objectives is coupled with a range of actions and a deadline for implementation. The Commission and the Standing Committee on Operational Cooperation on Internal Security (COSI) will be the main actors involved in implementing these actions. (EDB)

➤eucrim ID=1101002

Enlargement of the EU

Commission Presents Enlargement Package and Country Reports

On 9 November 2010, the European Commission adopted the annual assessment of the EU's enlargement efforts over the past year.

➤eucrim ID=1101003

The overview confirms that the negotiations with Croatia are entering their final stages. Like Serbia, full cooperation with the ICTY is a key requirement for Croatia's progress as well as judicial reforms regarding the application of

* If not stated otherwise, the news reported in the following sections cover the period November 2010–January 2011.

objective and transparent appointment criteria for judges and prosecutors, the reduction of the backlog of cases and the length of proceedings, as well as improved enforcement of decisions. Corruption remains an issue in Croatia. Progress in the area of the judiciary and fundamental rights will be assessed in the first quarter of 2011. Furthermore, the country needs to enhance the administrative capacity that is necessary for the implementation of EU legislation.

➤eucrim ID=1101004

Accession negotiations with Iceland recently started. Steps to be taken by Iceland are strongly associated with the banking crisis. Therefore, the country needs to continue to address some of its structural weaknesses through appropriate macroeconomic policies and structural reforms. With regard to EU legislation, the Commission expressed the opinion that the level of Iceland's preparedness to meet the criteria for accession is good.

➤eucrim ID=1101005

Turkey has made progress on meeting the EU membership criteria. However, according to the Commission, these negotiations are advancing slowly. The country report states that significant efforts are needed regarding fundamental rights, especially freedom of the press. Reforms that have already been made in the Turkish judicial system include the following:

- Limiting the competence of military courts;
- Restructuring the constitutional court;
- Creating a more representative composition of the high council of judges and prosecutors;
- Introducing a basis for the adoption of special measures protecting the rights of women and children;
- Safeguarding the protection of personal data and the right to apply to an ombudsman.

➤eucrim ID=1101006

The Commission's opinion on Serbia's application has not yet been released. The Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, stated that the country "should redouble its efforts to fully cooperate with ICTY." Additional improvements are required regarding the reappointment of judges and prosecutors as well as the reform of public administration and the fight against organised crime and corruption.

➤eucrim ID=1101007

With regard to Montenegro, the Commission's opinion was positive under the condition that progress is made in some key areas. Overall, Montenegro's institutional framework has been adequately developed. Nevertheless, an effective implementation and enforcement of legislation is needed, especially regarding anti-discrimination policies, freedom of expression, and government relations with civil society. Additionally, the situation of displaced persons from Croatia, Bosnia and Herzegovina, and Kosovo should be improved. Further efforts should include consolidating the rule of law, in particular in the fight against corruption and organised crime.

➤eucrim ID=1101008

The Commission also recommends the opening of accession negotiations with Albania. Its legal and institutional framework on human rights has been established and corresponds to most European standards. Legislative and institutional reforms of the judiciary and law enforcement as well as in the fight against corruption and organised crime have been successful. Offences related to drugs, human trafficking, and money laundering are areas where more concrete results should be achieved. More work is also needed concerning the effectiveness and stability of Albania's democratic institutions, notably the parliament.

➤eucrim ID=1101009

The Commission also renewed its positive recommendation regarding the start of accession negotiations with the former Yugoslav Republic of Macedonia. The political situation is stable and good progress was made regarding EU policies in the area of justice, freedom and security. Nevertheless, the independence of the judiciary, the fight against corruption, the reform of public administration, and freedom of expression in the media are still areas of concern.

➤eucrim ID=1101010

Kosovo and Bosnia and Herzegovina have not applied for EU membership, yet the Commission has reconfirmed the European perspective for both. With regard to Kosovo, the Commission states that progress has been mixed. Improvement was made in the legal framework in the areas of customs, taxation, the free movement of goods, statistics, policing, and anti-terrorism. Unfortunately, only limited progress can be seen in the areas of public procurement, financial control, money laundering, drug-trafficking, organised crime, and data protection. The functioning of the judiciary and the rule of law remain weak points.

➤eucrim ID=1101011

Bosnia and Herzegovina has also taken important steps forward in some areas but shows limited progress in others. Justice, freedom, and security-related matters, such as the fight against corruption and judicial cooperation with neighbouring countries, have improved. However, more work is still needed in the areas of free movement of goods, persons and services, information society, and the media. In addition, the independence of the judiciary and the backlog of cases in the courts need to be tackled. (EDB)

➤eucrim ID=1101012

Schengen

France and Germany Say No to Romania and Bulgaria in Schengen Area

The Schengen area, consisting of 25 countries of which 22 are Member States, was expected to be expanded to Romania and Bulgaria in 2011 (see eucrim

3/2010, p. 87). However, on 21 December 2010, Germany's Interior Minister at that time, Thomas de Maizière, and his counterpart in France, Brice Hortefeux, sent a letter to Commissioner for Home Affairs expressing their arguments in favour of not supporting the accession of the two states to the border-free zone. The news sites European Voice, EUobserver, and euractiv reported elaborately on the discussion.

The main reason for the objections of Germany and France is the lack of progress that Romania and Bulgaria have made in the fight against corruption and organised crime as well as the reform of their national judiciaries. Romanian President Traian Basescu called the letter "an act of discrimination against Romania."

When Romania and Bulgaria joined the EU in 2007, the so-called Cooperation and Verification Mechanism (CVM) was established − a way for the EU to monitor judicial reform and the fight against corruption and organised crime in both states, including potential sanctions for insufficient progress (see, for an overview of the CVM in Bulgaria, the article by Marinova and Uzunova, eucrim 2/2010, pp. 76-84). Media reports are now linking Romania and Bulgaria's entry to the Schengen zone to the CVM due to the objections raised by Germany and France.

On 4 January 2011, the head of the Foreign Affairs Committee in the Romanian parliament said that, shortly after the German and French objections were raised, the national assembly decided to postpone its vote on ratifying a Lisbon protocol allowing 12 Member States to appoint 18 extra members to the European Parliament (EP). This protocol aims to correct the number of MEPs after the EP elections were held in accordance with the Nice Treaty only six months before the Lisbon Treaty entered into force. The main consequences of the protocol after its ratification would be two additional MEPs for France and Germany would keep its 99 already elected MEPs until 2014, when its number of allocated seats will drop to 96. Romania furthermore threatened to cause problems for Croatia's accession to the EU by demanding a similar CVM for this new Member State. However, the Commission's spokespersons confirmed that Romania's accession to the Schengen area and Croatia's accession to the EU are two separate procedures.

All Schengen members have to reach a unanimous decision on the expansion of the zone. Therefore, vetoes by Germany and France would certainly postpone the accession of Romania and Bulgaria to the Schengen area.

The Working Party for Schengen Matters concluded the evaluation process for Romania in January 2011. For Bulgaria, all that remains is a reevaluation of the external land borders, which is scheduled for March 2011. These are the conclusions that were prepared by the Hungarian Presidency and endorsed by the Council on 24 February 2011. The Presidency has made it a priority to finalise Bulgaria and Romania's accession to Schengen and is committed to finding a solution that is acceptable to all parties concerned. (EDB)

➤eucrim ID=1101013

SIS II – State of Play

As part of the JHA Council of 8-9 November 2010, a meeting of the Mixed Committee (the Committee formed by all EU Member States plus Norway, Iceland, Liechtenstein, and Switzerland) was held. The Mixed Committee discussed a report of the Commission regarding the progress made on SIS II (see also eucrim 1/2010, p. 3). It took note of the conclusions made during the JHA Council of 7-8 October 2010. These conclusions included a possibility for Member States to use the European External Borders Fund to develop their national systems. The Commission's task is to keep the Council and the EP informed of the implementation of the SIS II schedule and the retention of the plan regarding further development of C.SIS 1+ until SIS II is successfully implemented. A new deadline was also set. SIS II should be operational by the first quarter of 2013. (EDB)

➤eucrim ID=1101014

Institutions

OLAF

Commission Appoints Giovanni Kessler as Director-General of OLAF

On 14 December 2010, the Commission appointed Giovanni Kessler as the new Director-General of OLAF. He takes over from Nicholas Ilett, who served as OLAF's interim chief after the former Director-General, Franz-Hermann Brüner, passed away in January 2010.

Mr. Kessler was one of three candidates who received the unanimous support of OLAF's Supervisory Committee, and his nomination was supported both by the European Parliament and the Council.

Giovanni Kessler is an Italian politician and member of Italy's Democratic Party. Prior to his appointment as Director-General of OLAF, he served, *inter alia*, as a public prosecutor and anti-mafia prosecutor in Sicily, and as the Italian High Commissioner to Combat Counterfeiting. Most recently, he served as the President of the Assembly of the Autonomous Province of Trento and as President of the Conference of European Regional Legislative Assemblies (CALRE). (ST)

➤eucrim ID=1101015

Success for Joint Operation Between Polish Authorities and OLAF

On 10 January 2011, OLAF published the results of a joint operation between OLAF officials and Polish police and customs authorities. A total of 144 tonnes of smuggled fresh garlic disguised as onions was seized during the operation. The import of fresh garlic to the EU is

subject to a 9.6% ad valorem duty and a specific amount of €1,200 per tonne (net weight). The garlic entered the EU in Rotterdam and was transhipped from there to Poland where it was eventually intercepted.

The financial impact on the EU budget of smuggling garlic is considerable: if these activities had remained undetected, the financial loss for the EU would have been over €180,000 in terms of customs duties. Although this loss was prevented through the close cooperation between OLAF and the Polish authorities, falsely declaring fresh garlic as onions is believed to be a rather common misdeed and is estimated to cost the EU more than €1 million in evaded customs duties annually. (ST)

➤eucrim ID=1101016

UK Company Director Sentenced to Imprisonment for Fraudulent Trading and Theft of EU Funds

On 3 December 2010, the director of Implants International Ltd. was sentenced to 18 months imprisonment on two charges of fraudulent trading and theft of EU funds. Implants International coordinated a research project aimed at improving the lifespan of orthopaedic devices for disabled people. In 2001, the EU paid the company €284,000 in advance, which should have been distributed to participating research institutions. Instead, the company retained the money and pulled out of the project in 2002. In 2005, the Commission obtained judgement against the company. The company director was ordered to repay the sum of €284,000, plus interest and procedural costs. However, instead of repaying the money, the old company was liquidated, and the director formed a new company under the same name, which purchased the old company's assets. In 2007, OLAF opened an investigation and passed information on to the UK Department for Business Innovation and Skills (BIS), which subsequently opened a criminal investigation. The director was not only sentenced to imprisonment, but was also disqualified from acting as a director of a limited company for a period of 15 years. (ST)

➤eucrim ID=1101017

Biggest Spanish Operation Ever Against Counterfeit Tobacco

On 12 November 2010, OLAF published information on the biggest operation against counterfeit tobacco that has ever been conducted in Spain. The operation resulted in the seizure of 90 million fake cigarettes and six arrests. Spanish Customs launched Operation BALMAN in February 2010 when information on suspicious imports from China to Spain was provided by OLAF. On 20 October 2010, six men were arrested in connection with the investigation after searches of homes and businesses in various cities throughout Spain. Smuggling cheap tobacco is a profitable business – a container load sells for around €100,000 in China, whereas it can reach more than €1 million in Europe. The Commission takes the problem of counterfeit tobacco products very seriously and recently signed new agreements with some of the biggest tobacco companies to jointly fight the illicit trade in tobacco products (see eucrim 4/2010, p. 135 and eucrim 3/2010, p. 90). (ST)

➤eucrim ID=1101018

Europol

Better Parliamentary Control

On 17 December 2010, the European Commission adopted a Communication that shall strengthen parliamentary control over Europol's activities, especially with regard to the scrutiny exercised by national parliaments. To achieve this aim, the Commission suggests setting up a permanent joint or inter-parliamentary forum through which both the European Parliament and national Parliaments could exercise control over Europol. Furthermore, the Communication shall strengthen the European Parliament's role in debating Europol's annual work programme and its long-term strategic goals. (CR)

➤eucrim ID=1101019

Eurojust

Vice-President Re-Elected

On 27 October 2010, Raivo Sepp, National Member for Estonia, was re-elected as Vice-President of Eurojust. The College of Eurojust elected Mr. Sepp, who joined Eurojust in 2004, for another 3-year term starting on 9 November 2010.

Further representatives of Eurojust's College at the moment are its President Aled Williams, National Member for the United Kingdom, and second Vice-President Michèle Coninsx, National Member for Belgium. (CR)

➤eucrim ID=1101020

New Issue of Eurojust News Available

The third issue of Eurojust News is dedicated to the fight against drug trafficking. In addition to an article describing the support that Eurojust can provide in this matter, the newsletter contains reports on practical case examples, an introduction to the work of Eurojust's Trafficking and Related Crimes Team, and an interview with Mr. Cees van Spierenburg, National Public Prosecutor for Synthetic Drugs and Precursors at the Dutch National Public Prosecution Office.

Drug trafficking is the most frequent type of crime dealt with at Eurojust, with 230 cases registered and 40 coordination meetings held on the issue in 2009. (CR)

➤eucrim ID=1101021

Consultative Forum of the Prosecutors General and Directors of Public Prosecution

On 16 December 2010, the first meeting of the so-called "Consultative Forum of the Prosecutors General and Directors of

Public Prosecution" was held at Eurojust in The Hague. Within the framework of the Belgian Presidency, the Belgian Board of Prosecutors General – supported by Eurojust – invited the Prosecutors General and Directors of Public Prosecution of all EU Member States as well as representatives of the European Commission and the General Secretariat of the Council of the EU to participate in this first meeting.

At this meeting, the Consultative Forum agreed on its mandate, outlining that the forum shall consist of representatives from all EU Member States who hold the highest level positions within public prosecution systems. The forum shall meet at least once a year at Eurojust's office complex in The Hague. The forum's objective will be to promote the strengthening of the judicial dimension of the EU's internal security:

- By discussing trends in criminality impacting the EU;
- By sharing prosecution strategies and best practices in the main areas of serious and organised crime;
- By sharing experiences in the use of procedures and practical cooperation measures.

The discussions shall contribute to the evaluation of lessons learned and to legislative initiatives taken at the EU level. (CR)

➤eucrim ID=1101022

European Judicial Network (EJN)

New Application for Tools Correspondents

The EJN launched a new application for its Tool Correspondents that shall allow them to communicate directly with the EJN Secretariat and with each other. The new application offers information on ongoing projects, a forum for ideas and discussion, and a list of all tool correspondents to contact on a personal basis.

Tool Correspondents of the EJN are composed of appointed EJN contact points or other experts in charge of updating the EJN website and making technical decisions representing the interests of their Member States. (CR)

➤eucrim ID=1101023

Frontex

Programme of Work 2011

The Programme of Work is Frontex' operative plan that proposes and outlines its areas of activities for the year 2011.

The programme consists of two parts: The first general part reiterates Frontex' mission, its strategic positioning, and its vision for the agency as "… the anchor stone of the European concept of Integrated Border Management, promoting the highest level of professionalism, interoperability, integrity and mutual respect of stakeholders involved." Furthermore, the general part contains an outlook regarding the situation at the external borders of the EU in 2011 as well as a detailed description of the allocation of Frontex' budget for 2011.

The second part focuses on four key business areas and strategic goals of Frontex:

- Awareness (analytical capabilities);
- Response (operational capabilities and reaction capabilities);
- Interoperability (customerisation);
- Performance (managerial capabilities). (CR)

➤eucrim ID=1101024

Working Arrangement with Cape Verde

On 14 January 2011, Frontex and the National Police of Cape Verde signed a Working Agreement. The agreement aims at promoting cooperation in operational and technical border security as well as management matters between Frontex and the competent authorities of the island country. It foresees the exchange of best practices and strategic information, training, capacity-building and collaboration on relevant technologies, as well as participation in joint operations. Furthermore, information regarding people smuggling and trafficking in human beings shall be shared.

The Working Agreement is the fourteenth agreement with a non-EU state signed by Frontex. (CR)

➤eucrim ID=1101025

Consolidated Version of Amended Frontex Regulation

The Hungarian Presidency published a consolidated version of the draft Regulation amending Regulation (EC) No. 2007/2004 (FRONTEX Regulation) as it stands in January 2011 (for further details, see eucrim 1/2010, pp. 9-10).

Changes and amendments mainly concern:

- The provisions on joint operations and pilot projects at external borders and their organisational aspects;
- Composition, deployment, and instructions to Frontex Joint Support Teams;
- The deployment of Frontex' risk analysis and its monitoring and contributing to research;
- The acquirement of technical equipment;
- Frontex' cooperation in joint return operations of Member States;
- Frontex' information exchange system;
- The processing of personal data. (CR)

➤eucrim ID=1101026

Greek RABIT Operation Extended

The mission of the Rapid Border Intervention Teams (RABITs) deployed to Greece in October 2010 to assist in combating the increase in illegal border crossings at Greece's external border with Turkey (see eucrim 4/2010, pp. 133-134) was extended until 3 March 2011.

The teams' operation appears to have produced measurable results: According to Frontex' estimation, by the end of November 2010, the number of irregular migrants detected at the Greek-Turkish land border had decreased by 43,7% in comparison to October 2010,

and they fell even further in December 2010 (-37%) and January 2011 (-57%). While 245 irregular migrants on average were detected per day in October 2010, by January 2011, this number decreased to approximately 98 persons.

After March 2011, Frontex will continue to provide operational support to Greece through Operation Poseidon Land. This is a joint operation that was already designed in 2006 as a purely sea-based operation and, since then, has become the focus of Frontex' operational deployment in the Mediterranean region. (CR)

➤eucrim ID=1101027

Specific Areas of Crime / Substantive Criminal Law

VAT/Tax Fraud

Directive on Mutual Assistance in the Field of Direct Taxation Adopted

On 15 February 2011, the Council adopted the new Directive aimed at strengthening administrative cooperation in the field of direct taxation. The Council had already reached an agreement on the directive on 7 December 2010 and now adopted it without further discussion.

The directive will enable Member States to mutually assist each other in the fight against tax evasion and tax fraud, particularly by providing for ways to better exchange information between the competent authorities. The directive will ensure that the OECD standard for the exchange of information upon request is implemented in the EU. Member States will no longer be able to refuse to supply information about a certain taxpayer on the grounds that the information is held by a bank or other financial institution. The directive also provides for a new approach to automatically exchange information on eight categories of income and capital. The deadline for transposition of the directive into the national laws of the Member States is 1 January 2013. (ST)

➤eucrim ID=1101028

Fraud

Council Takes on Fight Against Identity-Related Crime

At the JHA meeting from 2-3 December 2010, the Council adopted conclusions on preventing and combating identity-related crimes and on better identity management. The Council hereby asked the Commission to analyse and support the Member States' efforts to reinforce personal identification procedures, e.g., by monitoring the findings of the SWOT analyses carried out by several Member States. SWOT analysis is a strategic planning method used to evaluate the Strengths, Weaknesses, Opportunities, and Threats involved in a project. Several Member States have started such assessments to evaluate:

- The respective personal identity management systems;
- The inherent strengths and weaknesses of the procedures applied in each of the systems as regards the creation, registration, use, and verification of identity;
- The threats and risks that might compromise the security of information and of information processes.

Furthermore, the Commission shall, *inter alia*, set up a platform for the exchange of good practices in the area of managing the personal identity chain. It will also support the establishment of effective complaint mechanisms in the Member States that could provide adequate help to victims. The Council invited Member States to contribute to the SWOT assessments, to exchange information with a view to improving the prevention of and fight against identity-related crimes, and to rethink security and content standards of source documents (e.g., birth certificates). (ST)

➤eucrim ID=1101029

Corruption

Council Sets Up New Watchdogs to Supervise the Financial System

On 17 November 2010, the ECOFIN Council adopted several Regulations aimed at eliminating deficiencies that were exposed during the financial crisis. Regulation (EU) No. 1092/2010 establishes the new European Systemic Risk Board (ESRB), which will provide macro-prudential oversight of the financial system. The ESRB will monitor and assess potential threats to the financial system. It will issue general or specific risk warnings and recommendations to the EU, the new European supervisory authorities (ESAs) and/or to the Member States.

For the first five years, the ESRB will initially be chaired by the President of the European Central Bank. For subsequent terms, the ESRB's president will be designated in accordance with modalities yet to be determined. With regard to the day-to-day running of the ESRB, Regulation (EU) No. 1096/2010 confers specific tasks of the ESRB upon the European Central Bank. In addition to the ESRB, three new supervisory authorities ("ESAs") are being created:

- The European Banking Authority (EBA; Regulation (EU) No. 1093/2010);
- The European Insurance and Occupational Pensions Authority (EIOPA; Regulation (EU) No. 1094/2010);
- The European Securities and Markets Authority (ESMA; Regulation (EU) No. 1095/2010).

The ESAs' main task is to ensure that consistent supervisory practices are being applied by the respective national supervisory authorities. The ESAs have the power to:

- Investigate alleged breaches of EU law;
- To adopt individual decisions requiring the competent national authorities to take certain measures in emergency situations (the Council determines whether there is an emergency situation or not);
- In case of disagreements or conflicts

The Use of New Technologies in Criminal Proceedings

Seminar 1: E-Evidence – Validity and Admissibility of Electronic Evidence in Criminal Proceedings

Barcelona, 26–27 May 2011

This project, mainly sponsored by the European Commission, consists of three major seminars that will take place in Barcelona (Spanish Judicial School), Budapest (Hungarian Judicial Academy) and Trier/Germany (Academy of European Law – ERA).

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

This seminar will discuss the validity and admissibility of electronic evidence in criminal proceedings. The main aims of the seminar are to:
- Define "electronic evidence"and offer practical illustrations and examples of analogue and digital evidence;
- Present the practical challenges relating to the collection and use of digital evidence;
- Discuss the legal implications of digital evidence (collection, evaluation, and admissibility);
- Identify some of the practical problems that judges and prosecutors experience when dealing with criminal proceedings;
- Provide an overview of good practices in various EU Member States.
- Finally, the seminar will assess how the use of electronic evidence can help to rationalise, simplify, or possibly complicate criminal procedures and trials.

The seminar will be held in English and Spanish.

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

between national authorities of different Member States, to take binding decisions requiring them to take specific actions to settle the conflict. Any binding decision taken by the ESAs will be subject to review by the EU courts.

On 19 January 2011, the Commission proposed a new directive amending the adopted legislation in order to clearly define the scope for the authorities to exercise their powers, e.g., by including the possibility to develop draft technical standards and to settle disagreements between national supervisors. The proposed directive will now be sent to the Council and the European Parliament for consideration. (ST)

➤eucrim ID=1101030

Money Laundering

Germany Warned over Anti Money-Laundering and Combating the Financing of Terrorism Laws

On 27 January 2011, the Commission sent out a reasoned opinion to Germany asking for full compliance with EU laws regarding anti money-laundering (AML) and combating the financing of terrorism (CFT). According to German law, the federal states are responsible for assigning supervisory authorities in charge of monitoring entities of the financial sector that are subject to AML/CFT requirements. Two German federal states have not yet assigned such supervisory authorities and Germany therefore fails to fully comply with the respective provisions. If Germany does not reply satisfactorily to the Commission's request within two months, the matter may be referred to the ECJ. (ST)

➤eucrim ID=1101031

Organised Crime

MEP Calls for Assessment of Counter-Terrorism Measures

On 19 January 2011, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs published a Working Document on achievements and future challenges of EU counter-terrorism policy. In the document, rapporteur Sophie in't Veld asks the Commission to carry out a study to establish whether counter-terrorism policies are subject to effective democratic scrutiny, in the sense that either national parliaments or the EP has full rights and means of scrutiny regarding counter-terrorism measures.

The study shall examine whether the measures taken in the fight against terrorism are subject to a retrospective proportionality test. It will also provide an overview of the use of external expertise, the instruments for democratic scrutiny of cross-border cooperation of intelligence agencies, measures adopted by third countries with extraterritorial effect in the EU, measures agreed on in international governmental and non-governmental bodies, and non-legislative activities (e.g., research programmes).

The Working Document also calls on the EU and the Member States to investigate possible unlawful actions and violations of international law and human rights, particularly referring to the EU's role in EU-US counter-terrorism cooperation. Another important part of the document refers to large-scale collection of personal data, detection and identification technologies, and their effectiveness for the prevention of terrorism.

The Working Document recommends an assessment of the current situation of collecting data for counter-terrorism purposes, including an evaluation of the use of the collected data, the amount of collected data, and the means of processing and sharing the collected data. (ST)
➤eucrim ID=1101032

Council Discusses the Future of EU Counter-Terrorism Policies

The EU Counter-Terrorism Coordinator, Gilles de Kerchove, presented his most recent discussion paper on EU counter-terrorism strategy as well as his annual report on the implementation of the EU Action Plan for combating terrorism at the JHA meeting from 2-3 December 2010. The annual report, which gives an overview of measures taken within the past year, is accompanied by a discussion paper that highlights the most important issues in the fight against terrorism. The Council discussed some of the paper's key findings:

- Transport security: the Coordinator identifies a need for setting up a body on land transport security to complement the existing committees on aviation security (AVSEC) and maritime security (MARSEC);
- Terrorist travel: to improve document checks and document security and to develop closer cooperation with the relevant authorities of the third states constituting target or transit countries;
- Cyber security: to support, *inter alia,* the Commission's initiative to explore the set-up of an EU Computer Emergency Response Team (CERT);
- External dimension: to ensure that the EU has adequate resources to support its external counter-terrorism efforts;
- To fight the discrimination and social marginalisation of Muslims. (ST)

➤eucrim ID=1101033

Trafficking in Human Beings – State of Play

After negotiators of the European Parliament (EP), the Council, and the Commission reached a political consensus on the text of a new Directive on preventing and combating trafficking in human beings and protecting victims, the Council on 2 December 2010 unanimously agreed upon a text to be sent to the EP for approval. Shortly after the Council's agreement, the EP endorsed the proposed text at a first hearing on 14 December 2010 and sent it back to the Council for formal adoption.

Once formally adopted, the new directive will constitute the first legal instrument mutually created by the Council and the EP in the area of substantive criminal law after entry into force of the Lisbon Treaty. It is therefore the first instrument to be established by both institutions on an equal footing. This is in contrast to the situation before entry into force of the Lisbon treaty where decisions were made by unanimous decision in the Council after mere consultation of the EP.

The Directive will apply to all Member States except for Denmark and the UK, although the latter might still use an opt-in to participate in the new rules at a later stage.

The new directive will replace Framework Decision 2002/629/JHA on combatting trafficking in human beings and draws on a proposal adopted by the Commission in March 2010 (COM(2010) 95 final; see eucrim 1/2010, p. 10). It will introduce EU-wide minimum rules concerning the definition of criminal offences and higher penalties in this area, e.g., at least five years of imprisonment for trafficking in human beings or ten years of imprisonment in specific aggravating circumstances. These aggravating circumstances include situations where the victim is particularly vulnerable or endangered, e.g., because the victim is a child or the offence was committed within the framework of a criminal organisation.

The text establishes extraterritorial jurisdiction by obliging Member States to investigate and prosecute offences committed in whole or in part within its territory or committed by one of its nationals, even if the offence has been committed outside of its territory. Furthermore, the directive gives national authorities the option not to prosecute victims of trafficking in human beings for their involvement in criminal activities that they were forced to commit. The text strengthens victims' rights by laying down protection measures like access to legal counselling, support before, during, and after criminal proceedings, specific measures for child victims, and access to compensation for victims of violent intentional crimes.

According to the Commissioner for Home Affairs, Cecilia Malmström, the agreed upon text is "a balanced compromise between the institutions" and the new directive will create "an ambitious common legal framework to combat trafficking in human beings."

On the same day that the EP voted in favour of the new directive, Commissioner Malmström announced the appointment of Myria Vassiliadou as the new European Anti-Trafficking Coordinator. According to the text of the directive, the task of the Anti-Trafficking Coordinator is to improve coordination and coherence between EU institutions, EU agencies, Member States, third countries, and international actors. The Anti-Trafficking Coordinator will monitor the progress made in the fight against trafficking in human beings and periodically report directly to the Director-General of the DG Home Affairs.

Following the agreement on the new directive, on 21 December 2010, Commissioner Malmström launched a new website dedicated to the fight against trafficking in human beings. The website was created to inform both practitioners and the public about measures taken at the EU level and will include national information pages of all EU Member States with information on legislation, action plans, coordination, prevention, assistance and support to victims, investigation and prosecution, as well as international coordination. (ST)
➤eucrim ID=1101034

Council Emphasises Importance of Cooperation between Member States and SITCEN

During the JHA meeting from 2-3 December 2010, the Council adopted conclusions on the sharing of information on terrorist threat levels between the Member States. The Council herein requested Member States to swiftly share information on any changes in national threat levels with other Member States and the EU Joint Situation Centre (SITCEN). SITCEN shall then immediately inform all national contacts points and the relevant EU authorities about the changes in national threat levels. (ST)

➤eucrim ID=1101035

Fight against Crimes Committed by Mobile Criminal Groups

At its meeting from 2-3 December 2010, the JHA Council adopted conclusions on the fight against crimes committed by mobile criminal groups. According to the Council's definition, a mobile criminal group is "an association of offenders, who systematically acquire wealth through theft of property or fraud, having a wide ranging area of operations and are internationally active."

The Council invited the Member States to develop an administrative approach to fighting mobile criminal groups, including, *inter alia*, the registration and marking of "precious objects" that are being acquired or sold in order to facilitate the return of these goods to the respective owner. The conclusions emphasise the need to monitor international financial transactions and (informal) information exchange between EU authorities, national contact points, and even third countries and private partners. The conclusions also call on Europol to continue and expand its work in this particular area of crime. (ST)

➤eucrim ID=1101036

EU Action Plan on Air Cargo Security

In response to the security alert of 30 October 2010, when viable explosive devices were found in cargo shipments originating from Yemen for transfer to US-bound flights at airports in Germany and the UK, the Commission published a report listing a set of recommendations to improve air cargo security. These recommendations were developed in cooperation with the *ad hoc* High Level Group on cargo security/civil aviation that was set up during the JHA Council meeting on 8-9 November 2010. The report identifies security gaps and recommends developing a coordinated approach at the EU and international levels in order to achieve additional security measures. The three main issues addressed by these recommendations concern the following:

Firstly, new harmonised EU cargo and mail security controls are planned. To achieve this aim, new legislative proposals are envisaged that may, for instance, introduce actions to be taken by EU air carriers wishing to bring cargo from countries outside the EU into the EU. Criteria are to be established for identifying cargo that represents a particular risk. Mechanisms should allow for the evaluation of security standards at non-EU airports and require Member States to accelerate the implementation of the EU's system of supply chain security. Furthermore, cargo and mail inspections shall be enhanced by increasing the number of EU inspections, actions by the Member States to strengthen national monitoring programmes, and effective staff training. Finally, further investment will be made in research projects aiming at the development of better detection technologies.

Secondly, EU coordination is to be enhanced by putting in place appropriate mechanisms to share information on new threats and by developing an EU threat assessment capability.

Thirdly, as it is understood that a global approach is crucial to improving security, swift implementation of the relevant treaties of the International Civil Aviation Organization (ICAO) as well as the use of audits and capacity-building initiatives offered by the ICAO are recommended.

An idea from the German Minister of the Interior to introduce a blacklist of airports in countries that are prone to terrorism was considered too extreme and therefore abandoned.

During the JHA meeting from 2-3 December 2010, the Council discussed this report on strengthening air cargo security.

The Presidency asked the Commission and the Member States to implement the measures proposed by the action plan and to report back to the Council within six months. (CR/ST)

➤eucrim ID=1101037

Cybercrime

Digital Agenda: First Ever Pan-European Cyber Security Exercise

On 4 November 2010, all EU Member States as well as Norway, Switzerland, and Iceland participated in the first ever pan-European Cyber Security Exercise: "CYBER EUROPE 2010". The simulation was facilitated, organised, and managed by the European Network and Information Security Agency (ENISA) and supported by JCR, the European Commission's Joint Research Centre. This came about after the European Commission called for ENISA to continue supporting EU and EFTA Member States in organising and running national exercises within its newly extended mandate (see eucrim 4/2010, p. 136).

The exercise involved a simulation of hacker attempts aimed at hindering the availability of the Internet in several EU Member States. As a result, citizens, businesses, and public administrations would experience difficulties in accessing critical online services unless the traffic from affected interconnections could be rerouted. Throughout the day, one country after another would increasingly be affected by this problem, ultimately making cooperation between

European Criminal Justice – Before and After Lisbon

A Report from the ERA Winter Academy for Young Judges and Prosecutors

In January 2011, judges and prosecutors launching their professional careers in the field of criminal justice across the European Union gathered for the first time for a two-week "Winter Academy" on European criminal justice at the Academy of European Law (ERA) in Trier/Germany. The course was co-financed by the European Commission as part of its criminal justice framework partnership programme and conducted in cooperation with the European Judicial Training Network (EJTN). Almost 60 participants from 18 EU Member States attended lectures on the legislation of the Council of Europe and the European Union on substantive and procedural criminal law. They also discussed practical problems and solutions in several workshops and visited different European courts and organisations. This course ultimately helped them overcome a true obstacle to mutual assistance and recognition in the EU: the lack of mutual trust.

Two weeks intensive program

Lecturers gave an overview on the history and current developments in European criminal law. Since the Lisbon Treaty, the area of Freedom, Security and Justice (AFSJ) has replaced the former third pillar and provides a broader competence for the EU to act in matters of criminal law. The legislative process has fundamentally changed and now requires co-decision by the EU Council (qualified majority voting) and the European Parliament (EP). The conventional legal instruments (Art. 288 Treaty on the Functioning of the European Union, TFEU) now also apply to criminal law. With the new legislative participation of the EP, the rights of suspects receive more attention than ever. Before, the focus was on strengthening the investigation and prosecution of transborder crimes. The accession of the EU to the ECHR is currently being negotiated.
The European Court of Justice (ECJ) provides judicial control in the area of European criminal law. Preliminary rulings by the ECJ upon the request of national courts on matters of European legislation regarding substantive and procedural criminal law ensure a uniform application in all Member States.

Common law and civil law systems

Despite some incompatibilities in the common law and civil law systems, the ECHR sets procedural standards across the various legal systems in Europe. In order to ensure the admissibility of evidence obtained in one country, the requesting judicial authority may ask for certain procedures to be applied, even if they are not standard in the requested state.
In workshops, the participants examined concrete cases and issued requests for legal assistance, including requests for search warrants and for the provision of evidence.

European Mutual Legal Assistance – in Theory and Practice

The legal basis for European mutual assistance is found in the 1959 Council of Europe (CoE) Convention on Mutual Assistance in criminal matters and its additional protocols, the Schengen Agreement, and, lastly, the 2000 EU Convention on Mutual Assistance in Criminal Matters. The latter Convention is the basis for most mutual assistance in criminal matters today.[1] Depending on the specific assistance needed, the 1959 CoE Convention may still be applied. The 2000 Convention[2] enhances mutual legal assistance, requests that the states provide the assistance as soon as possible, and coordinates the assistance by means of direct contacts between the relevant judicial authorities. The European Judicial Network (EJN) is a network of judicial authorities across the EU, with a secretariat located on the premises of EUROJUST in The Hague. Most importantly, the EJN facilitates contacts between the judicial authorities and provides important information online (e.g., through the EJN Atlas and the "fiches belges").
These tools were used throughout the workshops, during which the principle of ne bis in idem was also applied (Art. 50 of the EU Charter on Fundamental Rights).
In addition, the European Arrest Warrant (EAW), the best example of mutual recognition of judicial decisions within the EU,[3] was introduced and applied in workshops. Other lectures and workshops addressed the seizure of evidence and its admissibility in the requesting state as well as the European Confiscation and Freezing Order.
Further subjects of discussion were the provision of criminal records from another EU state, the enforcement of foreign criminal sentences, data protection, efforts to harmonise European criminal law (e.g., in the areas of cybercrime, counter-terrorism, human trafficking), procedural rights in the EU, and the proposals for a European Protection Order (EPO) and a European Investigation Order (EIO).
The participants also visited the Court d'Appel in Metz/France as well as the ECJ in Luxembourg. EUROJUST, EUROPOL, and the EJN Secretariat were visited during a short trip to The Hague where their work was explained in more detail.

Conclusion

Overall, the Winter Academy provided the participants with a detailed legal background on European criminal law and mutual legal assistance and introduced the relevant European bodies and organisations. Most importantly, they could practise mutual assistance in various workshops and become familiar with the various legal systems in other EU states.
60 more colleagues attended a second course. The Winter Academy was therefore a true success, and the participants expressed their gratitude to the ERA, especially to Cornelia Riehle and Tatsiana Bras-Gonçalves who organised and managed the course. They also proposed that the ERA consider a follow-up course in a few years time.
The participants came to Trier as professional colleagues and left as friends. Many personal contacts and workshops on concrete cases helped build mutual trust amongst the participants. Despite different legal backgrounds and systems, they felt united in their aim to achieve justice and security across Europe, while guaranteeing the fundamental rights of suspects and victims.

Klaus Hoffmann, Public Prosecutor, Freiburg/Germany.
Mr. Hoffmann worked as Prosecutor at the UN-Tribunal for the former Yugoslavia (ICTY) from 2005 to 2010.

1 Only Italy, Greece and Ireland have not yet ratified this Convention.
2 Its scope was extended by the 16 October 2001 Protocol in relation to bank information.
3 See also, however, EU Framework Decision 2005 on the enforcement of financial penalties from another Member State.

all playing Member States in a joint response to the crisis essential.

Participants in the pan-European Cyber Security project were public authorities of the EU Member States, including communications ministries and regulators, information infrastructure protection authorities, crisis management organisations, law enforcement organisations, as well as National Computer Emergency Response Teams. Ultimately, 22 Member States actively participated while eight countries were observers. Over 70 public sector bodies responded to more than 320 security threats.

The exercise had the following aims:
- Increasing the understanding of how cyber incidents are handled;
- Testing communication points and procedures between the Member States;
- Understanding interdependencies between key actors within each country;
- Promoting trust and mutual support between the Member States.

A full report, including an in-depth evaluation of CYBER EUROPE 2010, is expected to be published in 2011. A presentation of the results will take place within a follow-up workshop. (NK)

➤eucrim ID=1101038

EU-US Working Group on Cyber Security and Cybercrime Established

An EU-US Working Group on Cyber Security and Cybercrime was established during the EU-US summit held in Lisbon on 20 November 2010. The Working Group was created to address a number of specific priority areas (cyber incident management, awareness raising, cyber crime, and public–private partnerships) and will report on progress made within one year of its creation. (ST)

➤eucrim ID=1101039

Environmental Crime

Fighting Illegal Timber Import

Following agreements with the Republics of Congo and Cameroon (see eucrim 2/2010, p. 47 and 4/2010, p. 136), a new EU regulation to prevent illegal timber from being sold on the European market was adopted in November 2010. The regulation was proposed by the Commission in 2008 and will apply in all Member States from 3 March 2013 on. The newly adopted regulation bans the sale of illegal timber or products derived from illegally harvested timber on the EU market. The regulation obliges EU operators selling timber and timber products for the first time on the EU market to verify that the timber has been harvested according to the relevant laws of the country of harvest. Also, traders along the supply chain will need to keep records of the seller and the country of origin. Timber products from countries that have entered into Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements with the EU will be considered to be in compliance with the Regulation. (ST)

➤eucrim ID=1101040

Member States Taken to Court over Breach of EU Environmental Legislation

The Commission has again issued many warnings to the Member States about shortcomings in properly transposing EU environmental legislation into national law. Some Member States now face proceedings before the ECJ for not complying with the EU legislation despite having received warnings by the Commission (see also eucrim 4/2010, p. 137-138 and eucrim 3/2010, p. 93):

On 24 November 2010, the Commission announced to refer Estonia and Poland to the ECJ for failing to adopt legislation on spatial data infrastructure at national level. Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive on spatial infrastructure before 15 May 2009. Poland has received a reasoned opinion on the matter in November 2009 and Estonia has been warned in January 2010. Since both Member States still did not adopt the necessary legislation, the Commission decided to refer the cases to the ECJ.

➤eucrim ID=1101041

Also on 24 November 2010, the Commission decided to refer Poland to the ECJ for failing to comply with EU environmental legislation in the area of flood prevention. Despite a reasoned opinion sent out in July 2010, Poland still has not notified the Commission of proper transposition of Directive 2007/60/EC on the assessment and management of flood risks. Member States were to implement the Directive into national law and inform the Commission by November 2009.

➤eucrim ID=1101042

Poland, once again, has been referred to the ECJ for its insufficient transposition of nature protection legislation. On 24 November 2010, the Commission announced that it would refer the country to the ECJ, since there are concerns about the Polish provisions derogating the strict system of protection offered by the Habitats Directive (92/43/EEC). Poland received a reasoned opinion on the matter in January 2010.

➤eucrim ID=1101043

Cyprus, Italy, Portugal, and Spain face proceedings before the ECJ for failing to effectively tackle excess emissions of airborne particles known as PM10. Directive 2008/50/EC on ambient air quality and cleaner air for Europe requires Member States to limit the exposure of citizens to PM10. The Member States concerned have failed to respect the limit values for PM10 as set out by the Directive and are therefore now being referred to the ECJ.

➤eucrim ID=1101044

On 27 January 2010, the Commission announced that it would refer Greece to the ECJ for failing to protect Lake Koroneia. Lake Koroneia, an internationally important wetland in the region of Thessaloniki, has been seriously affected by pollution and illegal water extraction. Although Greece adopted a comprehensive action plan including various meas-

ures (co-financed by the EU) to rehabilitate the wetland, many of the measures have still not been put into practice, and important conditions set for the financing have not been met. The Commission has therefore decided to refer the matter to the ECJ and to review the EU-financing decision. (ST)
➤eucrim ID=1101045

Sexual Violence

Fighting the Sexual Exploitation of Children

At the JHA meeting from 2-3 December 2010, the Council reached a general agreement on the proposed Directive on combating sexual abuse, sexual exploitation of children, and child pornography. The proposed directive was adopted by the Commission in March 2010 (see eucrim 1/2010, p. 12) and aims at establishing EU-wide minimum rules concerning criminal offences and sanctions, strengthening the prevention of these crimes, strengthening the protection of child victims, and combating Internet child pornography more effectively, e.g., by removing or blocking web pages containing or disseminating child pornography. Now that the Council has reached agreement on the proposal, negotiations with the European Parliament can begin. The intention is to reach agreement with the parliament after a first reading as soon as possible. (ST)
➤eucrim ID=1101046

Procedural Criminal Law

Procedural Safeguards

General Approach Reached on Right to Information in Criminal Proceedings

In line with the proposal adopted on 20 July 2010 (see eucrim 3/2010, pp. 93-94), the Council agreed on a general approach to the Directive on the right to information in criminal proceedings during the JHA Council of 2-3 December 2010.

A general approach was reached regarding the right of a person being arrested to receive a so-called "Letter of Rights" in a language that he/she understands upon arrest. This document should be drafted in simple wording so as to be easily understood by any person without any knowledge of criminal procedure.

The procedural rights that should be included in the Letter of Rights are as follows:

- The right to know how long one can be deprived of liberty in the country concerned before being brought before a judicial authority after arrest;
- The right of access to a lawyer;
- Any entitlement to legal advice free of charge and to the conditions for obtaining it;
- The right to interpretation and translation;
- The right to remain silent.

The proposed Directive also contains a sample Letter of Rights. The status and content of this sample letter will be discussed at a later date. (EDB)
➤eucrim ID=1101047

Data Protection and Information Exchange

Negotiations on EU-US Data Protection Agreement

During the JHA Council of 2-3 December 2010, the Council adopted the negotiation mandate for a new agreement between the EU and the US. The future agreement is to cover personal data transferred and processed for the purpose of preventing, investigating, detecting, or prosecuting criminal offences, including terrorism, within the framework of police cooperation and judicial cooperation in criminal matters. A number of agreements governing the exchange of personal data in criminal matters between the EU and the US are already in place. These agreements, as well as domestic law, will continue to govern data transfers. However, the new agreement will provide a general legal framework for transatlantic data exchange. This will be established by means of a supervision mechanism and the formulation of common data protection principles. Principles will be developed in the areas of data quality and updates; purpose limitation; data minimisation, secure data processing; logging or documentation; the right to access, rectification, erasure and redress, as well as the right to compensation.

On 9 December 2010, an EU delegation travelled to Washington in order to start negotiations on the future data protection agreement with US officials including Attorney General Eric Holder and Secretary of Homeland Security Janet Napolitano. Vice-President and Commissioner of Justice Viviane Reding represented the EU in these negotiations. On 20 December 2010, she issued a statement that the US had an apparent lack of interest in seriously discussing data protection and had not yet appointed a negotiator. The US Ambassador to the EU William Kennard released a press statement that he disagreed with the allegations and that the talks on the agreement are moving ahead. (EDB)
➤eucrim ID=1101048

Commission Presents New Approach on Data Protection in the EU

On 4 November 2010, the Commission presented its communication on a comprehensive approach to data protection in the EU (COM(2010) 609 final). One month later, during the JHA Council of 2-3 December, a policy debate was held on this topic.

In the communication, attention is drawn to five key objectives:

- Strengthening individuals' rights;
- Enhancing the internal market dimension of data protection;
- Revising the data protection rules in

the area of police and judicial cooperation in criminal matters;
- Addressing the global dimension of data protection (cooperation with third states such as the US);
- Providing a stronger institutional arrangement for better enforcement of data protection rules.

One of the first results will be a revision of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This basic legal instrument still includes the fundamental principles of data protection in the EU but will be revised in the light of technological developments and globalisation − new challenges for the protection of personal data. As a first step, the Commission plans to make a proposal for a new legal instrument in the course of 2011. Secondly, the Commission will evaluate the need to adapt other legal instruments (Regulation 45/2001) to the new data protection framework. (EDB)
➤eucrim ID=1101049

European Data Protection Supervisor's Opinion on Data Protection Approach

On 14 January 2011, the European Data Protection Supervisor (EDPS) presented his opinion on the Commission's Communication on a comprehensive approach to personal data protection in the EU (see previous news item).

The EDPS highlights the necessity of reviewing the existing data protection legal framework in order to continue ensuring the protection of personal data in the current technological context. He thus welcomes the Commission's efforts. The EDPS and the Commission also see eye to eye on the validity of the general principles of data protection in this new context. Nonetheless, he criticises the Commission's approach as insufficient because data processing by EU institutions and bodies was excluded.

After a review of existing data protection legislation, his findings focus on a higher level of harmonisation in the form of a directly applicable regulation. Strengthening the rights of individuals should not stand alone but should be accompanied by strengthening the obligations of organisations and data controllers. The latter is connected to the concept of privacy by design. The EDPS calls upon the Commission to cooperate with the Council of Europe and the Organisation for Economic Cooperation and Development (OECD) – both of whom have developed data protection instruments in the past – in order to develop standards that reach beyond the EU. As regards the need for specific rules when processing personal data in criminal matters, he also suggests avoiding different regimes for data processing by Europol, Eurojust, data included in the SIS, and application of the so-called Prüm decisions. Ultimately, the status of the national data protection authorities and their mutual cooperation should be clarified and strengthened. (EDB)
➤eucrim ID=1101050

EU Agreements on PNR Transfers to Third States

The Council adopted the negotiating mandates for new agreements on the transfer and use of passenger name records (PNR) with Australia, Canada, and the US during the JHA Council of 2-3 December 2010. The agreements with the US and Australia have to be (re) negotiated as they were only provisionally applied, based on data protection concerns. Furthermore, due to the Lisbon Treaty, their entry into force is also dependent on the consent of the EP. The agreement with Canada needs to be renegotiated due to expiry of the decision regarding the adequacy of the Canadian level of data protection (see eucrim 4/2010, p. 139).

The European Criminal Records Information System (ECRIS)

Seminar 2: State of Play and Experiences to Date in EU Member States

Budapest, 9–10 June 2011

This project, mainly sponsored by the European Commission, consists of three major seminars to take place in Barcelona (Spanish Judicial School), Budapest (Hungarian Judicial Academy), and Trier/Germany (Academy of European Law – ERA).

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

The European Criminal Records Information System (ECRIS) is a decentralised information technology system for the exchange of information extracted from criminal records between EU Member States. It sets out the elements of a standardised format for an electronic exchange as well as general and technical implementing aspects of the information exchange. Council Decision 2009/316/JHA on the establishment of the ECRIS was adopted by the Council in April 2009. EU Member States shall take the necessary steps to comply with it by 7 April 2012.
The seminar will debate the design, functionality, and state of play of ECRIS as well as the obligations of the Member State of the person's nationality, including storing and updating the information transmitted. It will offer a forum for sharing practical experiences already gained and discuss the new EU initiatives with particular reference to their likely impact on fundamental rights.
The seminar will be held in English.

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

The goal of all three agreements is to prevent and combat terrorism and other forms of serious cross-border crime while respecting the secure transmission of personal data in line with the existing EU requirements. Therefore, the Commission presented a Communication on the global approach to transfers of PNR data to third countries on 21 September 2010 (see eucrim 4/2010, p. 139). Shortly after, at the JHA Council of 7-8 October 2010, the proposals for negotiating mandates were presented and discussed. Since they have in the meantime been adopted, negotiations with the US were launched on 8 December 2010, as announced by Commissioner for Home Affairs Cecilia Malmström and US Homeland Security Deputy Secretary Jane Holl Lute. (EDB)
➤eucrim ID=1101051

Commission Proposal for the Use of PNR Data for Law Enforcement Purposes

On 2 February 2011, the Commission presented its proposal for the use of PNR data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime (COM(2011) 32 final). While the current legal instruments on the exchange of PNR data consist of agreements with third states (see previous report), this proposed Directive lays down common rules for the EU Member States to set up their own national PNR systems. In 2007, the Commission had already developed a proposal on the use of PNR data for law enforcement purposes in the shape of a Framework Decision. Under the Lisbon Treaty, the text needed to be reintroduced into the new decision-making procedure as a Directive.

In practice, many national law enforcement authorities already collect PNR data on a case-by-case or on a flight-by-flight basis. The proposed Directive aims to create a coherent approach across the EU and ensure similar protection of the data as well as passenger's rights. Air carriers will be obliged to provide the authorities of the EU Member States with data on passengers who are entering or departing from the EU. The Framework Decision on data protection in criminal matters of 2008 will have to comply with ensuring the protection of privacy and personal data. PNR data, for example, must be made anonymous one month after the date of the flight, and the maximum retention period is five years in total.

The press release introducing the proposed Directive states that it is expected to take approximately two years to negotiate the proposal in the Council and the European Parliament. (EDB)
➤eucrim ID=1101052

Decision on UK Participation in Regulation Establishing Large-Scale IT Agency

By decision of 14 December 2010, the Council confirmed the participation of the UK in some of the provisions of the Schengen acquis relating to the establishment of a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. The UK requested this partial participation by letter of 5 October 2010 (see eucrim 4/2010, p. 140). The Decision was published in the Official Journal of 17 December 2010 and entered into force the day following the day of publication. (EDB)
➤eucrim ID=1101053

Victim Protection

European Protection Order – State of Play

After receiving the support of the EP Committee for Civil Liberties, Justice and Home Affairs and the Committee for Women's Rights and Gender Equality (see also eucrim 4/2010, p. 141), the EP also voted for the proposed Directive on a European Protection Order on 14 December 2010. The adopted text that allows crime victims to request similar protection when they move to another Member State is a compromise that was negotiated between the EP and the Belgian presidency. The proposal was adopted after a first reading (610 to 13 votes and 56 abstentions). The next step is discussion of the text in the Council. (EDB)
➤eucrim ID=1101054

Cooperation

Police Cooperation

SIXTH JIT Expert Meeting

The sixth Expert Meeting on Joint Investigation Teams (JITs) took place in The Hague from 2-3 December 2010. Topics on the agenda included:

- The exchange of best practices for running a JIT;
- JIT funding opportunities;
- Profile requirements for successful JIT experts at the national level;
- How to further stimulate the use of the JIT tool.

Further participants to the meeting included representatives from the General Secretariat of the Council of the EU, the European Commission, Frontex, OLAF, and the LIBE Committee of the EP. (CR)
➤eucrim ID=1101055

CEPOL Accounts Closed

On 3 February 2011, following a vote by the Budgetary Control Committee in the previous week, the EP voted to close the financial accounts of the European Police College (CEPOL) for 2008. However, the Parliament emphasised the technical nature of the decision and expressed its disapproval with CEPOL's former management.

In October 2010, the European Parliament had refused to grant discharge to CEPOL for the inadequate and ineffective handling of its budget, procurement, and human resources management (for details, see eucrim 4/2010, p. 143). (CR)
➤eucrim ID=1101056

Judicial Cooperation

EU-Japan MLA Agreement Enters Into Force

On 2 January 2011, the Agreement between the European Union and Japan on mutual legal assistance in criminal matters entered into force.

From now on, this agreement will serve as the basis for mutual legal assistance in criminal matters between Japan and the 27 EU Member States regarding issues such as the exchange of information. This includes providing information on bank accounts, the taking of testimony or statements, hearings by videoconference, and examination of persons, items, or places (for further details, see eucrim 3/2009, p. 76 and eucrim 4/2010, p. 143). (CR)

➤eucrim ID=1101057

European Evidence Warrant

Framework Decision Implementation Deadline Expired

On 19 January 2011, the deadline for implementation of the Framework Decision on the European Evidence Warrant expired.

According to Article 23 of Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents, and data for use in proceedings in criminal matters, Member States were asked to take the necessary measures to comply with its provisions by 19 January 2011. (CR)

➤eucrim ID=1101058

European Investigation Order

Progress Report

On 26 November 2010, the Belgian Presidency published a progress report summarising the key issues addressed so far with regard to the European Investigation Order (EIO). One of these main issues concerns the scope of the proposal. The report concludes from the discussions held so far that the new instrument should cover all investigative measures aimed at the obtaining of evidence, except Joint Investigation Teams.

Furthermore, in a first phase, discussions should focus on criminal proceedings. If the agreed solutions could be extended to specific non-criminal procedures, they should be assessed in a second stage.

A second major issue concerns the question of competent authorities for issuing and executing an EIO. The conclusions drawn from the discussion find that the new instrument should only apply to EIOs that have been issued or validated by a judge, a prosecutor, or an investigating magistrate. The designation of the authorities competent to execute an EIO should be left to the Member States.

With regard to the third issue, concerning grounds for non-recognition or non execution, it seems to be commonly agreed that grounds for refusal should be specific. When differentiating between categories of investigative measures, the envisaged solution should be based on a threefold approach proposed by the Presidency:

- A first category would cover non-coercive measures and hearings for which no additional grounds for refusal would be provided.
- A second category would cover all other coercive measures, without listing the specific measures covered. It would provide for additional grounds for refusal, e.g., double criminality, authorisation in a similar domestic case, if the measure does not exist under the law of the executing State or its use is restricted to a list or category of offences that does not include the offence covered by the EIO.
- Thirdly, double criminality and authorisation in a similar domestic case would not constitute a ground for refusal if the execution of coercive measures concerns serious offences.

With respect to the issue of proportionality, discussions held so far seem to reveal that further deliberations on this matter should be based on the principles set out in the Presidency proposal. In addition to the proportionality check conducted by the issuing authority upon the issuing of an EIO, the executing authority would have the possibility to consult with the issuing authority on the relevance of the execution of the EIO if it had reason to believe that, in the case concerned, the investigative measure involved a minor offence.

Finally, regarding the question of costs, delegations seem to generally agree with the Belgian proposal to include the possibility of making, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be borne by (or shared with) the issuing State. In this case, the issuing authority would be given the possibility to withdraw the EIO. (CR)

➤eucrim ID=1101059

Law Enforcement Cooperation

Prüm Implementation Discussion Paper

In order to assist Member States with their implementation of the so-called Treaty of Prüm and the Prüm Decisions (see eucrim 1-2/2008, pp. 35-36), the Belgian Presidency launched a questionnaire on the state of play of implementation (see eucrim 4/2010, p. 142) and organised a follow-up conference in October 2010.

Following the outcome of these activities, the Belgian Presidency published a discussion paper addressing four key issues with regard to implementation problems and possible solutions which, according to the Presidency, should be discussed at the political level. These issues concern:

- Legal aspects and governmental decision-making processes at the national level;

- The supply of technical support;
- Funding;
- A final evaluation.

To solve the first issue, the Presidency, e.g., suggests stronger cooperation with the Working Party on Information Exchange and Data Protection (DAPIX). Furthermore, Member States have been asked for their ideas on how to reinforce monitoring at the political level and the supply of information by the Member States.

Regarding technical support, the paper outlines existing or planned measures, such as the Mobile Competence Team and a Prüm helpdesk at Europol. It asks which further measures should be taken to provide adequate technical support for Member States.

To solve the problem of funding, co-financing possibilities under the ISEC programme have been outlined. Furthermore, Member States have been asked to suggest further measures to ensure adequate funding for the Prüm implementation.

Finally, in order to prevent final evaluations from becoming a bottleneck hindering timely implementation, the Presidency suggests several measures that could straighten out the procedure and asks for Member States' ideas in this regard. (CR)

➤eucrim ID=1101060

Creation of AIRPOL

During its meeting of 2-3 December 2010, the JHA Council adopted a Resolution on the creation of a European network of airport law enforcement services (AIRPOL).

The aim of the network is to increase overall security in European airports and in civil aviation by setting up a closer and more structured cooperation between police services, border guards, and other relevant law enforcement services that are active in and around airports. Furthermore, the network shall combat criminal activities in and around airports and other areas relating to civil aviation.

The network focuses on three concerns: airport policing, aviation security, and air border security. Firstly, airport policing shall step up policing in and around airports, e.g., airport crime prevention, VIP protection, public order tactics, the protection of critical infrastructure, and contingency management. Secondly, in the area of aviation security, the network shall improve aspects of civil aviation security, e.g., control of passengers behaving badly, airport access and security checks, airport badge management, and use of air marshals. Thirdly, the network shall help to increase air border security by improving border management activities and addressing the phenomenon of illegal migration. Finally, the resolution encourages the involvement of Frontex, Europol, and other relevant EU agencies in the activities of the network. (CR)

➤eucrim ID=1101061

EU Action against Illicit Trade in Small Arms and Light Weapons by Air

During its meeting from 2-3 December 2010, the JHA Council adopted a Decision on EU action to counter the illicit trade in small arms and light weapons (SALW) by air. The decision shall:

- Improve the tools and techniques available to effectively screen and target suspect air cargo aircrafts;
- Help increase the awareness and technical expertise of relevant international and national personnel;
- Enhance the exchange of "best practices" in monitoring, detection, and risk management analysis of air cargo carriers suspected of SALW trafficking via air within, from, or to third States.

The decision provides for a financial reference amount of €900,000. (CR)

➤eucrim ID=1101062

Road Safety Directive Agreed

On 2 December 2010, the EU Transport Ministers agreed on a proposal for a directive on cross-border enforcement in the field of road safety. This move was in response to EU figures suggesting that foreign drivers account for 5% of traffic but around 15% of speeding offences and that a registered foreign driver is three times more likely to commit offences than a resident driver. The proposal targets traffic offences with a critical impact on road safety, including the four big offences causing 75% of road fatalities, namely speeding, failure to stop at traffic lights, failure to wear seatbelts, and drunk driving. Further offences tackled include driving under the influence of drugs, failure to wear safety helmets (for example on motorcycles), the illegal use of an emergency lane, and illegal use of a mobile phone while driving. Whether, for instance, drunk driving or driving under the influence of drugs shall be defined as an offence or not is up to the legislator of the Member State in which the offence occurs. The proposal only deals with financial penalties; penalty points linked with a driving licence and the withdrawal of a driving licence are not dealt with.

In order to identify and prosecute those EU drivers that commit such offences in a Member State other than the one in which the car is registered, the directive requires Member States to give each other access to their vehicle registration data. For this purpose, the software designed for the automated search of vehicle registration data under the Prüm Treaty shall be used. If the Member State where the offence occurs decides to initiate follow-up proceedings in relation to the traffic offence, an information letter (for which a model has been established by the proposed directive) will be sent to the car holder. If the car holder is not the driver, he is given the possibility to respond with a reply providing the relevant data for identifying the driver. In case of non-payment by the offender, the final conviction to pay a fine issued by the Member State in which the offence was committed could then be enforced through Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition

to financial penalties, which also covers road traffic offences.

The proposal must now be approved by the European Parliament, with a two-year period to allow Member States to implement the Directive. (CR)
➤eucrim ID=1101063

Better Detection of Stolen Vehicles

In response to the diminishing recovery rate for stolen vehicles (down from 70% in 2006 to 50% in 2008) and in order to tackle cross-border vehicle trafficking, the JHA Council in its meeting of 2-3 December 2010 adopted conclusions inviting Member States to fully implement Regulation 1160/2005.

This regulation amends the Schengen Convention as regards access to the Schengen Information System (SIS) by the authorities in the Member States responsible for issuing registration certificates for vehicles. Member States should also ensure that these authorities systematically check SIS in realtime before the registration process is completed. In addition, checks of the registration documents are also to be performed in order to detect any attempts to register vehicles with forged identification numbers on the basis of stolen documents.

Furthermore, Member States shall provide the possibility to immediately enter an alert in SIS whenever registration certificates are reported as stolen. First-line access should also be provided to those authorities in charge of custom checks of imported and exported vehicles. Finally, Member States are invited to accede to the Treaty concerning the European Vehicle and Driving Licence Information System (EUCARIS) of 29 June 2000, which allows for the detection of stolen vehicles with forged identification numbers by making use of vehicle identification numbers or the identification papers of seriously damaged vehicles. In accordance with Council Decisions 2008/615/JHA and 2008/616/JHA, Member States are required to use EUCARIS software to conduct automated searches on vehicle registration data for the prevention and investigation of criminal offences, before 26 August 2011. (CR)
➤eucrim ID=1101064

EU Action Plan Against Illegal Trafficking in "Heavy" Firearms

On 2-3 December 2010, the JHA Council adopted an action plan to combat illegal trafficking in so-called "heavy" firearms, which can be used or are used in criminal activities. This was done in the light of the significant and increasing threat that the possession and use of so-called "heavy" firearms (e.g., assault rifles, submachine guns, rockets launchers) by organised criminal groups as well as lower-level street gangs poses to the general public and to law enforcement personnel.

Actions foreseen in this plan include improvement of the existing criminal profiles (types of offenders, sources of trafficking, etc.), strengthened cooperation between the Member States' law enforcement agencies and EU agencies, strengthened police or administrative control of the different potential sources of such illegal trafficking, and the setting-up of a policy to prevent theft of such firearms. (CR)
➤eucrim ID=1101065

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Joint Statement on the Accession of the EU to the ECHR

On 27 January 2011, Jean-Paul Costa and Vassilios Skouris, the Presidents of the two European Courts (the ECtHR and the Court of Justice of the EU (CJEU)) issued a joint statement concerning the accession of the EU to the ECHR. A prior meeting of the Presidents on 17 January 2011 addressed two important topics: the application of the Charter of Fundamental Rights of the EU and the accession of the EU to the ECHR. Regarding the first subject, the statement emphasises that the Charter contains rights that correspond to those guaranteed by the Convention. Further, Article 52(3) of the Charter stipulates that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same. Therefore, the Presidents suggested that a future parallel interpretation of the instruments would be useful.

The accession of the EU to the Convention is enshrined in the Treaty of Lisbon by the Member States. As a result of the accession, the acts of the EU will be subject to the review of the ECtHR in the light of the Convention. This could lead, on the one hand, to individual applications directed against measures adopted by EU institutions subsequent to the accession of the EU to the Convention. On

* If not stated otherwise, the news reported in the following sections cover the period November 2010–January 2011.

the other hand, it could lead to applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law. In the first case, the exhaustion of domestic remedies, imposed under Article 35(1) of the Convention, will oblige applicants to refer their matter first to the EU Courts in accordance with EU law. Accordingly, any review exercised by the ECtHR will be preceded by an internal review carried out by the CJEU in order to respect subsidiarity. The second case, however, evokes a more complex situation, as the national courts of the respective Member States, in accordance with Article 267 TFEU, may, or in certain cases must, refer a request to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. Hence, the reference for a preliminary ruling is generally not a legal remedy to be exhausted by the applicant before referring the matter to the ECtHR (see also eucrim 4/2009 p. 148). If no such reference exists, the ECtHR would be required to adjudicate on an application calling into question provisions of EU law without a prior internal review by the CJEU. Although the situation has rarely occurred so far, it might arise in the future.

Consequently, the text suggests for such situations that a flexible procedure should be put in place, one which would ensure that the CJEU may carry out an internal review before the ECtHR conducts an external review. Such an arrangement would be in keeping with the principle of subsidiarity in the Convention system and would not necessarily require amendment of the procedural provisions of the Convention.

For these reasons, it is important that the types of cases brought before the CJEU are clearly defined.

➤eucrim ID=1101066

Lawyer's Guide to Reduce Inadmissible Applications

On 13 December 2010, the ECtHR published *The Practical Guide on Admissibility Criteria*, a comprehensive guide to enable lawyers to properly advise their clients on their chances of bringing an admissible case to the ECtHR. On the one hand, clients' time, energy, and unnecessary expense will be saved. On the other hand, the guide should help stem the flow of clearly inadmissible applications that are "flooding" the Court. Currently, there are over 130,000 pending cases before the Court, 95% of which are generally rejected because they fail to satisfy the admissibility criteria set out in the European Convention on Human Rights (ECHR). The time spent dealing with obviously inadmissible applications could be devoted to important cases that actually meet the criteria.

The handbook explains in detail the Court's admissibility criteria and intends to help decide when an application (or case) has absolutely no chance of resulting in a ruling. For instance, a new admissibility criterion was introduced on 1 June 2010 (see also eucrim 4/2010 pp. 148-149), whereby cases are ruled inadmissible if the applicant has not suffered a significant disadvantage. As an example, the Court refers to the recent case of *Korolev (II) v. Russia* (No. 5447/03) where the applicant complained to the Court after being fined less than one Euro. The guide further intends to ensure that applications that do warrant examination on their merits pass the admissibility test. For example, the handbook reminds the user that applications must be brought to the Court within six months of the last national decision in the respective case. The handbook was made available on the Court's website in English and French, will be available soon in Russian and Turkish, and other languages are to follow.

The guide was produced by the Research Division of the Court and is part of the implementation of the action plan adopted at the milestone conference in Interlaken (Switzerland, 18 to 19 February 2010, see eucrim 4/2009, pp. 145-147).

➤eucrim ID=1101067

Court Launches Further Thematic Factsheets on Its Cases

On 10 December 2010, the European Court of Human Rights (ECtHR) launched ten new factsheets on its case law as part of Human Rights Day. The factsheets can be found on the website of the ECtHR and are intended to help make the Court's case law better known. They deal with children's rights, collective expulsions, conscientious objection, the protection of journalists' sources, racial discrimination, the right to one's own image, social welfare, trade union rights, transsexuals' rights, and violence against women. They include both decided cases and pending applications (see also eucrim 4/2010, p. 148).

The factsheets are part of the implementation of the action plan adopted at the Interlaken Conference in Switzerland (18-19 February 2010; for a detailed summary, see eucrim 4/2009, pp. 145-147), which was created to find ways to help the ECtHR cope with its growing volume of applications.

➤eucrim ID=1101068

Specific Areas of Crime

Corruption

GRECO: Third Round Evaluation Report on Azerbaijan

On 18 November 2010, the CoE's Group of States against Corruption (GRECO) published its Third Round Evaluation Report on Azerbaijan. As usual, the report focused on two distinct matters: the criminalisation of corruption and the transparency of party funding. GRECO made a total of 17 recommendations to the country. The findings concluded major shortcomings on both issues but, given the fact that a revision of the Penal Code is currently underway, the recommendations can be seen as a timely contribution to the ongoing reform process. Regarding the criminalisation of cor-

ruption, the report states that the 2006 amendments to the corruption provisions of the Penal Code can be considered an important step towards bringing the legislation of the country in line with the standards of the Criminal Law Convention on Corruption (hereinafter: the Convention). However, further significant amendments are required in order to remedy the remaining shortcomings, as the country's legal framework contains several major deficiencies in relation to the requirements established under the Convention. For example, the concept of "official" does not cover all civil servants and public employees, while the "offer and the promise of a bribe" or the "acceptance of an offer or a promise" do not constitute completed crimes. Furthermore, the legislation fails to fully address the bribery of foreign and international officials, domestic and foreign jurors, and arbitrators. Moreover, private sector bribery is not penalised in respect of any person working in private sector entities, and the criminalisation of trading in influence also shows several gaps. The report therefore urges Azerbaijan to abolish the requirement of dual criminality regarding the offences of bribery and trading in influence. It further points out that Azerbaijan is one of the Member States to which nearly all of the reservations tolerated under the Convention apply. GRECO also calls upon the country to become a Party to the Additional Protocol to the Convention and to be more proactive in detecting, investigating, and prosecuting corruption cases.

Concerning party financing, GRECO stated that the transparency standards established by CoE Recommendation (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns (hereafter "the Recommendation") are difficult to apply to a country that lacks a truly pluralistic political landscape. In Azerbaijan, most political parties are not active between elections, and no political party − except for the ruling party − has significant resources. GRECO identified the following major shortcomings:

- The transparency provisions are insufficient in the Law on Political Parties;
- The party accounts lack supervision;
- Monitoring of election campaign funding is deficient;
- The fragmentary regime of sanctions available in this area is deficient.

Political parties should be provided with adequate support to comply with further transparency requirements. Ultimately, GRECO welcomed the idea, currently under discussion, of introducing state aid for the regular financing of political parties.

➤eucrim ID=1101069

GRECO: Third Round Evaluation Report on Montenegro

On 14 December 2010, GRECO published its Third Round Evaluation Report on Montenegro (see also eucrim 3-4/2008 p. 105). The report's main conclusion is that the anti-corruption legislation is not effectively applied and that there is an urgent need to establish an independent monitoring mechanism for political financing. The report addressed a total of 14 recommendations to Montenegro. Regarding the criminalisation of corruption, it welcomed that – following a legal reform – the criminal law of Montenegro largely complies with the Convention. However, key elements of the law, such as coverage of the term "bribe", advantages intended for a third person, and direct or indirect commission of the offence, suffer from several inconsistencies and ambiguities, and they should be promptly remedied. Concerning the transparency of party funding, GRECO acknowledged several steps taken to enhance the financial discipline of political actors, such as:

- The obligation to keep proper books;
- The opening of dedicated political accounts;
- The appointment of responsible persons for the management of political finances;
- The submission of financial reports;
- The disclosure of private donations.

In practice, however, these measures are largely weakened by the inefficient monitoring mechanisms of the system. Competent monitoring is presently lacking the clear responsibility of any public entity. As a consequence, no sanction has been imposed to date for breaches of political financing regulations, even though there are concerns that irregularities are occurring in practice, e.g., with respect to the failure to submit financial reports or the misuse of public resources. In sum, the true challenge for the country lies in its effective application of legislation.

➤eucrim ID=1101070

GRECO: Third Round Evaluation Report on Portugal

On 8 December 2010, GRECO published its Third Round Evaluation Report on Portugal and addressed a total of 13 recommendations to the country. According to the report, criminal legislation in respect of domestic bribery complies with the standards of the Convention. However, concerning the international context of such offences, the legislation needs to be further improved.

Regarding the criminalisation of domestic corruption offences, Portugal's law covers all those offences contained in the Convention and its Additional Protocol. Not all corruption offences in the international context are covered though. The sanctions for private sector bribery and trading in influence are weak and need to be revised. GRECO further called for an extension of the practices available in applying bribery legislation for the professionals involved.

Concerning the transparency of party funding, GRECO identified Portugal's current system as "relatively developed." However, it identified as crucial weaknesses the laboriousness of the monitoring system (carried out jointly by the Entity for Accounts and Political Financing and by the Constitutional Court) as well as the fact that the monitoring results are only made public at a very late stage.

Consequently, GRECO called for more transparency in party financing, particularly if more privately based funding is to be allowed in the future.
➤eucrim ID=1101071

GRECO: Third Round Evaluation Report on Serbia

On 6 December 2010, GRECO published its Third Round Evaluation Report on Serbia. In the report, GRECO addresses 15 recommendations, acknowledges the efforts made to comply with CoE standards, but urges a more active fight against corruption and strengthening the supervision of party funding.

Regarding the criminalisation of corruption, the report states that, overall, the criminal law of Serbia complies with the standards of the Convention. Deficiencies are the legal framework applicable to the bribery of foreign jurors and arbitrators as well as the possibilities to prosecute corruption abroad. The report emphasises that, despite the well developed state of criminalisation, only a few investigations have been launched to date in respect of the relevant offences. Therefore, GRECO encourages Serbia to be more proactive in detecting, investigating, and prosecuting corruption cases. More must be done to secure convictions, not only for petty bribery but also high-level corruption in the public sector. Therefore, GRECO calls upon the authorities to remain alert regarding related problems (other than traditional bribery), such as trading in influence and corruption in the private sector.

Concerning the transparency of party funding, GRECO recognises Serbia's current "promising" reform efforts to improve the accountability of political finances. However, the strengthening of supervision remains of crucial importance so that the verification of party accounts is properly carried out. Thereby, it enables the detection of possible instances of improper influence and the effective punishment of illegal practices. Additionally, the report states, that the current rules on transparency must be further developed, e.g., better regulation of cash donations and donations in kind, in particular the use of public facilities. Finally, the report underlines the importance of public access to an effective monitoring system and therefore calls upon the country to ensure that all political parties must report on their financial situation and make these reports available to the public in a timely manner.
➤eucrim ID=1101072

Money Laundering

MONEYVAL: Report on Fourth Assessment Visit to Hungary

On 17 December 2010, MONEYVAL, the CoE's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, published the Report on its Fourth Assessment Visit to Hungary. The fourth cycle of assessments is, in general, a follow-up round in which important FATF Recommendations are reassessed as well as those findings for which the state received non-compliant or partially compliant ratings in its third round report. The report summarises, describes, and analyses the major anti-money laundering and counter-terrorist financing measures (AML/CFT) in place at the time of the fourth on-site visit (January 2010). It offers recommendations on how to strengthen certain aspects of the AML/CFT system.

In the report, MONEYVAL acknowledges that, since the third round evaluation in 2005, Hungary has continued to develop and strengthen its AML/CFT regime. The core elements of its regime were established in the 2007 Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by which Hungary transposed and implemented into national law Directive 2005/60/EC of the EP and of the Council. At that time, the financing of terrorism was also introduced into the preventive legislation. The report states that ML is related to a variety of crimes in Hungary, including illicit narcotics trafficking, prostitution, trafficking in persons, fraud, and organised crime. Further prevalent economic and financial crimes are corruption, tax evasion, real estate fraud, and identity theft. Nevertheless, the level of convictions for proceeds-generating offences in Hungary is still very low. MONEYVAL further suggests placing more emphasis on autonomous and third party money laundering. The risk of Hungary being used as a base for terrorism or financing of terrorism is estimated as being low. While there is a system of measures in place under the EU Regulations, several issues still need to be addressed in order to ensure that the freezing of terrorist assets under the UN Security Council Resolutions are fully implemented in accordance with international standards. The criminalisation of terrorist financing also needs further refinement. The report found that both the preventive controls in place for financial institutions as well as the supervisory regime seem to be comprehensive and effective. In addition, MONEYVAL characterised the Hungarian Financial Intelligence Unit as well structured, resourced, and professional but recommends the adaptation of clearer legal provisions in order to assure the operational independence and autonomy of this unit. Ultimately, the systems and procedures in place to facilitate both national and international cooperation appear to be working well, although statistics are lacking in some areas, making it difficult to judge their effectiveness.
➤eucrim ID=1101073

Procedural Criminal Law

CCJE: Magna Carta of Judges

On 18 November 2010, the Consultative Council of European Judges of the CoE (CCJE) adopted the Magna Carta of

Judges (fundamental principles), codifying the main conclusions of the opinions already adopted (see eucrim 4/2009 p. 156).

The Magna Carta of Judges highlights all fundamental principles relating to judges and judicial systems, such as the criteria of the rule of law, the independence of the judiciary, access to justice, and the principles of ethics and responsibility in national and international contexts to name but a few. The Carta lists the guarantees of independence and demands for independent national bodies in charge of these guarantees. The representatives of Member States within the CCJE will ensure the dissemination and application of the principles in their respective countries. They shall apply "mutatis mutandis to judges of all European and international courts."

➤eucrim ID=1101074

CCJE: The Role of Judges in the Enforcement of Judicial Decisions

On 9 December 2010, the CCJE adopted Opinion No. 13 on the role of judges in the enforcement of judicial decisions (in particular, those of the ECtHR), According to the opinion, this role is essential to the functioning of a state based on the rule of law. The CCJE based its opinion on the responses of 32 Member States to an a priori questionnaire. The replies identified several obstacles to effective and appropriate enforcement of judicial decisions in civil, administrative, and criminal matters. The opinion emphasises that the role of judges in the enforcement of judicial decisions should be increased in order to strengthen the citizen's trust in justice. It also referred to their important role in the right to fair trial as guaranteed by Article 6 of the ECHR. The opinion has an introductory part followed by general principles. The role of judges in civil, administrative, and criminal matters as well at the international level are presented in separate sections. The international part separately addresses the decisions of the ECtHR as well as international coopera-

Ratifications and Signatures (Selection)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptation of the provisional application (a)
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (ETS No. 082)	Serbia Montenegro	12 October 2010 (s) 6 December 2010 (r)
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)	Ukraine	30 September 2010 (r)
European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116)	Serbia	12 October 2010 (s)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167)	Slovenia Turkey	15 October 2010 (s) 10 November 2010 (s)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Ukraine	30 September 2010 (r)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Armenia Netherlands	8 December 2010 (r) 20 December 2010 (a)
Convention on Cybercrime (ETS No. 185)	Turkey	10 November 2010 (s)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Spain	17 January 2011 (r)
Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)	Italy San Marino Ukraine	29 November 2010 (r) 29 November 2010 (r) 29 November 2010 (r)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	France Armenia Montenegro Hungary	27 September 2010 (r) 29 September 2010 (s) 25 November 2010 (r) 29 November 2010 (s)
Council of Europe Convention on Access to Official Documents (CETS No. 205)	Moldova	21 December 2010 (s)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Albania Austria Bulgaria Finland Latvia Portugal Serbia Slovenia FYROM Sweden Luxemburg Germany	10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 10 November 2010 (s) 17 November 2010 (s) 18 November 2010 (s) 31 January 2011 (s)

➤eucrim ID=1101075

tion and cross-border law enforcement in civil, administrative, and criminal matters. In conclusion, the CCJE demands that legal provisions providing for the independence of courts must exist at the highest level of the legislation of the Member States. They should be designed in such a way that "they call for prompt enforcement of judicial decisions with no interference by other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters." The opinion further concludes that states should refrain from developing policies in criminal matters that result in minor penalties that are not executed in practice. The opinion also emphasises that it is the responsibility of the judge to protect the rights – under the ECHR – of any convicted person deprived of his or her liberty.

➤eucrim ID=1101076

CEPEJ: The European Ministers of Justice Support the Work of CEPEJ

The Ministers of Justice of the CoE's Member States expressed their support for the work of CEPEJ during their 30th Conference in Istanbul (24-26 November 2010). The adopted Resolution on a modern, transparent and efficient justice, invites the Committee of Ministers to build on the work of the SATURN centre (CEPEJ's Centre for judicial time management), further developing its capacity to acquire better knowledge of the time required for judicial proceedings in the Member States. Developing relevant tools could also enable the Member States to better meet their obligations under Article 6 of the ECHR regarding the right to a fair trial within a reasonable time.

➤eucrim ID=1101077

CEPEJ: New Handbook to Develop User Satisfaction Surveys

On 10 September 2010, the European Commission on the Efficiency of Justice (CEPEJ) adopted a new methodological handbook for central court authorities and, in principle, for individual courts wishing to develop user satisfaction surveys. The handbook contains methodological guidelines as well as several model questionnaires for court users and lawyers. They were developed on the basis of the experiences of various Member States. Use of the results of these surveys aims, on the one hand, at a better comprehension of the perception by court users of the public prosecution service at the local and national levels. On the other hand, improvement of the quality of the courts is targeted in practice.

➤eucrim ID=1101078

CEPEJ: New Composition of the Bureau and 2011 Activity Programme

During its 16th plenary meeting (9-10 December 2010), CEPEJ elected its new Bureau for the period from 1st January 2011 to 31 December 2012. Mr. John Stacey (United Kingdom) was elected new President of CEPEJ. CEPEJ also adopted its 2011 activity programme, which is designed around six areas of responsibility:

- Developing tools for analysing the functioning of justice and ensuring that public policies of justice are geared towards greater efficiency and quality;
- Gaining in-depth knowledge of the timeframes of proceedings in order to reach optimum and foreseeable length of proceedings;
- Promoting the quality of judicial systems and courts;
- Developing targeted cooperation at the request of one or more states;
- Strengthening relations at various levels (users of the justice system, national and international bodies),
- Promoting the implementation and use of measures and tools designed by CEPEJ.

During the meeting, CEPEJ also officially integrated the activities of the Lisbon Network into its own activity programme. The Lisbon Network is composed of training institutes for Judges and Prosecutors of the Member States of the CoE. It has been entrusted with providing advice, expertise, and support to CEPEJ members in the field of judicial training. It will also be entrusted with the testing of the satisfaction survey (drawn up by the CEPEJ Quality Working Group) for court users,

➤eucrim ID=1101079

Different Implementations of Mutual Recognition Framework Decisions

Dr. Annika Suominen

This article focuses on the different implementation solutions of mutual recognition framework decisions, based on a study of the first four framework decisions and their implementation in the Nordic Member States.[1] The Lisbon Treaty changed the environment of EU criminal law and explicitly mentions mutual recognition in Art. 82(1) TFEU. This article also briefly analyses the change towards using either directives or regulations as mutual recognition instruments.

I. Different Techniques of Implementation

Through *transformation*, the most commonly used form of implementation, the framework decisions are transformed into national legislation and into some of the rules on cooperation in criminal matters in the respective national legal systems. Transformation entails modifying other relevant national legislation to correspond with the implementing national legislation.[2] Transformation can firstly be done by implementing the framework decision entirely into one corresponding national act.[3] Transformation can also be used to transform several mutual recognition framework decisions into one national act.[4] This type of transformation can include common provisions applicable to all forms of cooperation. That facilitates developing an internal coherence and developing similar solutions as regards grounds for refusal. This is desirable in order to achieve a uniform application of mutual recognition.

Incorporation can also be used in the implementation of framework decisions (although usually used to implement international conventions). The framework decision then applies directly and is treated as domestic legislation. [5] Incorporation has the advantage that there is no need to draft new national legislation. Framework decisions are nevertheless intended to be implemented into the national legal systems. This can impact the precision of their provisions, as the framework decisions are perhaps not intended to be directly applicable. Some adjustments or clarifications are possibly expected to be done when implementing. When the provisions of the framework decisions are specific enough, this form of implementation facilitates the coherent use of the framework decisions in the EU. Incorporation also facilitates the uniform definition of particular terms in framework decisions, as required by the ECJ. This may not be the best solution from the perspective of maintaining the coherence of national legal systems. It is, however, possible for the national legislator to insert sections in the national acts where further national rules or adjustments are considered necessary.[6]

II. Different Possibilities When Implementing Grounds for Refusal

The basic idea is that judicial decisions are to be recognised unless a ground for refusal is applicable. The implementation of grounds for refusal thus becomes important. In the former third pillar, no clear guidelines were to be found on exact and correct implementation. This can also be seen by the types of grounds for refusal, which are either mandatory or optional in the framework decisions. Whether the option is meant for the national legislator or the judicial authority is unclear. The national legislator can first choose not to implement an optional ground for refusal. In some cases, Member States have considered it appropriate not to insert an optional ground for refusal if situations where the ground would be applied are very rare.[7] The same applies for situations where a choice has been made not to implement a conditional recognition.[8] Discretion is used by the national legislator in these situations. It is within the Member States' margin of discretion not to implement all grounds for refusal or to establish a more far-reaching meaning for a provision exemplifying mutual recognition.

Implementing optional grounds for refusal can be done in two different ways: either in a mandatory way or in a not mandatory way for the judicial authorities. The national legislator uses the previous when grounds for refusal are implemented as obligatory for the judicial authorities. This occurs mainly in situations where the ground for refusal is considered essential for cooperation.[9] When the optionality is reserved for the judicial authorities, the national legislator maintains the discretion for their use. When the conditions are met, the judicial authorities have an option, whether to apply the grounds for refusal or not. This enables a more flexible application of national legislation and, for some grounds for refusal, the optional nature can be appropriate.[10] Both possibilities are within the Member States' margin of discretion.

Although the grounds for refusal in the framework decisions are considered exhaustive, the national judicial authorities can apply other grounds for refusal. These grounds can be included in national legislation by the national legislator. Examples can be found in all Nordic countries implementing legislation in relation to surrender and human rights grounds for refusal.[11] The national judicial authority can further refuse recognition if another ground is in conflict with recognition. This can be based on an ongoing European procedure, which needs to be decided on before the recognition takes place. An asylum-seeking process could be seen as an example of a "Union-legal" ground for refusing the recognition and execution of an arrest warrant. The cases *Gataeva* and *Gataev* of the Helsinki district court are good examples of this.[12]

The cases concerned two Russian nationals sought in arrest warrants issued by Lithuania for the execution of sentences. Both persons had applied for asylum in Finland when the arrest warrants were received. The district court refused surrender based on the human rights ground for refusal, as extradition[13] could have endangered the persons' right to a fair trial. The case was appealed to the Supreme Court, which requested a preliminary ruling from the ECJ. At issue was especially whether a framework decision was to be interpreted in such a way that recognition could be refused on grounds for which there are no explicit provisions in the framework decision. If refusal could be based on grounds not expressly included in the framework decision, the Supreme Court asked to be informed of the conditions for such a refusal. The request for a preliminary ruling was rescinded, however, as the judgments in Lithuania were reversed and the arrest warrants revoked. The question of extradition was therefore no longer relevant and no preliminary ruling was issued by the ECJ.

If either the national legislator or the national judicial authorities apply further grounds for refusal, this could be considered unacceptable. However, in situations where refusal of recognition is based on human rights concerns or other Union-legal grounds, that can be considered within the Member States' discretion.

In some exceptional situations, mandatory grounds for refusal can be disregarded in the implementation process. This would occur in situations where the ground for refusal is not considered essential for refusing cooperation. There are no such examples in Nordic implementing legislation today, but the possibility exists. For the Member States, a choice to cooperate beyond the framework decisions seems possible (here, parallels can be drawn to minimum harmonisation in substantive criminal law). This could be considered within the margin of discretion of the Member States, unless the ground for refusal is necessary for cooperation.

III. Reasons Behind the Different Grounds for Refusal

There are several reasons behind the different grounds for refusal, both at the EU and national levels. Some general characteristics can be distinguished. They motivate and explain the differing implementation and mandatory or optional nature of the grounds for refusal.

Some of the grounds for refusal can be seen as *prerequisites for mutual recognition*. These grounds lay down the minimum requirements in order for recognition to apply. Unless these prerequisites exist, there is no starting point for recognition. Situations involving insufficient information, the non-existence of the requested object, and concurrent requests are all based on practical legal reasons that preclude the possibility of recognition.[14] Recognition is refused when these minimum requirements are not met. These grounds for refusal are generally similar in the framework decisions and in the implementing national legislation.

Certain grounds for refusal are *consequences of applying mutual recognition*. These consequences are the results of applying mutual recognition and can have either positive or negative effects. An outcome is positive if it allows recognition to take place. The abolition of double criminality for the offences on the list included in mutual recognition instruments can be considered a positive outcome of mutual recognition.[15] Although not an actual ground for refusal, the explicit mentioning of the abolition in all framework decisions signifies a determined approach, whereas, for offences that are not in the list, the double criminality requirement still applies. If an outcome is negative, recognition is refused. *Ne bis in idem* is such an outcome of mutual recognition.[16] It ensues from accepting the legal force of prior decisions rendered in other Member States. This strengthens the free movement of persons affected by these decisions and legal certainty. Persons are only to be prosecuted and judged once for the same offence in the EU. The first prosecution is recognised as a prosecution in all Member States, and therefore a new prosecution would be contrary to the general principle prohibiting double jeopardy. The consequence of a prior final decision is that recognition of any subsequent decision must be refused, and thus it functions as a ground for refusal.

These grounds are mainly similar in framework decisions and implementing legislation. The margin of discretion for the Member States seems limited when implementing grounds for refusal, as these outcomes are consequences of applying mutual recognition. If the implementation expresses a broader degree of mutual recognition (abolishing the double criminality requirement for more offences than those listed), however, this is not problematic.

Some of the grounds for refusal are based on *respect for established principles of international law*. Mutual recognition is not intended to amend established principles of international law, but to make cooperation more efficient. This is not to take place without respect for the existing principles of international law. Examples are human rights grounds for refusal and grounds related to immunities and privileges.[17] Such grounds for refusal are present both in framework decisions and implementing legislation, and are usually similar in both.

Grounds for refusal can also be based on *respect for the core of state sovereignty*. The Member States have competence to regulate the extent of their criminal jurisdictions, to determine the scope for exercising criminal competence and legislation regarding their own nationals, and to determine the conditions of criminal responsibility. They can be considered an essential part of a sovereign state's criminal law competences. Mutual recognition leads to certain restrictions on the sovereignty of the Member States. Some grounds for refusal are symptomatic of the battle of competences between the EU and the Member States.[18] The reason for these grounds for refusal is that the Member States have competence as regards the exclusion of the EU in matters that can be considered to be at the core of state sovereignty. Such grounds in the implementing legislation demonstrate how much the Member States have considered it possible to relinquish sovereign powers in the name of mutual recognition.

They are grounds from which a Member State may deviate in EU-level negotiations as well as in implementing national legislation. These grounds for refusal balance the interests of EU cooperation and the sovereign interests of Member States. They represent the area where competence belongs to the Member States but where the EU considers this a hindrance to cooperation. Member States are reluctant to relinquish control over issues so closely related to their sovereignty. These grounds are usually already found in the framework decisions, but they tend to be applied in the implementing legislation as far as possible. In several cases, they are mandatory, as the Member States did not wish to relinquish their sovereignty.

IV. How will Directives and Regulations Impact This Development?

Art. 82 TFEU states that the ordinary legislative procedure shall be applied. This means that the current mutual recognition instruments are either directives or regulations.

When directives are used as mutual recognition instruments, this will not influence the different techniques of implementation. Directives are to be implemented into the national legal systems. Directives nevertheless do have a direct effect, which can be relevant if a Member State implements a mutual recognition directive incorrectly or fails to implement it on time. This should not, however, lead to interpreting the national criminal laws *contra legem*.[19] As regards the different possibilities of the Member States to implement the grounds for refusal, the same approaches mainly seem to apply as it does in relation to framework decisions. The Member States have a possibility to safeguard their sovereign interests. An exception is the full jurisdiction of the ECJ over criminal matters, as its general competence applies pursuant to Art. 267 TFEU. The ECJ can take a more active role in mutual recognition matters and possibly apply a more EU-friendly approach. If a Member State has chosen not to implement a mandatory ground for refusal in a directive, the ECJ could − via the direct effect of the directive − state that the ground for refusal is nevertheless applicable.

When regulations are used as mutual recognition instruments, the above scenario regarding different possibilities changes fundamentally. No implementation is required and therefore no adjustment of the national legal system is possible. Different possibilities in relation to adjusting the grounds for refusal do not exist. The regulation is directly applicable, which leads to the Member States losing the possibilities to adjust the mutual recognition instrument in their national legal systems. This is unfavourable, especially as regards those grounds for refusal motivated by respect for the core of state sovereignty. The Member States lose their possibilities to emphasise and safeguard sovereign interests relating to national criminal law. Although this might not differ largely from previous incorporation of framework decisions, the difference is such that, with regulations, there is no possibility to amend the instrument.[20]

V. Conclusion

The Lisbon Treaty may not necessarily influence the implementation of mutual recognition instruments. However, EU criminal law is now part of general EU law, and the special status of EU criminal law measures is not guaranteed. Most Member States today do not consider it possible to relinquish control over matters close to their sovereignty. The lack of harmonisation is not the only reason.

The Member States' refusal to unconditionally apply mutual recognition also makes it clear that these grounds for refusal are, to a certain extent, based on mistrust between the Member States. In situations where there is mutual trust, it is possible to reduce the grounds for refusal based on mutual respect for core sovereignty. The provisions in the Nordic Arrest Warrant[21] and its implementing legislation are prime examples of such trust.

1 Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, O.J. L 190, 18.7.2002, p. 1 (EAW); Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, O.J. L 196, 2.8.2003, p. 45 (FFWD); Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, O.J. L 76, 22.3.2005, p. 16 (FPFWD); and Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, O.J. L 328, 24.11.2006, p. 59 (CFWD). See further the author's doctoral dissertation "The principle of mutual recognition in cooperation in criminal matters – A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States," defended on February 18, 2011 in Bergen, Norway.
2 E.g., section 9(b) of chapter 31 in the Finnish Code of Judicial Procedure relating to reversing final judgments in situations where extradition is not possible for all sentences in a joint sentence.
3 See the Finnish EU Extradition Act 1286/2003 and EU Freezing Act 540/2005 as well as the Swedish EU Surrender Act 2003:1156 and EU Freezing Act 500/2005.
4 The Danish Execution Act 1434/2004, which implements the FFWD, FPFWD, and CFWD.
5 See the Finnish implementation by reference of the FPFWD by Act 231/2007 and the CFWD by Act 222/2008.
6 See section 5 of the first act and section 4 of the second act mentioned in note 5.
7 In the Swedish EU Surrender Act and EU Financial Penalties Act, the optional grounds for refusal relating to extraterritorial jurisdiction are not included as they are not considered necessary and would hardly ever be applied. The Finnish EU Extradition Act, on the contrary, includes the optional ground relating to extraterritoriality in section 6(8), even though its rare application is stressed.
8 In contrast to Art. 5(2) EAW, there are no provisions relating to review or clemency of life sentences in the Swedish EU Surrender Act or the Danish EU Extradition Act 433/2003. In Sweden, the insertion of such a provision was considered to interfere with the issuing state's rules on sentencing or execution of sentences.
9 E.g., the ground for refusal related to the nationality of the person sought in relation to surrender in Finnish and Swedish implementation of the EAW.
10 This applies, e.g., in situations involving conflicts of jurisdiction.
11 In section 5(1)(6) of the Finnish EU Extradition Act, section 4(2) of chapter 2 of the Swedish EU Surrender Act, and section 10(h)(1) of the Danish EU Extradition Act.

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12 The Finnish cases *Gataeva Khadizhat* Case R 10/363 Helsinki district court and *Gataev Malik* Case R 10/359 Helsinki district court, both of 25.1.2010.
13 In Finland and Denmark, the term extradition is still used instead of surrender.
14 See Arts. 15(2) EAW, 7(1)(a) FFWD, 7(1) FPFWD and 8(1) CFWD, 7(4) FFWD and 8(5) CFWD as well as Arts. 16 EAW and 11 CFWD.
15 See Arts. 2(2) EAW, 3(2) FFWD, 5(1) FPFWD, and 6(1) CFWD.
16 See Arts. 3(2), 4(2), 4(3) and 4(5) EAW, 7(1)(c) FFWD, 7(2)(a) FPFWD, and 8(2)(a) CFWD.
17 Human rights grounds in national legislation (mentioned above) and Arts. 20 EAW, 7(1)(b) FFWD, 7(2)(e) FPFWD and 8(2)(c) CFWD.
18 See Arts. 2(4) EAW, 3(4) FFWD, 5(3) FPFWD and 6(3) CFWD, Arts. 3(3) EAW and 7(2)(f) FPFWD, 4(6) and 5(3) EAW; see also Arts. 4(7) EAW, 7(2)(d) FPFWD and 8(2)(f) CFWD in addition to Arts. 3(1) EAW, 11(1) FPFWD and 13(1) CFWD.
19 The ECJ stated in the *Pupino* case, C-105/03 para. 47, that interpreting national legislation in case of failing implementation of a framework decision cannot lead to an interpretation *contra legem*, where the framework decision would be the sole basis for the sentence or increase in the severity of the sentence. This indirect effect does not seem to differ much from direct effects of directives (see *A. Klip*, European Criminal Law, 2009, p. 65).
20 Admittedly, it is unclear whether regulations will be widely used to regulate mutual recognition cooperation.
21 Regarding the Convention of 15.12.2005 on surrender on the basis of an offence between the Nordic States (The Nordic Arrest Warrant), see *A. Strandbakken*, The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant, in: eucrim 3-4/2007, pp. 138-140.

"Yes we can!" – The UK Bribery Act 2010

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After some foot-dragging, which did not go unnoticed internationally,[1] the UK has adopted the Bribery Act 2010, which received Royal Assent in April 2010. It will come into force in April 2011, after Government Guidance has been issued.

This has been described as one of the most significant reform to corporate criminal law in a century. It repeals the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. It also revokes relevant sections of diverse acts concerning criminal justice, local government, electoral procedure, housing and the armed forces.[2] It replaces a system of fragmented and complex offences with a comprehensive scheme of bribery offences, covering bribery both in the UK and abroad. The Act simplifies and expands the range of offences for which individuals and organisations can be prosecuted, but does not deal with the transparency of political financing. The Act implements the Organisation for Economic Cooperation and Development

(OECD) Convention on Combating Bribery of Foreign Public Officials in international business transactions of 1997,[3] taking into account the Council of Europe Criminal Law convention on Corruption,[4] and the Council of Europe Civil Law Convention on Corruption.[5]

The implementation of the EU *acquis*[6] on anti-corruption – in particular the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[7] and the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector[8] – is favourable to the protection of the financial interests of the EU.

Historically, the UK has prosecuted corruption under the common law, until the crime of corruption entered statute law with the Public Corrupt Practices Act 1889, which outlawed bribery of public officials. The Prevention of Corruption Act 1906 extended bribery into the private sector and introduced the concept of bribing agents acting on behalf of a principal. The Prevention of Corruption Act 1919 widened the definition of "public body" and added a presumption of corruption for all payments made in connection with contracts to Crown employees or government departments. Section 59 of the Criminal Justice Act 2008 extended the powers of the Serious Fraud Office (SFO) to compel the production of documents in foreign bribery cases. The aim was to facilitate the collection of evidence at an earlier stage and to make for a swifter investigation.

The Act is also perceived as a response to the *BAE Systems*[9] case,[10] where the prosecution against the defence company was dropped after the intervention of Lord Goldsmith, then Attorney General. Subsequently, BAE agreed to pay £300 million in fines after signing up to a plea bargain with the SFO and the US Department of Justice. The BAE affair has been awkward for the UK. However, the new Act may reduce future embarrassments by creating a climate that is more propitious to enforcement without political interference.

Four offences are introduced by the Act. They will be examined in turn:

- Two general offences covering the offering, promising or giving of an advantage and requesting, agreeing to receive or accepting of an advantage (see title I. below);
- A discrete offence of bribery of a foreign public office (see title II. below) applying both the public and private sectors;
- A new offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage. Should an offence be committed, it will be a defence that the organisation has adequate procedures in place to prevent bribery (see title IV below).

I. New Bribery Offences

According to the Act, it is a criminal offence to give, promise or offer a bribe (active corruption) and to request, agree to receive or accept a bribe[11] (passive corruption) either within or outside the UK.[12] Activities relevant to the Act are any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment or any activity performed by or on behalf of a body of persons (whether corporate or incorporate).[13] A key element of the new bribery offences is that the intention of the briber is that the person being bribed improperly performs his duties. Improper performance[14] is defined by reference to a failure to perform one's duties in line with a relevant expectation. These relevant expectations are (i) that the function will be performed in good faith, (ii) that the function will be performed impartially or (iii) that the function imports a position of trust.

Expectations are judged by UK, not local, standards.[15] Influencing a person to perform their duties improperly, for example by behaving partially, would cover a wide range of scenarios (for example, inducing the recipient to breach his contract with a third party). The issue of low threshold for improper performance was raised in the course of Parliamentary debate. The Government's response has been to maintain that prosecutorial discretion would prevent "non-criminal" cases from being prosecuted. This however sends a strong signal that a zero tolerance attitude to corrupt behaviour is needed.

The Act prohibits all corrupt payments, regardless of whether they are paid directly by the corporate entity or (indirectly) on its behalf by a third party.

A limited number of defences are allowed for by the Act. It is a defence for a person charged with a relevant bribery offence to show that his conduct was necessary for the proper exercise of any function of an intelligence service or of the armed forces when engaged in active service.[16] The Bill had proposed to exempt law enforcement agencies "where necessary for the prevention of a serious crime" but this defence was removed at the last minute in Parliament.

II. Bribery of Foreign Public Officials

Section 6 of the Act criminalises the bribery of foreign public officials. Bribery of a foreign public official does not need to include an intention that the foreign public official will improperly perform his duties nor does the payment need to be made corruptly as required by the US Foreign Corrupt Practices Act. There must be an intention to influence the foreign public official in his official capacity and an inten-

tion to obtain/retain business, or an advantage in the conduct of business, the act not being permitted by local written law. It is therefore a defence to show that, under the written laws applicable, the foreign public official is permitted to be influenced.

Bribery of a foreign public official does not need to include an intention that the foreign public official will improperly perform his duties, nor does the payment need to be made corruptly (as is required in the US Foreign Corrupt Practices Act). The offence can be committed anywhere in the world if performed by an associated person who performs services for the company, even if operating through a subsidiary, agent, joint venture or other intermediary.

All payments of this kind, no matter how small, routine or expected by local custom will be illegal. This differs from the provisions of the US Foreign Corrupt Practices act, which make an exception for small facilitation or "grease" payments paid to officials to smooth relevant processes of official actions. As a result, corporate executives have already expressed concern that the measures will place them at a competitive disadvantage to companies in the US.

Foreign public officials are defined in the Act as individuals who hold a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK; or an individual who exercises a public function for or on behalf of a country or territory outside the UK or for any public agency or pubic enterprise of that country or territory; or an individual who is an official or agent of a public international organisation. This includes EU officials, since the Act defines public international organisations as organisations whose are any of the following: (a) countries or territories, (b) governments of counties or territories, (c) other public international organisations or (c) a mixture of any of the above.[17]

III. Territorial Application for All Bribery Offences

Extra-territoriality in matters relating to financial crime is becoming increasingly common. A natural person commits a bribery offence under the Act if any act or omission which forms part of the offence takes place within the UK or if the person who committed the acts has a close connection with the UK.[18] "Close connection" is defined as being a British citizen,[19] a body incorporated under the law of any part of the UK, a Scottish partnership or an individual ordinarily resident in the UK. The last category will of course include EU nationals who reside in the UK or those who do not but whose businesses are incorporated in the UK.

IV. Failure of Commercial Organisations to Prevent Bribery

Perhaps the most interesting aspect of the Bribery Act is the new offence of failing to have adequate procedures to prevent bribery, found in Section 7. Adequate procedures move up from the status of good practice to an urgent requirement under the Act. It is a strict liability offence – the failure to have adequate processes to prevent bribery will result in prosecution, regardless of whether prosecutors can show corrupt intent.

A relevant commercial organisation may be guilty of this offence if a natural person associated with it bribes another person, intending to obtain or retain business for the commercial organisation or an advantage in the conduct of business. A relevant commercial organisation is defined as either a body or partnership incorporated or formed in the UK and which carries on a business or a body corporate or partnership incorporated or formed outside the UK which carries on a business (or part of a business) in any part of the UK.

Section 8 of the Act defines "associated person" as someone who performs services for or on behalf of the commercial organisation. This may be an agent, an employee or a subsidiary. "Associated person" is not defined by reference to the nature of the relationship with, or control exercised over, the associated person, unlike under the US Foreign Corrupt Practices Act. What this means in practice is that where a company has operations carried out by another individual or entity on its behalf, even in a small part, it must ensure that the third party is aware of and commits itself to the Company's anti-bribery policy. The same third party will also need to be subjected to appropriate monitoring by the company.

The only defence available is for a commercial organisation to say that it had in place adequate procedures designed to prevent persons associated with the commercial organisation from undertaking such conduct.[20] The Act does not define adequate procedures and the Secretary of State will provide guidance in 2011. It is understood that this guidance will not be prescriptive. Draft guidance is at present arranged around six core themes: risk assessment, top-level commitment, due diligence, clear, practical and accessible policies and procedures, effective implementation and monitoring and review.[21] This will give an incentive to commercial organisations to try to "design out" corruption.

The failure to prevent bribery applies to any corporate or partnership as long as it carries on a business or part of a business, in the UK or to any commercial organisation incorporated or formed in the UK where the person committing the offence

is associated with the organisation. It also applies to conduct that takes place outside the UK. This means that, as long as it carries out business in the UK, a foreign company can commit the failure to implement adequate procedures offence in relation to conduct in a foreign country that is not connected with any business undertaken in the UK. In this, the Act's extra-territorial reach is broader than that of the US Foreign Corrupt Practices Act.

V. The Possibility of Debarring Commercial Organisations in Breach of Section 7

Transparency International UK warns that "if a company is reliant on selling to EU governments it should not ignore the risk of debarment arising from a conviction under the Bribery Act".[22] However, it is currently a moot point whether a corporate entity convicted of a failure to implement adequate procedures would be debarred from participating in future public contracts in accordance with EU Directive 2004/18.[23] Article 45 of this Directive requires the compulsory exclusion from participation in a public contract of any candidate or tenderer who was the subject of a conviction by final judgment of corruption as defined in Art. 3 of the Council Act of 26 May 1997[24] and Art. 3(1) of the Council Joint Action 98/742/JHA.[25]

Art. 3 of the Convention on the Fight against Corruption involving officials of the European Communities or officials of the Member States of the European Union refers to active corruption, defining it as the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party to act or refrain from action in accordance with his duty or in the exercise of his functions in breach of his official duties. Art. 3(1) of the Council Joint Action on Corruption in the Private Sector defines active corruption in the private sector as the deliberate action of promising, offering or giving, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person, in order that the person should perform or refrain from performing an act, in breach of his duties.

It therefore does not appear that a commercial organisation having failed to prevent bribery under Section 7 of the Bribery Act could be excluded on the grounds found in Art. 45(1)(b) of Directive 2004/18, unless for example the director had a prior conviction for active corruption. This means that the 2006 Public Contracts Regulation implementing the 2004 Directive needs not be amended to include the offence of failure to prevent bribery.

Let us see if other exclusion grounds found in Art. 45 of the Procurement Directive 2004/18 could apply to this offence of failing to prevent bribery. Art. 45 also states that any economic operator may be excluded from participation in a contract where that economic operator has been convicted by a judgement which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct (Art. 45(2)(c)); where he has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate (Art. 45(2)(d)); or when he is guilty of serious misrepresentation in supplying the information required and has not supplied the information required (Art. 45(2)(g)). It is conceivable that in some cases, an omission such as a failure to prevent bribery may constitute grave professional misconduct. Yet as there is no harmonised interpretation of "grave professional misconduct" in the EU, there may be some reluctance to use this ground for exclusion in the context of prevention.

There is a mismatch between the compulsory debarment procedures (criminal law based) and Section 7 of the Bribery Act (seeking to prevent bribery), so it might prove difficult to invoke Section 7 for the purpose of debarment.

Yet debarment should be possible after convictions under Section 1 of the Bribery Act (active corruption) and Section 6 (bribery of foreign officials). It remains to be seen whether a commercial organisation's debarment could be shortened or cancelled (the so-called "cleansing" or "rehabilitation" process, which does not exist in all legal systems), using a Section 7 defence – that the commercial organisation had put in place adequate procedures designed to prevent persons associated with the commercial organisation from undertaking bribery. If so, the Act will have served to make debarment more difficult.

In the present state of EU legislation, it will not be possible to debar for a conviction under Section 2 of the Bribery Act (passive corruption) and it will be difficult, if not impossible to debar under Section 7 (failure of commercial organisations to prevent bribery), as we have just seen.

It would be advantageous if Art. 45 of the Procurement Directive could be extended to cover passive corruption. A way could also be explored to proportionately include cases where there has been no attempts to put in place systems to prevent bribery.

VI. Penalties

Natural persons found guilty under the Act of one of the principal offences are liable on conviction to imprisonment of up to

10 years, or to a fine, or to both. This increases the maximum penalty from seven to ten years. The Act also penalises those senior officers of the corporate entity with whose "consent and connivance" the bribery was committed – although where the bribery takes place overseas, they must have a close connection with the UK. This could be committed for example by the passive acquiescence of a director, if in practice that amounted to consent to the bribery.

A commercial organisation guilty of an offence under Section 7 (failure to prevent bribery) is liable on conviction to an unlimited fine. Failure to maintain "adequate procedures" could also render directors vulnerable to civil claims. Penalties for corruption seem to vary within the EU. For example, similar offences exist in the French system, although penalties differ: France has maximum fines of €150,000 and €750,000. Interesting comparisons can also be made between the French and British limitation periods, and respective approaches to private and public sectors, which are illustrated in table 1.

VII. Guidance on How to Prevent Bribery

Section 9 of the Act requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing. The guidance is arranged around six principles and is due to be consolidated in 2011.

The first principle relates to risk assessment. The commercial organisation should regularly and comprehensively assess the nature and extent of the risks relating to bribery to which it is exposed. Key bribery risks will need to be identified. Internal risks can include a lack of clarity in the organisation's policy on gifts, whilst an external risk can be country-specific – there may be a perceived high level of corruption – or relate to the transaction itself or to the partnership: business partners may be located in higher-risk jurisdictions.

The second principle is that there should be "top-level commitment". The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) should be committed to preventing bribery. They should establish a culture within the organisation in which bribery is never acceptable. They should also take steps to ensure that the organisation's policy to operate without bribery is clearly communicated to all levels of management, the workforce and any relevant external actors. Codes of conduct and anti-bribery policies should be published, communicated to employees, subsidiaries and business partners.

Thirdly, due diligence is required. The commercial organisation should have due diligence policies and procedures which cover all parties to business relationships, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the commercial organisation does business. In practice this means that the commercial organisation must be able to show that it made enquiries, for example to establish whether individuals or other organisations involved in key decisions – such as intermediaries consortium or joint venture partners, contractors or suppliers – have a reputation for bribery and whether anyone associated with them is being investigated or prosecuted, although in practice this may not always be easy.

	UK	France	
Limitation period	None	3 years	
Penalties	Both public and private sector	Public Sector	Private Sector
Individuals/ Company Officers	Up to 10 years in prison and/or unlimited fine	■ Up to 10 years in prison and/or fine up to €150,000* ■ Additional penalties**	Up to 5 years in prison and/ or maximum fine of €75,000
Companies	■ Unlimited fine ■ Debarment***	■ Fine up to €750,000 ■ Debarment*** ■ Additional penalties	■ Fine up to €375,000 ■ Additional penalties
Defences	Company must show that adequate procedures were put in place	Defence of coercion or imminent danger, but only for individual	

Table 1: Penalties for corruption – comparing the UK with France;[26] *Arts. 435-1 and 435-2 of French Penal Code; **Art. 432-17 of French Penal Code: civic and professional bans, confiscation; ***Art. 45 of Directive 2004/18.

Organisations would also wish to ensure that enquiries are made of partners' internal anti-corruption measures.

The fourth principle relates to the need to adopt clear, practical and accessible policies and procedures. The commercial organisation's policies and procedures to prevent bribery being committed on its behalf should be clear, practical, accessible and enforceable. Policies and procedures take account of the roles of the whole workforce from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control. Procedure documentation should contain:

- A clear prohibition of all forms of bribery including a strategy for building this prohibition into the decision-making processes of the organisation;
- Guidance on making, directly or indirectly, political and charitable contributions, gifts and appropriate levels and manner of provision of bona fide hospitality or promotional expenses to ensure that the purposes of such expenditure are ethically sound and transparent;
- Advice on relevant laws and regulations;
- Guidance on what action should be taken when faced with blackmail or extortion, including a clear escalation process;
- The organisation's level of commitment to the Public Interest Disclosure Act 1998 (employment law for whistleblowers) and an explanation of the process. Any employee should be able to report allegations of bribery or breaches of corporate anti-bribery policy in a safe and confidential manner;
- Information on anti-corruption programmes relevant to the sector.

Managers may also wish to consider the resistance to bribery of particularly vulnerable operational areas, such as procurement and supply chain management mechanisms, addressing any issues identified.

The fifth principle refers to effective implementation. The commercial organisation effectively implements its anti-bribery policies and procedures and ensures they are embedded throughout the organisation.

Other guidance has also been issued. The OECD has produced good practice guidance on internal controls, ethics and compliance.[27] Transparency International (TI) UK has already made guidance notes available ahead of the Bribery Act's commencement so that companies can start putting in place procedures. They stress that adequate procedures will include training for staff; internal audit procedures, spot checks and the adoption of whistle blowing procedures. TI aims to complement official guidance by providing greater details to be used as the basis for designing a new anti-bribery programme if none exists. The TI guidance also aims to allow companies with systems already in place to cross-check and benchmark their procedures against a good practice standard. The idea is that corruption will be "designed out" by corporations taking preventive action.

Monty Raphael has argued that organisations did not need to wait for official guidance – they already knew what needed to be done.[28] Indeed guidance seems to have been widely available from public bodies, international organisations and consultants for some time so it should be possible for corporate entities to choose a regime that suit their size and their exposure. What has been missing hitherto for the UK has been political will.

VIII. Conclusion

The Bribery Act 2010 represents a big step forward for the UK. It is the first step in a strategy, which will also involve supporting ethical business, enforcing the law and international cooperation and capacity building.[29] The Director of the SFO believes that the legislation will have a positive role in creating an ethical business culture and that the SFO looked forward to contributing directly to a common ethical culture for all corporations large or small, by working with them to improve their procedures. The Act might be expected to increase in investigations (and perhaps prosecutions). However, in the present climate of budget constraints, it is unclear whether public resources will be extended to deal with the practical consequences of the Act.

To conclude, in the light of the adoption of the UK Bribery Act 2010, there are three areas that the European Commission might wish to include in its anti-corruption strategy.

1. It seems that the EU's forthcoming accession to GRECO (the Council of Europe's Group of States against corruption) would make easier the monitoring of anti-corruption legislation in the EU Member States and beyond, so that we can look to international standards being met and an even playing field. Szarek-Mason has made this point.[30]

2. There is a need for comparative work, to gauge the impact of limitation periods and penalties within the EU. We need to know the likely impact of various (i) approaches to extra-territoriality, (ii) mixes of prevention and criminal law approaches and (iii) approaches to the private and public sectors in national legislations.

3. Lastly, there is a need to look at the application of Article 45 of Regulation 2004/18 in order to see to what extent debarment can be used in corruption cases and how "rehabilitation" is applied. EU-level guidelines may be needed there.

1 The OECD 2005 Phase two report on the UK recommended, as did an earlier 2003 Working Group report, that the UK enact modern foreign bribery legislation at the earliest possible date. The OECD criticised the UK for its lack of prosecutions for bribery: "it is surprising that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK", especially given the size and nature of its exports and outward Foreign Direct Investment. See also GRECO's evaluation papers http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp and the OECD Working Group on Bribery Annual Report 2007, http://www.oecd.org/dataoecd/21/15/40896091.pdf. In 2007, the UK undertook a review of the law on bribery and the Law Commission issued their report in 2008.
2 See Schedule 2 of the Act for a complete list.
3 In 2001, the UK had failed to implement the OECD convention to the satisfaction of the OECD.
4 Opened to signature on 27 January 1999.
5 Opened to signature on 4 November 1999.
6 http://www.libertysecurity.org/IMG/pdf_jls_acquis_oct_2008_update.pdf
7 O.J. C 195 of 25 June 1997, p. 2.
8 O.J. L 192 of 31 July 2003, p. 54.
9 BAE Systems is an international company that develops defence and aerospace systems.
10 HL Deb, 1 February 2007, col 339 Back. See also http://www.wiwi.uni-passau.de/fileadmin/dokumente/lehrstuehle/lambsdorff/downloads/BAE_Systems_and_the_Rule_of_Law.pdf and http://www.telegraph.co.uk/finance/newsbysector/industry/8239575/Lord-Goldsmith-urges-plea-bargaining-in-bribery-cases.html
11 The bribe can be given in anticipation or as a reward.
12 Sections 1-2 of the Act.
13 Section 3 of the Act.
14 Section 4 of the Act.
15 Section 5(2) of the Act.
16 Section 13(1) of the Act.
17 Section 6(6) of the Act.
18 Section 12(3)(b) of the Act.
19 The various types of citizenships are included: British citizen, British overseas territories citizen, British national (overseas), British Overseas citizen, a person who under the British nationality Act 1981 was a British subject, a British protected person within the meaning of that Act.
20 Section 7(2) of the Act.
21 UK Ministry of Justice Consultation on Guidance about Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010), Consultation Paper CP11/10.

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22 *P. Wilkonson,* The 2010 UK Bribery Act adequate procedures – Guidance on good practice for corporate anti-bribery programmes, Transparency International 2010; see also Transparency International (ed.), Business principles for countering bribery – a initiative led by Transparency International, 2009.
23 Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134 of 30 April 2004, p. 114.
24 O.J. C 195 of 25 June 1997, p. 1. Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.
25 O.J. L 358 of 31 December 1998, p. 2. Joint Action 98/742/JHA on corruption in the private sector.
26 UK Bribery Act, New Compliance Challenges for International Businesses, presentation by McGuireWoods Business Department, 2009. The table has been checked and adapted. See also GRECO, Third Evaluation Round, Evaluation Report on France on Incriminations, 2009.
27 This good practice guidance was adopted by the OECD Council as an integral part of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009 and adopted on 18 February 2010.
28 Presentation at seminar held in London on 20 October, 2010 – Fraud Advisory Panel, Best Practice Forum, Designing Out Bribery and Corruption. See also *M. Raphael*, Blackstone's Guide to the Bribery Act 2010, Oxford University Press 2010.
29 See HM Government, UK Foreign Bribery Strategy, 2010.
30 *P. Szarek-Mason*, The European Union's fight against corruption – The evolving policy towards Member States and candidates countries, Cambridge Studies in European Law and Policy, 2010.

Gegenseitige Anerkennung von Geldstrafen und Geldbußen in Deutschland

Zur Umsetzung des Rahmenbeschlusses 2005/214/JI in das deutsche Recht

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Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties was implemented into German law in October 2010. With this instrument, it is for the first time possible to enforce financial penalties in all Member States of the European Union using a uniform procedure, provided that the Member States have adopted the necessary implementation laws. FD 2005/214/JHA is governed by the principle of mutual recognition, which became a cornerstone of cooperation both in civil and in criminal matters at the Council meeting in Tampere in 1999. In particular, the concept of

list offences under Art 5 of the FD, where double criminality is not verified by the executing State, is based upon this principle. In Germany, the Federal Office of Justice (Bundesamt für Justiz) in Bonn has been designated as the competent authority for incoming and outgoing requests under FD 2005/214/JHA. The following article gives an overview of the German implementation law on the basis of FD 2005/214/JHA.

Der Grundsatz der gegenseitigen Anerkennung wurde auf der Sondertagung des Europäischen Rates im finnischen Tampere als Eckstein der zukünftigen justiziellen Zusammenarbeit in Zivil- und Strafsachen bestimmt.[1] Als erstes strafrechtliches Instrument wurde auf dieser Grundlage 2002 der Rahmenbeschluss über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten (2002/584/JI) angenommen. Weitere Rahmenbeschlüsse folgten.[2] Mit Inkrafttreten des Vertrags von Lissabon wurde der Grundsatz der gegenseitigen Anerkennung gerichtlicher Urteile und Entscheidungen in Art. 82 Abs. 1 des Vertrags über die Arbeitsweise der Europäischen Union als Grundsatz für die justizielle Zusammenarbeit in Strafsachen festgelegt.

Am 24. Februar 2005 hatte der Rat den Rahmenbeschluss über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen (im Folgenden: RB Geld) angenommen.[3] Der RB Geld ersetzt für die Vollstreckung von Geldstrafen und Geldbußen die herkömmliche Vollstreckungshilfe zwischen den Mitgliedstaaten der EU. Er schafft erstmals eine einheitliche Rechtsgrundlage für die EU-weite Vollstreckung von Geldsanktionen und füllt damit eine Lücke in der strafrechtlichen Zusammenarbeit der Mitgliedstaaten.

Deutschland hat mit dem Gesetz zur Umsetzung des Rahmenbeschlusses 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen vom 18. Oktober 2010 den RB Geld umgesetzt.[4] Die Umsetzung von Rahmenbeschlüssen hatte sich maßgeblich dadurch verzögert, dass das Bundesverfassungsgericht mit Entscheidung vom 18. Juli 2005 das (erste) Umsetzungsgesetz zum Europäischen Haftbefehl für verfassungswidrig erklärt hatte.[5]

I. Zur Umsetzung des Rahmenbeschlusses

1. Gesetzgebungsverfahren

Die Bundesregierung hat den Gesetzesentwurf am 13. Januar 2010 beschlossen.[6] Nach Befassung von Bundesrat und Bundestag (Rechtsausschuss)[7] ist das Gesetz am 18. Oktober 2010 vom Bundespräsidenten ausgefertigt und am 27. Oktober 2010 verkündet worden.[8] Die Vorschriften, mit denen der RB Geld umgesetzt wurde, sind in das Gesetz über die internationale Rechtshilfe in Strafsachen (IRG) aufgenommen worden, und zwar in einem eigenen Abschnitt des Neunten Teils über den Vollstreckungshilfeverkehr mit den Mitgliedstaaten der Europäischen Union (§§ 86–87o IRG). Auch die vorangegangenen Rahmenbeschlüsse haben gesonderte Teile im IRG erhalten, die sich deutlich von den übrigen Bestimmungen des Gesetzes absetzen, welche die strafrechtliche Zusammenarbeit mit Staaten außerhalb der EU behandeln.[9]

2. Die Grundzüge des Verfahrens der Anerkennung und Vollstreckung

a) Behördliche Entscheidung

Gemäß Art. 2 Abs. 1 RB Geld wurde das Bundesamt für Justiz, eine Bundesoberbehörde im Geschäftsbereich des Bundesministeriums der Justiz mit Sitz in Bonn, als Bewilligungsbehörde für sämtliche ein- und ausgehende Ersuchen bestimmt. Die Entscheidung für eine zentrale Zuständigkeit in Deutschland soll die Zusammenarbeit mit den anderen Mitgliedstaaten und zugleich den Umgang mit der neuen Materie erleichtern. Das Bundesamt für Justiz nimmt die ausländischen Ersuchen entgegen und arbeitet eng mit den Behörden des Entscheidungsstaates zusammen. Ist die Geldsanktion in Deutschland anerkannt und vollstreckt worden, teilt das Bundesamt für Justiz dies der ausländischen Stelle mit.

Der Betroffene muss vom Bundesamt für Justiz angehört werden (§ 87c Abs. 1 IRG). Das Bundesamt für Justiz übersendet dem Betroffenen Abschriften der vom Entscheidungsstaat übermittelten Unterlagen. Dieser hat binnen zwei Wochen Gelegenheit, Einwendungen gegen die Zulässigkeit und Bewilligungsfähigkeit des Ersuchens vorzubringen. Danach entscheidet das Bundesamt für Justiz über die Bewilligung der Vollstreckung. Die Verpflichtung des Art. 6 RB Geld, die ausländische Entscheidung anzuerkennen und zu vollstrecken, erscheint in § 87d IRG, wonach die Bewilligung eines zulässigen Ersuchens nur in eng begrenzten Ausnahmefällen abgelehnt werden kann. Der mit Gründen versehene Bewilligungsbescheid, der zugleich eine Rechtsbehelfsbelehrung enthält, wird dem Betroffenen zugestellt (§ 87f Abs. 3 IRG). Sofern keine freiwillige Zahlung erfolgt, betreibt das Bundesamt für Justiz die Zwangsvollstreckung. Die Anhörung kann gemäß § 87c Abs. 2 IRG unterbleiben, wenn die Bewilligungsbehörde unmittelbar nach Eingang des Ersuchens gegenüber dem Entscheidungsstaat ein Zulässigkeits- oder Bewilligungshindernis geltend macht oder in den Ausnahmefällen des § 87i IRG eine

gerichtliche Umwandlung der Entscheidung beantragt werden muss.[10] Ebenso zählt zum Rechtsschutz des Betroffenen die Möglichkeit, sich gemäß §§ 87e, 53 IRG eines anwaltlichen Beistands zu bedienen. Ist dies wegen besonderer Schwierigkeit der Sach- oder Rechtslage erforderlich, wird ihm dieser Beistand von Amts wegen bestellt.

b) Gerichtliche Überprüfung

Gegen die Bewilligungsentscheidung ist der ordentliche Rechtsweg eröffnet. Diese Möglichkeit des gerichtlichen Rechtsschutzes ist durch den Erwägungsgrund 6 des RB Geld gedeckt, wonach jedem Mitgliedstaat die Freiheit zur Anwendung seiner verfassungsmäßigen Regeln für ein ordnungsgemäßes Gerichtsverfahren bleibt. Der Betroffene kann gegen die Bewilligung innerhalb von zwei Wochen nach Zustellung Einspruch einlegen und eine gerichtliche Überprüfung herbeiführen. Bevor das Bundesamt für Justiz das Verfahren an das zuständige Amtsgericht abgibt, hat es gemäß § 87g Abs. 1 Satz 2 IRG die Möglichkeit, dem Einspruch abzuhelfen. Hilft die Behörde dem Einspruch nicht ab, so entscheidet nach § 7g Abs. 1 Satz 1 IRG das zuständige Amtsgericht. Örtlich zuständig ist grundsätzlich das für den Wohnort des Betroffenen zuständige Amtsgericht (§ 87g Abs. 2 IRG). Den Bundesländern wird in § 87g Abs. 2 Satz 7 IRG die Möglichkeit eröffnet, die Zuständigkeit bei einem oder mehreren Amtsgerichten zu konzentrieren.

Gegen den Beschluss des Amtsgerichts kann der Betroffene nach Maßgabe der §§ 87j–87l IRG Rechtsbeschwerde zum Oberlandesgericht einlegen, die der gesonderten Zulassung bedarf. Dafür gelten weithin die Vorschriften der StPO und des GVG über die Revision entsprechend (§ 87j Abs. 2 IRG). Zugelassen wird die Rechtsbeschwerde nur, wenn es geboten ist, die Nachprüfung des erstinstanzlichen Beschlusses zur Fortbildung des Rechts oder zur Sicherung einer einheitlichen Rechtsprechung zu ermöglichen. Ferner ist die Rechtsbeschwerde zuzulassen, wenn erstinstanzlich rechtliches Gehör versagt wurde (§ 87k Abs. 1 IRG). Zur Wahrung der Rechtseinheitlichkeit kann die Sache schließlich dem Bundesgerichtshof vorgelegt werden.

3. Die Umsetzung des Rahmenbeschlusses im Einzelnen

a) Anzuerkennende Entscheidungen (Art. 1 RB Geld)

Nach § 87 Abs. 2 IRG kann Vollstreckungshilfe durch Vollstreckung einer in einem anderen Mitgliedstaat rechtskräftig verhängten Geldsanktion geleistet werden, wenn die Geldsanktion auf einer Entscheidung beruht, die ein Gericht oder eine Behörde wegen einer nach dem Recht des ersuchenden Mitgliedstaates strafbaren Tat oder wegen einer Tat getroffen hat, die nach dessen Recht als Ordnungswidrigkeit geahndet wurde. Im letzteren Fall muss gegen die Entscheidung ein auch für Strafsachen zuständiges Gericht angerufen werden können. Unter den Begriff der Geldsanktion fallen gemäß Art. 1 b) RB Geld nicht nur die verhängte Geldstrafe oder Geldbuße, sondern auch die Verfahrenskosten sowie Geldbeträge, die zugunsten des Opfers oder von Opferschutzorganisationen oder öffentlicher Kassen festgesetzt wurden. Der deutsche Gesetzgeber hat diese Vorgaben vollständig in § 87 IRG umgesetzt. Zwar kennt das deutsche Recht Entscheidungen von Behörden in Strafsachen nicht; der RB Geld verpflichtet allerdings die Mitgliedstaaten, auch solche Entscheidungen anzuerkennen und zu vollstrecken, die dem jeweiligen nationalen Recht unbekannt sind, solange sie im RB Geld aufgeführt werden. Ebenfalls anerkannt und vollstreckt werden können Geldsanktionen gegen juristische Personen, obwohl das deutsche Recht eine Strafbarkeit juristischer Personen nicht kennt.

b) Formale Voraussetzungen und Sprachenregime (Art. 4, 16 RB Geld)

Nach § 87a IRG hat der Entscheidungsstaat das Original der zu vollstreckenden Entscheidung oder eine beglaubigte Abschrift hiervon zu übermitteln sowie die von seiner zuständigen Behörde ausgefüllte und unterzeichnete Bescheinigung entsprechend dem im Anhang zum RB Geld abgedruckten Formblatt. Von der möglichen Erleichterung in Art. 4 Abs. 3 Satz 1 RB Geld (Übermittlung per E-Mail oder Fax) hat der deutsche Gesetzgeber keinen Gebrauch gemacht.

Entsprechend Art. 16 Abs. 1 RB Geld muss die Bescheinigung in die Amtssprache des Vollstreckungsstaates – für Deutschland also in die deutsche Sprache – übersetzt werden. Eine Erklärung, wonach auch Bescheinigungen in anderen Amtssprachen der EU akzeptiert werden, hat Deutschland nicht abgegeben. Liegt die Bescheinigung nach Art. 4 RB Geld nicht vor, ist sie unvollständig oder entspricht offensichtlich nicht der Entscheidung, so kann die Anerkennung und Vollstreckung der Entscheidung verweigert werden. In Deutschland wurde diese Vorschrift als zwingende Zulässigkeitsvoraussetzung in §§ 87a, 87b Abs. 3 Nr. 1 IRG umgesetzt.

c) Stichtagsregelung

Das Datum der Verkündung des Umsetzungsgesetzes (27. Oktober 2010) ist für die Anwendbarkeit des RB Geld in Deutschland entscheidend. Gemäß § 98 IRG, der für ein- und ausgehende Ersuchen gilt, können ausländische gerichtliche Entscheidungen in Deutschland nur dann anerkannt und vollstreckt werden, wenn sie nach dem 27. Oktober 2010 rechtskräftig geworden sind. Bei behördlichen Entscheidungen gilt, dass diese nach dem 27. Oktober 2010 ergangen sein müssen.

Diesen Unterschied zwischen gerichtlichen und behördlichen Entscheidungen begründet der Gesetzgeber mit der Vermeidung von Unklarheiten, auf welche Entscheidung welcher Instanz bei gerichtlichen Entscheidungen abzustellen ist; bei behördlichen Entscheidungen ist der das Verfahren abschließende Bescheid maßgeblich.[11]

d) Beiderseitige Sanktionierbarkeit und Listendelikte (Art. 5 RB Geld)

Ziel des RB Geld ist es, die bisher bestehenden Hindernisse bei der grenzüberschreitenden Vollstreckung von Geldsanktionen zu beseitigen und sie wesentlich zu vereinfachen. Erreicht wird dies unter anderem dadurch, dass der klassische Ablehnungsgrund des Fehlens der beiderseitigen Sanktionierbarkeit nur noch in Ausnahmefällen geltend gemacht werden kann. Nach Art. 5 Abs. 1 RB Geld (umgesetzt in § 87b Abs. 1 Satz 2 IRG) wird die beiderseitige Sanktionierbarkeit nicht geprüft, wenn die Tat nach dem Recht des Entscheidungsstaates eine der dort aufgeführten 39 Straftatbestände oder Ordnungswidrigkeiten verwirklicht. Die Listendelikte wurden im Kern aus dem Rahmenbeschluss zum Europäischen Haftbefehl übernommen. Neu aufgenommen sind neben 6 weiteren Delikten Verhaltensweisen, die gegen die den Straßenverkehr regelnden Vorschriften verstoßen, einschließlich Verstößen gegen Vorschriften über Lenk- und Ruhezeiten und des Gefahrgutrechts. Deutschland hat hierzu im Rat folgende Erklärung abgegeben:

> Als entsprechende Zuwiderhandlungen werden nur Verstöße gegen Verkehrsregeln und Regelungen zum Schutz von Verkehrsanlagen angesehen, nicht hingegen allgemeine Straftatbestände oder Verstöße gegen allgemeine Ordnungsvorschriften. Als den Straßenverkehr regelnde Vorschriften sind insoweit nur solche zu verstehen, deren Schutzzweck die Sicherheit des Straßenverkehrs oder der Erhalt der Verkehrsanlagen ist.[12]

Praktisch anspruchsvoll wird der Umgang mit dem letzten Listendelikt, nämlich

> Straftatbestände, die vom Entscheidungsstaat festgelegt wurden und durch Verpflichtungen abgedeckt sind, die sich aus im Rahmen des EG-Vertrags oder des Titels VI des EU-Vertrags erlassenen Rechtsakten ergeben.

Jenseits der Listendelikte hat Deutschland die beiderseitige Sanktionierbarkeit als Zulässigkeitsvoraussetzung beibehalten (Art. 5 Abs. 3, Art. 7 Abs. 2 b) RB Geld, § 87b Abs. 1 Satz 1 IRG).

e) Ablehnungsgründe (Art. 7 RB Geld)

Der RB Geld erlaubt es den Mitgliedstaaten, die Anerkennung und Vollstreckung aus den in seinen Art. 7 und Art. 20 Abs. 3 aufgezählten Gründen zu versagen. Dem Grundsatz der gegenseitigen Anerkennung werden damit Grenzen gesetzt. Die Aufzählung ist abschließend, weitere Gründe dürfen die Mitgliedstaaten nicht geltend machen. Deutschland hat sämtliche Versagungsgründe in §§ 87a, 87b und 87d IRG umgesetzt. Nur einige sollen hier vorgestellt werden. Insbesondere die bekannte 70 €-Grenze (Art. 7 Abs. 2 h) RB Geld) hat der deutsche Gesetzgeber genutzt: Gemäß § 87b Abs. 3 Nr. 2 IRG ist die Vollstreckung nicht zulässig, wenn die verhängte Geldsanktion den Betrag von 70 € (oder dessen Gegenwert bei Umrechnung) nicht erreicht. Im Einklang mit Art. 1 b) i)–iv) RB Geld werden die einzelnen Arten der Sanktion zusammengerechnet, also insbesondere der in einer Entscheidung festgesetzte Geldbetrag aufgrund einer Verurteilung und die Kosten des Gerichts- und Verwaltungsverfahrens. Besondere Erwähnung verdient weiter der Ablehnungsgrund nach Art. 7 Abs. 2 g) ii) RB Geld, der durch Art. 3 des Rahmenbeschlusses 2009/299/JI geändert wird. Die Anforderungen an Abwesenheitsverfahren werden damit grundrechts- und betroffenenfreundlicher formuliert.

Der Rahmenbeschluss 2009/299/JI ist bis zum 28. März 2011 umzusetzen und findet ab diesem Zeitpunkt Anwendung. Sollte ein Entscheidungsstaat diesen Rahmenbeschluss bereits umgesetzt haben, Deutschland als Vollstreckungsstaat aber noch nicht, kann der Entscheidungsstaat gleichwohl bereits die Bescheinigung in der neuen Fassung verwenden. Nach § 87b Abs. 3 Nr. 9 IRG ist die Vollstreckung der Geldsanktion schließlich nicht zulässig, wenn die betroffene Person in dem ausländischen Verfahren keine Gelegenheit hatte einzuwenden, für die der Entscheidung zugrunde liegende Handlung nicht verantwortlich zu sein, und sie dies gegenüber der Bewilligungsbehörde geltend macht. Nach dem Willen des Gesetzgebers sollen damit vor allem Fälle der Halterhaftung im Straßenverkehr erfasst werden, in denen unter Verstoß gegen das Schuldprinzip der Halter eines Fahrzeugs als solcher sanktioniert wird.[13]

Nach Art. 20 Abs. 3 Satz 1 RB Geld kann jeder Mitgliedstaat die Anerkennung und Vollstreckung von Entscheidungen verweigern, wenn die Bescheinigung Anlass zu der Vermutung gibt, dass Grundrechte oder allgemeine Rechtsgrundsätze gemäß Art. 6 EUV verletzt wurden. Nach dem eindeutigen Wortlaut ist dies ein weiterer Ablehnungsgrund, den die Mitgliedstaaten heranziehen dürfen. Dies folgt unter anderem aus Art. 20 Abs. 3 Satz 2 RB Geld, der das auch für die übrigen Ablehnungsgründe vorgesehene Konsultationsverfahren vorschreibt. In Deutschland ist die Leistung von Rechtshilfe für andere Mitgliedstaaten unzulässig, wenn die Erledigung des Ersuchens zu den in Art. 6 EUV enthaltenen Grundsätzen im Widerspruch stünde (§ 73 Satz 2 IRG).

Die Zulässigkeitsvoraussetzungen sind vom Gesetzgeber als zwingend ausgestaltet worden. Liegt einer der Tatbestände

vor, muss die Bewilligungsbehörde die Anerkennung und Vollstreckung der ausländischen Entscheidung ablehnen. Zu einer solchen Ausgestaltung war der nationale Gesetzgeber trotz des Wortlauts des Art. 7 RB Geld, der von den zuständigen Behörden des Vollstreckungsstaats spricht, unionsrechtlich befugt. Der RB Geld kann nur so verstanden werden, dass das jeweilige nationale Umsetzungsrecht über die Ausgestaltung der Versagungsgründe entscheidet. Es wäre auch nicht ersichtlich, wie ein behördliches Ermessen im Einzelfall rechtsstaatlich und gegenüber allen Betroffenen gleich ausgeübt werden sollte, wenn es etwa am Erreichen der 70 €-Grenze fehlte.

Das Bundesamt für Justiz als Bewilligungsbehörde konsultiert nach Art. 7 Abs. 3 RB Geld (wie auch in allen anderen Fällen, etwa Art. 9 Abs. 2, Art. 14 RB Geld) die zuständigen Behörden der anderen Mitgliedstaaten.

f) Umrechnung und Herabsetzung (Art. 8 RB Geld)

Geldsanktionen aus Mitgliedstaaten, die den Euro (noch) nicht eingeführt haben, werden gemäß § 87f Abs. 2 Satz 1, § 54 Abs. 2 IRG (= Art. 8 Abs. 2 RB Geld) umgerechnet. Maßgeblich ist der Wechselkurs am Tag der Verhängung der Entscheidung. Als Konsequenz des Grundsatzes der gegenseitigen Anerkennung gilt dies gerade auch dann, wenn für die gleiche Tat nach Recht und Praxis in Deutschland die Geldsanktion niedriger ausgefallen wäre. Die Ausnahme in Art. 8 Abs. 1 RB Geld, dass die Geldsanktion auf das nach innerstaatlichem Recht vorgesehene Höchstmaß herabgesetzt werden kann, wenn die Tat außerhalb des Hoheitsgebiets des Entscheidungsstaates begangen wurde und zugleich die Gerichtsbarkeit des Vollstreckungsstaates begründet ist, wurde in § 87f Abs. 2 Satz 2 IRG umgesetzt.

g) Zwangsvollstreckungsrecht (Art. 9 und 10 RB Geld)

Für die Zwangsvollstreckung im engeren Sinn, die von der Anerkennung und Vollstreckung nach dem RB Geld insgesamt unterschieden werden muss, sind Art. 9 und 10 RB Geld einschlägig. Nach Art. 9 Abs. 1 Satz 1 RB Geld muss auf die Vollstreckung einer ausländischen Entscheidung das Recht des Vollstreckungsstaates in derselben Weise anwendbar sein wie bei Geldstrafen und Geldbußen, die vom Vollstreckungsstaat verhängt werden. Deshalb werden für Geldstrafen und für Geldbußen in § 87n IRG die Vorschriften des Ordnungswidrigkeitengesetzes (OWiG) und der Justizbeitreibungsordnung für anwendbar erklärt.

Die Möglichkeit von Ersatzfreiheitsstrafen oder anderen Ersatzstrafen nach Art. 10 RB Geld hat Deutschland nicht genutzt. Für eingehende Ersuchen erlaubt § 87n IRG keine Ersatzfreiheitsstrafe oder andere Sanktion, auch wenn der entscheidende Mitgliedstaat dies in der Bescheinigung zugelassen haben sollte. Für ausgehende Ersuchen werden Ersatzstrafen im Vollstreckungsstaat ebenfalls ausgeschlossen.

h) Erlösverteilung und Kosten (Art. 13 und 17 RB Geld)

Art. 13 RB Geld liegt die Erwägung zugrunde, dass alle Mitgliedstaaten nicht nur Entscheidungen anderer Mitgliedstaaten anerkennen und vollstrecken, sondern auch selbst Entscheidungen zur Anerkennung und Vollstreckung an die anderen Mitgliedstaaten übermitteln, dass also Aufwand und Ertrag sich langfristig in etwa gleichmäßig verteilen. Deshalb verbleibt dem Vollstreckungsstaat der aus der Anerkennung und Vollstreckung resultierende Erlös. Für eingehende Ersuchen ist innerhalb Deutschlands zwischen Bund und Bundesländern die Verteilung in § 87n Abs. 5 Satz 1 und 2 IRG so bestimmt, dass dem Bund das Geld zusteht, soweit nicht ein Gericht (eines Bundeslandes) mit der Sache befasst war. Entsprechend wird Deutschland bei ausgehenden Ersuchen den Vollstreckungsstaat auch nicht um Übermittlung des Erlöses bitten. Im Einklang mit Art. 13 Hs. 2 RB Geld kann bei Opferentschädigungen im Sinne von Art. 1 b) ii) RB Geld mit dem Entscheidungsstaat vereinbart werden, dass der Erlös aus der Vollstreckung dem Opfer zufließt (§ 87n Abs. 5 Satz 3 IRG).

Der Kostenverzicht in Art. 17 RB Geld ist durch den bereits bei Umsetzung des Rahmenbeschlusses 2006/783/JI neugefassten § 5 Abs. 4 Justizverwaltungskostenordnung sichergestellt. Danach werden Kosten nicht erhoben, soweit Rahmenbeschlüsse der Europäischen Union einen gegenseitigen Verzicht auf Kostenerstattung vorsehen.

4. Ausgehende Ersuchen

Ist Deutschland Entscheidungsstaat, übersendet das Bundesamt für Justiz gemäß Art. 4 Abs. 1 RB Geld das Ersuchen an den Vollstreckungsstaat, in dem der Betroffene seinen Wohnsitz hat, sich in der Regel aufhält, Einkommen bezieht oder über Vermögen verfügt oder in dem eine juristische Person ihren Sitz hat. Es gilt die Stichtagsregelung des § 98 IRG (siehe oben 3.c)). Der andere Mitgliedstaat kann um Anerkennung und Vollstreckung von Geldstrafen und Geldbußen sowie Kosten des Verfahrens ersucht werden (§ 87o Abs. 1 Satz 3 IRG). Bei der übersandten Entscheidung kann es sich um eine solche nach Art. 1 a) i), iii) oder iv) RB Geld handeln. Insbesondere fallen nach deutschem Ordnungswidrigkeitenrecht sanktionierte Taten in den Anwendungsbereich des RB Geld, weil gegen den Bußgeldbescheid der Verwaltungsbehörde der Rechtsweg zu den Strafgerichten eröffnet ist (§ 68 OWiG). Das Vollstreckungshindernis des Art. 15 RB Geld wurde vollständig in § 87p IRG umgesetzt.

Das Bundesamt für Justiz hat den deutschen Behörden im Internet ein elektronisches Formular zur Verfügung gestellt, mit dessen Hilfe die im Anhang zum RB Geld abgedruckte Bescheinigung ausgefüllt werden kann.[14] Die deutsche Behörde wird Schritt für Schritt durch die Bescheinigung geleitet, so dass Fehler beim Ausfüllen vermieden werden. Einzelne Felder sind bereits vorbelegt; etwaige Besonderheiten in einzelnen Mitgliedstaaten werden automatisch berücksichtigt. Ziel ist es, das Verfahren benutzerfreundlich und möglichst einfach zu gestalten, um die Akzeptanz des neuen Rechtsinstruments zu steigern. Das Bundesamt für Justiz wirbt bei allen Staatsanwaltschaften und Behörden aktiv für die neuen Möglichkeiten, die der RB Geld bei der grenzüberschreitenden Vollstreckung von Geldsanktionen bietet.

II. Zusammenfassung und Ausblick

Mit dem RB Geld hat die Europäische Union auf Grundlage des Grundsatzes der gegenseitigen Anerkennung einen weiteren wichtigen Baustein in der strafrechtlichen Zusammenarbeit der Mitgliedstaaten geschaffen. Die große Mehrheit der Mitgliedstaaten hat den RB Geld umgesetzt. Auch Deutschland ist aufgrund des Gesetzes vom 18. Oktober 2010 jetzt in der Lage, an der grenzüberschreitenden Vollstreckung von Geldstrafen und Geldbußen auf Grundlage des RB Geld mitzuwirken. Für die praktische Zusammenarbeit sollten alle in Betracht kommenden Möglichkeiten der Verbesserung genutzt werden, etwa Treffen der zuständigen Behörden von benachbarten Mitgliedstaaten, aber auch die enge Begleitung und Unterstützung der Praxis durch Kommission und Rat.[15]

Gegenüber der gelegentlichen öffentlichen Wahrnehmung des RB Geld ist festzuhalten, dass es (lediglich) um die grenzüberschreitende Vollstreckung rechtskräftiger Entscheidungen geht, also nicht um die vorangehende Verfolgung von Straftaten und Ordnungswidrigkeiten im Erkenntnisverfahren. Für die praktische Anwendung des RB Geld und das Fallaufkommen ist entscheidend, dass es vorher zu einer rechtskräftigen Entscheidung (mit einer Geldsanktion) kommt. Grenzüberschreitende Ordnungswidrigkeitenverfahren werden aufgrund des damit verbundenen Aufwands wohl eher selten geführt. Insbesondere bei Straßenverkehrsdelikten kommt es in der Regel aufgrund regelmäßig fehlenden Halterdatenaustauschs und nicht stattfindender Fahrerermittlung nicht zu einer grenzüberschreitenden Verfolgung. Die Aufnahme von Verkehrsdelikten in die Liste von Art. 5 Abs. 1 RB Geld hat Erwartungen geweckt, denen der RB Geld als solcher kaum wird gerecht werden können. Verbesserungen sind von der Richtlinie zur Erleichterung der grenzüberschreitenden Durchsetzung von Verkehrsvorschriften zu erhoffen, über die im Rat am 2. Dezember 2010 eine politische Einigung erzielt wurde.[16]

In der praktischen Zusammenarbeit stehen die Mitgliedstaaten erst am Anfang. Die bislang bekannt gewordenen Fallzahlen sind durchweg niedrig. Verantwortlich dafür sind auch die Neuartigkeit des RB Geld und die Tatsache, dass viele Mitgliedstaaten ihn noch nicht lange umgesetzt haben. Welches tatsächliche Potential an Fällen es gibt, muss sich mittelfristig zeigen. Jedenfalls sollte erst auf Grundlage umfassender Erfahrungen über Änderungen des RB Geld selbst nachgedacht werden. Das zu erwartende impact assessment der Kommission wird hierzu einen wichtigen Diskussionsbeitrag liefern.

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1 Schlussfolgerungen des Vorsitzes, Bulletin EU 10-99, Nr. I.1 und Nr. 1.6.1. Siehe allgemein etwa *A. Klip,* European Criminal Law, 2009, S. 330 ff; G. *Vernimmen-Van Tiggelen/L. Surano/A. Weyembergh* (Hg.), The Future of Mutual Recognition in the European Union / L`avenir de la reconnaissance mutuelle en matière penale dans l`Union européenne, 2009.
2 RB 2003/577 „Sicherstellung“; 2006/783 „Einziehung“; 2008/909 „Freiheitsstrafen“; 2008/947 „Bewährungsmaßnahmen“; 2008/978 „Europäische Beweisanordnung“. Hinzu kommt der (ändernde) RB 2009/299 „Abwesenheitsverfahren“.
3 ABl. L 76 vom 22.3.2005, S. 16. Im Titel der englischen Fassung des RB Geld heißt es „… application of the principle of mutual recognition *to* financial penalties“; richtiger wäre es wohl gewesen, auch in der deutschen Fassung des RB Geld von der „Anwendung des Grundsatzes der gegenseitigen Anerkennung *auf* Geldstrafen und Geldbußen zu sprechen.
4 BGBl. I S. 1408.
5 BVerfGE 113, 273; (Untechnisch: Erstes) Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der EU vom 21.7.2004 (BGBl. I S. 1748 und 2300). Die wirksame Umsetzung erfolgte erst durch das (untechnisch: Zweite) Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der EU (Europäisches Haftbefehlsgesetz – EuHbG) vom 20.7.2006 (BGBl. I S. 1721).
6 BR-Drucks. 34/10.

7 BT-Drucks. 17/1288 und 17/2458.
8 Abrufbar unter www.bgbl.de (Bundesgesetzblatt I Nr. 52 vom 27.10.2010); die konsolidierte Fassung des IRG ist abrufbar unter www.gesetze-im-internet.de. Mittlerweile haben 22 Mitgliedstaaten den RB Geld umgesetzt (siehe Ratsdok. 16924/1/10, 17205/10 und 17998/10 sowie den älteren Umsetzungsbericht der Kommission gemäß Art. 20 Abs. 5 RB Geld COM (2008) 888 final).
9 Es bleibt abzuwarten, ob bei Umsetzung der weiteren Rahmenbeschlüsse der deutsche Gesetzgeber dem Vorbild anderer Mitgliedstaaten folgt und sämtliche Bestimmungen zur strafrechtlichen Zusammenarbeit innerhalb der EU in ein eigenständiges Gesetz aufnimmt.
10 Im Antragsverfahren gemäß § 87i IRG (bei Geldstrafen gegen Jugendliche, bei Geldsanktionen gegen juristische Personen, bei Opferentschädigungen) muss das ausländische Erkenntnis durch ein Amtsgericht umgewandelt werden. Wird ein solcher Beschluss rechtskräftig, bewilligt das Bundesamt für Justiz die Vollstreckung nach dessen Maßgabe. Diese Bewilligung ist rechtskräftig und unanfechtbar.
11 BT-Drucks. 17/1288 S. 55.
12 Rats-Dokument 5871/1/05 vom 8.2.2005.
13 BT-Drucks. 17/1288 S. 27 f.
14 Abgerufen werden kann das Formular unter www.bundesjustizamt.de.
15 Dankenswerterweise hat die belgische Präsidentschaft die COPEN-Sitzung am 9.12.2010 im Schwerpunkt dem RB Geld gewidmet. Die Kommission hatte bereits am 29.6.2010 ein Expertentreffen veranstaltet.
Das Bundesamt für Justiz hat sich mit den zuständigen Zentralbehörden in den Niederlanden und in Finnland getroffen.
16 Siehe Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Erleichterung der grenzübergreifenden Durchsetzung von Verkehrssicherheitsvorschriften (zuletzt Rats-Dok. 17409/10).

Transposing the Framework Decision on Combating Racism and Xenophobia into the Greek Legal Order

Athanasios Chouliaras

European criminal law constitutes a hybrid field of law, resulting from the accumulation of unrelated social, political, institutional, and legal developments rather than the application of a master plan.[1] Its itinerary has been marked by a twofold strategy: first, the creation of a unified body of criminal law directly enforceable in Member States, serving the objective of establishing an autonomous and cohesive Community legal order (Community law)[2] and, second, a gradual approximation of national legislations that slowly but surely leads to the configuration of a European transnational legal order built on common standards (EU law).[3]

The former course of action was moderately introduced with the conclusion of the EU Convention of 26 July 1995 on the protection of the financial interests of the European Communities[4] and its two protocols.[5] It culminated in the ambivalently received[6] and ultimately abandoned project to create an EU-wide criminal code, known as *Corpus Juris,* for the protection of the financial interests of the European Community.[7] The latter approach was launched within the framework of an "area of freedom, security and justice" and has been developed in four directions: the approximation of national legislations, the development of instruments based on the mutual recognition principle, the improvement of judicial cooperation mechanisms, and the development of relationships with third states.[8] In other words, this approach presupposes the adoption of a broad European criminal policy, the basic lines of which were stipulated by the European Council in the Tampere Programme (1999–2004) and further developed in the Hague Programme (2004–2009) and the Stockholm Programme (2010–2014).[9]

The denial of concession of direct and broad criminal competence to the European Communities[10] and the gradual emergence of a common European criminal policy brought about a complex situation where criminal norms evolved at two levels: while the selection of interests and values worthy of being safeguarded by the draconian means of criminal law is effectuated primarily at the European level *(primary criminalisation)*, their factual protection is implemented at the national level by means of the enactment of specific criminal laws and their due application by the competent national authorities *(secondary criminalisation)*.[11] In this context, the implementation of European legislation into national legal systems has become one of the most intriguing issues in contemporary criminal theory, given that criminal law cuts to the core of the national sovereignty and cultural identity of Member States.[12] Therefore, harmonisation, defined in general terms as "the convergence of the legal practice of the various legal systems based upon a common standard,"[13] has become a keyword in the endeavour to articulate a sophisticated post-modern criminal theory clearly characterised by transnational and international traits.[14]

Notwithstanding the fact that the issue of harmonisation has justly provoked both positive and negative reactions, nobody could seriously challenge the simple truth that harmonisation is a growing phenomenon, especially in the European legal context.[15] From this angle, one could assert that it is more constructive to critically examine the content and the technical structure of the various legal tools through which harmonisation is promoted, e.g., framework decisions,[16] rather than cast doubts on their legitimacy.[17] In the following, I will describe the way in which the transposition of Framework Decision 2008/913 (hereafter FD) into the Greek legal order has been attempted by presenting the work of the relevant law preparation Committee of the Ministry of Justice (IV).[18] Before doing so, it is necessary to briefly describe the general framework within which the FD was adopted (I), the purpose and content of the latter (II) as well as the relevant Greek legislation on the issue (III).

I. The General Legal Framework

The EU is, by definition, opposed to any form of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. In particular, the Treaties provide for the possibility to take action against any or all discrimination based on the above-mentioned grounds (Art. 19 TFEC (*ex* 13 TEC), Arts. 3 (*ex* 2) and 6 TEU), while the Charter of Fundamental Rights nowadays further reinforces the right to non-discrimination (Art. 21).[19]

The European policy with respect to the aforesaid phenomena was set in motion on 15 July 1996 when the EU Council adopted Joint Action 96/443/JHA concerning action to combat racism and xenophobia by which the Member States undertook to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.[20] In 2000, the foundation of the EU legal framework on the broader issue of anti-discrimination, consisting of three directives and including penal provisions, was initiated: equal treatment irrespective of racial or ethnic origin, in employment, and between men and women outside the workforce.[21] It was further advanced on 28 November 2008 with the adoption of the FD under analysis here.[22]

II. The Purpose and Content of the FD

The use of the harsh means of criminal law is justified by the fact that racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (§1 FD). Since it is acknowledged that the treatment of these serious issues requires the adoption of a variety of measures within the context of a comprehensive policy agenda, the FD concentrates on combating their particularly severe manifestations (§6 FD). Its adoption is dictated by the belief that the approximation of criminal law should contribute to the effective prevention of racist and xenophobic offences, thus contributing to the promotion of a full and successful judicial cooperation between Member States (§12 FD). Of course, given that the cultural and legal traditions of the latter are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not considered possible (§6 FD).

Art. 1 contains several minimum rules for the drafting of the following criminal offences:

- §1 (a) public incitement to violence or racial hatred in respect of a group of persons or a member of such a group designated by reference to race, colour, religion descent or national or ethnic origin *(hate speech)*;
- §1 (b) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;
- §1 (c) public condoning, denying or grossly trivializing for a racist or xenophobic purpose of genocide, crimes against humanity and war crimes as defined in the ICC Statute *(core international crimes)* in a manner likely to incite violence or hatred against the aforementioned groups or members of such groups;
- §1 (d) the same act as §1 (c) with respect to crimes provided for in Art. 6 of the Charter of the International Military Tribunal *(historical revisionism* or *negationism)*;
- §2 opens the possibility to punish the acts provided for in §1 only when they carried out either in a manner likely to disturb public order or that is threatening, abusive or insulting. §4 provides that the punishment of the acts defined in §1 (c) and/or (d) may depend on the previous issuance of a final decision of a national and/or international court.

Art. 2 §1 compels Member States to punish the instigation of the conduct proscribed in Art. 1 §1(c) and Art. 2 §2 the aiding and abetting of the conduct referred to in Art. 1.

Art. 3 §2 sets a maximum of at least 1 to 3 years of imprisonment as a sentencing range. Art. 3 prescribes that all offences other than those referred to in Arts. 1 and 2 should be subject to harsh scrutiny when committed on racist and xenophobic grounds *(hate crimes)*, either by the stipulation of an aggravating circumstance or by consideration of this factor in the sentencing phase.

Art. 5 regulates the sensitive issue of the liability of legal persons: they can be held liable for the conduct in Arts. 1 and 2 committed for their benefit by any person, acting individually

or as a part of an organ of the legal person, who has a leading position within the legal person (§1). The same holds true when such conduct is carried out due to a lack of supervision or control by the aforesaid person (§2). This type of liability does not exclude criminal proceedings against natural persons who are perpetrators or accessories in the offences that are stipulated in Arts. 1 and 2. According to Art. 6, Member States should introduce effective, proportionate and dissuasive penalties − criminal or non-criminal − such as exclusion from entitlement to public benefits or aid, being placed under judicial supervision, etc.

Art. 7 reiterates that the content of the FD shall not have the effect of modifying the obligation to respect fundamental rights, including freedom of expression and association, as a result of constitutional traditions and the TEU (Art. 6).

Arts. 8 and 9 deal with procedural issues: the former requires that the initiation of investigations or prosecution should not be connected with a prior report or an accusation made by a victim of the offence, while the latter settles basic issues related to the establishment of national jurisdictions.

The 28th of November 2010 was set as a deadline for the transposition of the described provisions into national legal orders. Three years later, the degree to which the Member States have complied with the FD will be assessed. The FD will be reviewed by the Council by 28 November 2013.

III. Relevant Greek Legislation in the Field of Criminal Law

Greek criminal legislation includes one relevant statute: law 927 of 25/28.6.1979 entitled "on the punishment of acts or conducts aiming at racial discriminations," (further: the Greek law)[23] which was enacted in compliance with Art. 4 of the "International Convention on the Elimination of All Forms of Racial Discrimination."

In particular, Art. 1 §1 of the Greek law punishes intentional public incitement by any means to acts or conduct capable of provoking discrimination, hatred, or violence on racial or national grounds with imprisonment up to two years or a pecuniary penalty, which can be also imposed cumulatively. §2 criminalises the creation of or participation in organisations that pursue organised propaganda or any kind of activity tending towards discrimination. Art. 2 punishes expression by any means of ideas that are insulting to persons or groups of persons on the basis of their racial or national origin with imprisonment up to one year or a criminal fine, which can be also imposed cumulatively. Art. 24 of law 1419/1984 extended the application of the above-mentioned Greek law to conduct defined in Arts. 1 and 2 in order to include perpetration on religious grounds as well.[24]

The abolished Art. 3 of the Greek law used to criminalise the negation of supply of goods and services on the exclusive grounds of racial or national origin. This same conduct still constitutes a criminal offence by virtue of Art. 16 §2 of law 3304/2005[25] that transposed into the Greek legal order Directive 2004/113/EC of 13 December 2004.

Ultimately, Art. 4 of the Greek law based the initiation of criminal prosecution upon the victim's indictment. This provision was repealed by Art. 72 of law 2910/2001.[26] Even this essential change did not alter the fact that not one single published judgement (condemnatory or exculpatory) has applied law 927 over a period of 30 years.[27] This situation changed only in 2010, when the first widely known application of the law by the criminal courts of first and second instance of Athens resulted in an acquittal judgment that was even appealed before the Supreme Court.[28]

IV. The New Draft Law

There is no need to substantiate why the Committee gave preference to drafting a new law rather than simply amending the existing one; the mere juxtaposition of the content of FD with that of law 927 leaves no doubt that there was no room for minor changes. However, the basic methodological choices made by the Committee in fulfilling its mandate are worth mentioning.

On the one hand, the Committee strove to avoid the mistakes made almost systematically in past efforts to implement the EU legislation into the Greek legal order. Tracing their root cause to the mere transposition without contextualisation that repeatedly resulted in the literal reproduction of EU legal tools, a source of additional problems,[29] the Committee took into consideration the peculiarities and tradition of the Greek system of criminal law.[30] In this context, it employed concepts and categories long used by the Greek Criminal Code and at the same time equivalent to those used by the FD. The reason is more than obvious: only the former has been thoroughly analysed by legal scholars and authoritatively interpreted by Greek courts. What is more, given that the FD is principally orientated towards the penalisation of hate speech, special care was taken to respect the freedom of expression, enshrined in Arts. 10–14 of the Greek Constitution and in Art. 10 ECHR. The meticulous study of ECtHR case law on the issue led to the punishment of hate speech only when a danger (risk) to public safety and order was immediate and imminent.

On the other hand, the Committee was mindful of the fact that criminalisation is not merely a technical (or dogmatic) enterprise but rather a process of social (re)construction as well. Consequently, an evaluation of the broader social environment within which the draft law (hereafter DL) will be applied is not only desirable but also imperative. Empirical research has identified groups defined by reference to race, religion, or national or ethnic origin as the "preferential clientele" of the criminal justice system,[31] whereas the media are cautiously beginning to shed light on the other side of the coin: immigrants, apart from being suitable scapegoats, easily become the target of growing racism with endemic traits that slowly but surely develops into a fascist surge threatening Greek society as a whole and, of course, democracy. Seen through this prism, legislation is more effective when created after inclusive and extensive public debate, i.e., when both academic and popular discourse are taken into consideration. The Committee endeavoured to strike a balance by consulting international jurisprudence and by encouraging civil society's actors (universities, NGOs, etc.) to take a stand on the desirability and potential content of a criminal law against racism and xenophobia with regard to FD 2008/913.

In detail, the DL is composed of ten articles dealing both with substantial and procedural issues. Art. 1 declares the purpose of the draft law − combating particularly serious forms of racism and xenophobia − while Art. 2 defines core concepts like hatred and religion, including the lack of any religious belief. Art. 3 declares as a criminal offence any public intentional incitement to violence or hatred against a group of persons or a member of such a group, defined by reference to race, colour, religion, national or ethnic origin, sexual orientation, or even against property used exclusively by these persons or groups *(hate speech)*, in a manner that could endanger public order *(endangerment or anticipatory crime)*. Therefore, the danger need not be either abstract or concrete but potential in the sense that the court must evaluate whether it could have materialised under certain circumstances. Punishment consists of imprisonment ranging from six months to three years, and the pecuniary penalty ranges from €1000–€5000, imposed cumulatively. If the conduct of §1 brought about as an immediate consequence the actual commission of another crime, §2 provides for a heightened penalty, increasing to one to five years of imprisonment and €3000–€10,000 in pecuniary penalties. §3 penalises the creation of or participation in organisations whose activity falls under the scope of §1. The sentence would be imprisonment for a maximum of two years.

Art. 4 §1 penalises the public condonment, denial or annihilation of core international crimes and crimes provided for in Art. 6 of the Charter of the International Military Tribunal when perpetrated as described in Art. 1 §1 (c) and (d) of the FD and with the additional condition that their occurrence has been established by the final decision of a national or international court (§2). The sentence equals maximum imprisonment of two years and a pecuniary penalty ranging from €1000–€3000.

Art. 5 stipulates that the commission of the crimes typified in Arts. 3 and 4 is even possible through the Internet under the additional condition that the perpetrator is physically present in Greece, regardless of whether the material used is hosted to a web server located outside of Greece or vice versa *(territoriality principle)*.

Art. 6 institutes corporate liability for the conduct referred to in Arts. 3 and 4 when committed by any person holding a leading position within the legal person and acting individually or as a part of an organ of the legal person for the benefit or on the part of the legal person or simply through the latter. §2 renders the legal person liable even when a subordinate employee commits the prohibited conduct as a consequence of lack of supervision or dereliction of duty by superiors. Provided that Greek law follows the old axiom *societas delinquere non potest*, – a legal entity cannot be criminally liable[32] – the stipulated sanctions are not criminal sanctions. They comprise administrative fines, disqualification from the practice of commercial activities, exclusion from entitlement to public benefits or aid, etc. They can be imposed cumulatively or alternatively, and their severity and temporary or permanent character is governed by the following factors: gravity, degree of liability, economic size of the legal person, and recidivism. The sanctions are imposed by the Minister of Justice after hearing the representatives of the legal person and can, of course, be challenged before the administrative courts. §5 underscores that corporate liability does not exclude the civil, disciplinary, or criminal liability of the physical perpetrators of the offences.

Art. 7 adds some linguistic modifications to Art. 79 §3 of the Greek Criminal Code, stipulated by Art. 23 §1 of law 3719/2008, which provides for a general aggravating sentencing clause for the commission of any offence involving hatred against a group of persons or a person defined by reference to race, colour, religion, national or ethnic origin, or sexual orientation. In other words, the offender must first be found guilty of the basic offence, and then the court deliberates whether there is sufficient evidence of a bias to apply a heightened penalty *(hate crime)*.

Art. 8 awards to a union of persons or organisations with a registered office in Greece the right to appear at the criminal trial in the capacity of damaged complainant (civil party) but only in support of the criminal charge. Such a right is only conferred upon organisations that cooperate with the Economic and Social Council of the United Nations.[33]

Lastly, Art. 9 repeals law 927/1979, and Art. 10 dictates that the new law shall enter into force on the day of its publication in the Government Gazette.

V. Conclusion

According to Art. 34 §2 TEU (repealed by the Treaty of Lisbon), "framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods." The DL brings sufficiently into effect Greece's obligation to criminalise racist and xenophobic offences (*hate speech* and *hate crime*) and, in doing so, takes full advantage of the national margins of appreciation accorded by the FD: the elements of the offence of Art. 3 should endanger public order, the offence definition in Art. 4 presupposes the final decision of a national or international law, and Art. 7 reserves a penalty enhancement for hate crimes instead of creating a new substantive offence. In the spirit of the letter of FD, the DL:

- Protects sexual orientation;
- Recognises that either people or property can be victims;
- Touches upon organised forms of racist offences that are far more dangerous and harmful;
- Deals with perpetration through the Internet;
- Establishes corporate responsibility, not only when the offences are committed for the benefit of but also on account of or through the legal person;
- Recognises as a civil party organisations with established activity in the protection of human rights;
- Highlights the broader security dimension and community impact of racist and xenophobic crimes.

The Committee, by drafting a sophisticated law, has already covered half of the itinerary. The other half, consisting of its right and proper application, remains to be seen.

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1 *A. Klip*, European Criminal Law. An Integrative Approach, Antwerp-Oxford-Portland, Intersentia, 2009, pp. 1-3.

2 *D. Mouzakis*, On the criminal competence of European Communities, Poinika Chronika, 2004, pp. 485-507; *P. Filopoulos*, Community Law and national Criminal Law, Poinika Chronika, 2003, pp. 289-318 (both in Greek).

3 This methodological differentiation stems from the unique institutional framework of the EU, which, after the adoption of the Treaty of Maastricht in 1992 (O.J. C 191/01, 29.7.1992, ratified by Greece with law 2077/1992), is based on a three-"pillar" structure. Each of these pillars involves a different manner in which the legislation is adopted, its binding effect, and its compliance monitoring. The first pillar comprises the three Communities (EC, Euratom, and ECSC), and its goal is to create an internal market. The second pillar is directed towards the development of a common defence and foreign policy. The third pillar is related to cooperation in the areas of justice and home affairs, which was replaced in 1997 by the area of freedom, security and justice (Treaty of Amsterdam, O.J. C 340/144, 10.11.1997, ratified by Greece with law 2691/1999) and finally consolidated in 2001 (Treaty of Nice, O.J. C 80/1, 10.3.2001, ratified by Greece with law 3001/2002). Criminal law is a subsidiary enforcement instrument in the first pillar, one of the main instruments in the third pillar, and totally irrelevant in the second pillar. The Treaty of Lisbon concluded in 2007 (O.J. C 306/1, 17.12.2007, ratified by Greece with law 3671/2008), which became law on 1.12.2009, has abolished the pillar structure and introduced a single institutional framework, merging the internal market and the area of freedom, security and justice (Art. 3 §§2 and 3 TEU, see consolidated version: O.J. C 83, 30.3.2010). This development also entails the application of the principles of the former area on the latter. *A. Klip* (Fn. 1), pp. 13-46. See also *C. Mylonopoulos*, The European Criminal Law after the Treaty of Lisbon, Poinika Chronika, 2011, p. 81-98.

4 Also known as the "PIF" Convention. O.J. C 316, 27/11/1995, pp. 49-57, ratified by Greece with law 2802/2002.

5 The first protocol deals with the issue of corruption by or against national and Community officials (O.J. C 313, 23.10.1996, pp. 2-10), whereas the second deals with the issues of fraud and money laundering (O.J. C 221, 19.7.1997, pp. 12-22), ratified by Greece with law 2802/2002.

6 Greek scholars received this project with scepticism; see, e.g., the contributions of *D. Spinellis, N. Paraskevopoulos M. Kaiafa-Gbandi, I. Manoledakis, L. Margaritis* and *C. Argiropoulos*, in: Yperaspisi, 1999, p. 3-25, pp. 605-620, pp. 621-642, pp. 1091-1101, pp. 1103-1113, pp. 1115-1122, respectively. See also, *M. Kaiafa-Gbandi*, Criminal Law in the European Union. Important aspects and perspectives for development, Sakkoulas S.A., Athens-Thessaloniki, 2003, esp. pp. 63-106 (all in Greek).

7 *M. Delmas-Marty* (ed.), Corpus Juris: portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, Economica, Paris, 1997. See also *M. Delmas-Marty/J.A.E. Vervaele* (ed.), The Implementation of the Corpus Juris in the Member States, Vol. I-III (2000), Vol. IV (2001), Intersentia, Antwerpen-Groningen-Oxford, 2000-2001.

8 *D. Papagiannis*, The European area of freedom, security and justice, Athens-Komotini, A.N. Sakkoulas, 2001 (in Greek).

9 Tampere European Council 15/16 October 1999. The conclusions of this European Council constitute the Tampere Programme, available at: http://www.europarl.europa.eu/summits/tam_en.htm#c, O.J. C 53/1, 3/3/2005 and O.J. C 115/1, 4/5/2010, respectively. See also the Action Plans: O.J. C 019, 23.1.1999, pp. 1-15, O.J. C 198, 12.8.2005, pp. 1-22 and COM(2010) 171 final, 20.4.2010, respectively.

10 This seems to be the dominant opinion in theory. *D. Mouzakis* (Fn. 2), pp. 506-507. *P. Filopoulos* (Fn. 2), pp. 294-296, p. 317. For a review of the various opinions and, in particular, for the contrary position, see also *P. Staggos*, The proper legal basis for the enactment of the Corpus Juris under the Treaty establishing the European Economic Community, Yperaspisi, 1999, pp. 1123-1137.

11 *G. Nikolopoulos*, State, Penal Power and European Integration. A Criminological Approach, Kritiki, Athens, 2002; *G. Nikolopoulos*, The European Union as an Agent of Criminal Policy, The "Hague Programme" and its application, Nomiki Vivliothiki, Athens, 2008 (both in Greek).

12 *A. Psarouda-Benaki*, Towards a "European" Criminal Law?, Poinika Chronika, 2003, pp. 964-965 (in Greek).

13 *A. Klip* (Fn. 1), p. 23. See also *A. Klip*, Definitions of harmonisation, and *U. Nelles*, Definitions of harmonisation, both in: A. Klip/H. van der Wilt (eds.), Harmonisation and harmonising measures in criminal law, Royal Netherlands Academy

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of Arts and Sciences, Amsterdam, 2002, pp. 23-29, pp. 31-42, respectively.
14 *M. Delmas-Marty/M. Pieth/U. Sieber, U.* (eds.), Les Chemins de l'Harmonisation Pénale, Société de législation comparée, Paris, 2008, esp. the editors' contributions in Part II entitled "Éleménts d'une théorie de l'harmonisation pénale," pp. 369-440.
15 *W. Perron*, Perspectives of the Harmonisation of Criminal Law and Criminal Procedure in the European Union, in: E.J. Husabø/A. Strandbakken (ed.), Harmonization of Criminal Law in Europe, Antwerp-Oxford, Intersentia, 2005, pp. 5-22.
16 *M. Kaiafa-Gbandi*, European Integration and Criminal Law – contemporary development, Poiniki Dikaiosini, 2001, pp. 1284-1292, *S. Pavlou*, Criminal Law and the "Framework Decisions" of EU – another (dangerous) entranceway of the European criminal law into the Greek one, Poinika Chronika, 2004, pp. 961-978. *S. Pavlou* (ed.), Framework Decisions, Law & Economy-P.N. Sakkoulas, Athens, 2005 (all in Greek).
17 The legal basis of framework decisions was Arts. 29, 31, and 34 §2 (b) TEU. The Treaty of Lisbon replaces framework decisions with directives (Arts. 67 §3 and 83 TFEC). According to Art. 10 of the Protocol (No. 36) on transitional provisions, framework decisions will continue to have effect for a period of five years after the date of entry into force of the Treaty of Lisbon.
18 After the revision of the new draft law by Ministry of Justice leaders, it will be posted in a blog-like platform in the Internet for electronic review, i.e., citizens and organisations can post their comments, suggestions, and criticisms on an article-by-article basis (for more information on these new transparency and openness policies of the Greek Government, see http://diavgeia.gov.gr/en). Afterwards it will be tabled in the Parliament, where it may be amended and will finally be voted on.
19 O.J. C 83/396, 30.3.2010. See also the "International Convention on the Elimination of All Forms of Racial Discrimination" of 21 December 1965, ratified by Greece with Decree 494/1970.
20 O.J. L 185, 24.7.1996, p. 5. See also the "Commission Communication of 13 December 1995 on racism, xenophobia and anti-semitism" (COM(95) 653 final – 95/0355(CNS)). There are also prior joint declarations on the broader issue of discrimination with no real legal value. For a detailed presentation of the relevant instruments, see *D. Martin*, Racial Discriminations and Community Law, Nomiko Vima, 1997, pp. 931-965 (in Greek).
21 Directive 2000/43/EC of 29 June 2000 (O.J. L 180/22, 19.7.2000), Directive 2000/78/EC of 27 November 2000 (O.J. L 303/16, 2.12.2000), and Directive 2004/113/EC of 13 December 2004 (O.J. L 373, 21.12.2004, pp. 37-43), respectively. The first two directives were transposed into the Greek legal order with law 3304/2005 and the third with law 3769/2009.
22 O.J. L 328/55, 6.12.2008.
23 Government Gazette A 139/28.6.1979
24 Government Gazette A 28/14.3.1984
25 Government Gazette A 16/27.1.2005
26 Government Gazette A 9/2.5.2001
27 For this research, the database of Athens Bar Association as well as the legal database "NOMOS" were used. See also *G. Apostolakis*, Penal suppression of racial, national and religious discriminations, Poiniki Dikaiosini, 2002, p. 1184 (in Greek).
28 *Areios Pagos* Judgement 2/2010, published in: Poiniki Dikaiosini, 2010, p. 533 (confirming the judgement of the Appeal Court).
29 Prof. Pavlou has eloquently reproached this practice as being uncritical and even "subservient." *S. Pavlou* (Fn. 16), p. 962.
30 *J. Manoledakis*, The new internationalization of Criminal Law: our European legal culture in danger, Athens/Komotini, 2000.
31 See, as an indication, *V. Karydis*, The immigrants' criminality in Greece. Issues of theory and criminal policy, Papazisis, Athens, 1996. *V. Karydis*, Aspects of Social Control in Greece. Moral Panics, Criminal Justice, Athens/Komotini, 2010. *G. Nikolopoulos*, Internationalisation of criminal policy and criminalisation of immigrants in the "area of freedom, security and justice": General perspective, in: Prof. Iakovos Farsedakis Honarary Volume, Vol. II, Nomiki Vivliothiki, Athens, 2011, pp. 1385-1403 (all in Greek).
32 *C. Mylonopoulos*, Corporate Criminal Liability and Greek Law, Revue Hellénique de Droit International, 1/2010, pp. 471-476.
33 See detailed information at http://esango.un.org/paperless/Web?page=static&content=intro

The Payment of Fiscal and Social Debts with Seized Money, that Has to Be Reimbursed, in Belgium

Where Treasury, Social Security, and Justice Meet

Francis Desterbeck

By law of 27 March 2003, the Central Office for Seizure and Confiscation (COSC) was created in Belgium. The new institution, established within the Office of Public Prosecutors, assists the judicial authorities in criminal matters in the areas of seizure of assets, the implementation of criminal procedure with a view to the confiscation of assets, and the enforcement of final and conclusive sentences and orders involving confiscation of assets.[1] One of the forms of assistance consists of the management of all cash, seized in criminal matters all over the country.

By law of 20 July 2005, a new provision was inserted into the COSC law.[2] The new Art. 16*bis* authorised the COSC to inform those public servants of the federal government, the communities, and the regions responsible for the collection of taxes and those institutions responsible for the collection of social security contributions with regard to the data at the COSC's disposal. In practice, this competence is exercised when seized money has to be reimbursed, either as the result of a decision of the magistrate dealing with the case or as the result of an acquittal by the court. The person or institution

that is informed of the data verifies whether the beneficiary owes an amount of money. If this is the case, the debt of the beneficiary is paid off. On the occasion of the enactment of the law of 20 July 2005, the remark was made that, by insertion of the new Art. 16*bis* into the COSC law, an entirely new competence was given to the Office.[3]

From 2007 to 2009, a yearly amount of approximately €2,5 million was paid to the Treasury by virtue of the new provision. In 2010, an amount of €10 million was paid. This was the result of the closing of a number of exceptionally important cases. Payments to the institutions responsible for the collection of social security contributions have only been taking place since 2009. The Royal Decree, required in order to execute these payments effectively, was not adopted until 2009.[4] In this contribution, I will indicate first how the technique of payment of fiscal and social debts with sums of money seized in criminal matters emerged. This is mainly due to the "multi agency" approach, which is typical for the COSC. Subsequently I will clarify what line of action is followed in practice to pay fiscal and social debts with seized money that has to be reimbursed. In this area, a development can be seen. The procedure that was initially used, the procedure of garnishment, was replaced in 2007 by the procedure of statutory compensation, which is much easier.

I. The "Multi Agency" Approach of the Office

1. General

The practical implementation of the key tasks of the COSC lies partly in the scope of various other public services. One of the main aims of the Office was precisely to improve cooperation between the judiciary and the different agencies that intervene in the execution of seizures and confiscations in criminal matters. Thus, seizures in criminal matters are generally carried out by the police, be it that the police act under the responsibility of the public prosecutor or the investigating judge in charge of the investigation.

When it comes to confiscations, the Belgian law enables only criminal confiscations, which are the result of a decision of a criminal judge. When a criminal judge passes an order of confiscation, the sentence is executed by the administration of the Patrimonial Services of the Federal Public Service Finance,[5] by order of the public prosecutor. The main task of this administration is the sale of assets that are private property of the State. In most cases, the execution of a confiscation order in practice comes down to selling the confiscated assets for the benefit of the State. The execution of confiscation orders thus follows naturally from the traditional field of activity of Patrimonial Services.

In order to exercise its multitude of powers as efficiently as possible, the COSC has opted for a "multi agency" approach from the outset. In concrete terms, this means that the Office cooperates with liaison officers from government services who are charged with the execution of seizures and confiscation orders. The liaison officers are still part of their administration or service of origin. However, they are employed in the offices of the COSC where they have their own databases at their disposal. Their cooperation with the Central Office is organised by law.[6]

2. The Six Liaison Officers

At present, the COSC makes an appeal to the services of six liaison officers. Two of them belong to the police and four to the Federal Public Service Finance. Two of the four are part of the Patrimonial Services, the other two belong to the "Taxes and Tax Levy" administration.[7]

Relying on the cooperation of two police officers and two civil servants from the administration of the Patrimonial Services seems logical. The cooperation with two civil servants of the "Taxes and Tax levy" administration seems less obvious at first glance. Nevertheless, the presence of these civil servants is also highly important for the execution of confiscation orders. We know that seizure and confiscation are two different concepts,[8] and yet they are somehow connected. When an asset has been seized during a criminal investigation, the execution of the confiscation order entails no special difficulties. The seized asset is transferred to Patrimonial Services by the judicial services. The confiscated asset is subsequently to be sold in a public auction in practice. However, this is not always the case. The confiscation, which, according to Belgian law, is always the result of the verdict of a criminal judge, means that the property of the seized asset is transferred to the patrimony of the State. The State can dispose of the asset as the new owner. Hence, confiscated real estate can, for example, be used as an office building. The situation is different when the confiscated asset could not be seized during the criminal investigation. In this case, the confiscated asset has to be traced among the property of the condemned person. When a sum of money is confiscated but not seized, it has to be collected by a means of a civil procedure.

Furthermore, in addition to the "direct confiscation" method, the Belgian law also provides for a form of value-based confiscation, the "confiscation by equivalent."[9] This is the confiscation of a sum of money that corresponds with the value of the criminal property of the condemned person. Unlike the result of a direct confiscation, a confiscation by equivalent does not result in an immediate transfer of the confiscated sum of mon-

ey to the State. The confiscation by equivalent sets in motion a claim on the part of the State to the property of the condemned person. Here, a concurrence of creditors *(concursus creditorum)* can arise between the State and other creditors of the offender. In the case of confiscation by equivalent, assets seized during the criminal investigation are not directly transferred to the property of the State, but serve as collateral for the claim by the authorities.

It is the responsibility of the liaison officers of the "Taxes and Tax Levy" administration to provide assistance to their colleagues in Patrimonial Services with regard to the execution of the confiscation of assets that could not be seized during the criminal investigation and to confiscations by equivalent. However, it is precisely the efforts of the civil servants of the "Taxes and Tax Levy" administration, who are specialists in the recovery of taxes, that has provided the know-how that is necessary to enable the payment of fiscal and social security contributions with seized money that has to be reimbursed.

II. The Procedure

As mentioned above, the procedure for paying fiscal and social debts has evolved over time. Initially, the traditional technique of garnishment was used. Since 2007, this technique has been replaced by a system of statutory compensation.

1. Garnishment

a) General

In every European country, real estate has repeatedly been the focus of attention by the legislator in tax matters, not only as the subject of all types of taxes but also as security for the payment of due taxes.

The Belgian law assigns the treasury a right of mortgage on the real estate of a specific taxpayer, and his or her spouse or children, to the extent that the payment of his taxes can be the subject of prosecution against these relatives' assets. Initially, this right of mortgage was *obscure*, which means that the right existed even if it was not registered in the register of mortgages. At the same time, the right was temporary in the sense that it guaranteed only the payment of the taxes during the year they were established and the following year. By law, the right of mortgage expired when the tax collector did not use his right of mortgage to recover the taxes due. In case of sale of the mortgaged assets, the notaries[10] were under the obligation to pay the taxes that had not yet been paid by the taxpayer. The amount due was deducted from the purchase price and paid directly to the treasury. In order to know the amount of the due taxes, the notary was obliged to notify the treasury of the intended sale.[11]

b) The statutory obligations of the notaries

The statutory right of mortgage of the treasury still exists. Over the years, however, the system was conformed to modern standards, and nowadays there are practically no longer any differences between the right of mortgage of the treasury and conventional mortgage, as is common in the commercial credit system. The mortgage of the treasury must be registered in the register of mortgages and, just as for other mortgages, it is ranked in accordance with the date of registration. A relic of the obscure right of mortgage from former years still remains, however, and is to be found in the obligations that have to be met by notaries when they sell real estate. A notary who is requested to draw up the act of sale of real estate is obliged to notify the competent tax and VAT collectors as well as the institutions responsible for the collection of social security payments. The collectors and institutions have a period of 12 days at their disposal in which they can inform the notary of the amounts that are due by the vendor if they deem this necessary. The notified amounts are due peremptorily, and it must be legally possible to take out a mortgage for the amounts due.

The message of the collector or institution functions as a notice of garnishment for the notary, regarding the funds he receives as a result of the sale. In addition, the notification obliges the notary to hand over the proceeds he disposes of as a result of the sale, corresponding to the amount due. The notification of the collector or institution does not prevent the sale itself. After the sale, two possibilities exist. The first possibility is that the revenue of the sale is sufficient to pay off all the vendor's debts, including the notified fiscal and social debts. In this case, the notary is obliged to pay the fiscal and social debts with the profits of the sale. The second possibility is that the revenue of the sale is not sufficient to pay the fiscal and social debts. In this case, the notary is obliged to notify the collector and institution a second time. From the moment of this notification, the competent authorities have a period of eight working days to take out a mortgage on the sold real estate – as if no sale had taken place. Nowadays, such notifications, laid down in the law, are exchanged electronically. Initially, the system was designed for direct taxes. Later on, the implementation of the system was copied for uses in matters concerning VAT and social security.[12]

c) The procedure initially used by the COSC

The system that was initially used served as a model for the new provisions of the law of 20 July 2005, giving the COSC a new competence. Its application in practice was easy because

no real estate was involved. Of course, the most obvious reason for a seized sum of money is its confiscation. If a criminal judge confiscates a sum of money managed by the Central Office, the confiscated sum is immediately transferred in its entirety to the Patrimonial Services of the Ministry of Finance. In some cases, however, seized money must be returned to the person. For example, this could involve the case of an acquittal or simply a case where a public prosecutor or an investigating judge acted too eagerly and found, after seizure, that it happened erroneously. In such cases, the liaison officers of the Office, who have the respective databases at their disposal, verified whether the beneficiary of the reimbursement had fiscal or social debts. If this was the case, the tax collector was informed in order to give the liaison officers the opportunity to seize the amount due to the treasury. Of course, the beneficiary of the reimbursement was also informed. If the act of seizure was not contested before the competent court by the beneficiary of the reimbursement, the procedure continued, and the fiscal debt was effectively paid with the amount of the reimbursement. It should be remarked that hardly any court cases were started against this procedure.

d) The disadvantages of the execution procedure

Nevertheless, this procedure also had its disadvantages. Even when the procedure is carried out electronically, it necessitates an extensive management system. Time-consuming delays have to be taken in consideration. The formalities can cause errors that eventually have to be resolved in a judicial procedure. Therefore, the cost and length of a judicial procedure must be taken into consideration.

The most significant disadvantage, however, is that other creditors of the seized person can also exercise their rights to the funds that are the subject of the garnishment. When several creditors assert their rights on the same asset or sum of money, a special procedure must be initiated to divide the funds between the creditors who claim parts of it.

2. Statutory Compensation

The number of implementations of the new Art. 16*bis* of the COSC law increased exponentially immediately after its introduction. The new system was applied in practice 48 times in 2005, 86 times in 2006, and 129 times in 2007. This caused an additional workload but no additional budget was put at the Office's disposal.[13] Consequently, it became essential to take appropriate measures. A practical solution was found by the introduction of the statutory compensation *in fiscalibus*, which was made possible by the Belgian legislator in 2004. Statutory compensation was introduced in the COSC law by law of 27 April 2007,[14] in substitution of the former technique of garnishment.

a) Compensation in Belgian civil law

As with most legal systems, the Belgian civil law uses compensation as a means of termination of contracts.[15] Under certain conditions, the debt of a person is cancelled out by a claim on the same person, either according to the law, a judicial decision, or an agreement between the parties concerned. The Belgian Court of Cassation, however, always ruled against the application of the rules of statutory compensation *in fiscalibus.*[16] This point of view excluded not only the application of the rules of compensation between mutual debts and claims of the treasury and the taxpayer, but also resulted in it being impossible to compensate debts and claims between the various administrations of the Federal Public Service Finance. Thus, a collector of direct taxes who wanted to settle the debt of a certain taxpayer by means of a VAT credit of the same person had no other choice but to seize the amount of the VAT credit in the possession of his colleague at the VAT administration.

b) The Program Law of 27 December 2004

All of this changed when the Belgian legislator enabled the compensation of reciprocal debts and claims with regard to direct taxes and VAT.[17] Furthermore, the new law prescribed that statutory compensation continue to be applicable in the case of seizure, transfer, concurrence, or insolvency procedures. The validity of this provision was challenged several times before the Belgian Constitutional Court because of alleged violations of the constitutional principle of equality, more specifically the equality between creditors.[18] However, the Court dismissed the appeals. The Constitutional Court ruled that the legislator had created an objective difference, depending on whether the Treasury was a creditor or not. In the opinion of the Court, this difference was justified, considering the objectives of the law, namely the fight against arrears in tax matters, and the prevention of situations where taxes were paid back to persons who still owed other taxes. At the end of 2008, the application of statutory compensation in tax matters was extended to all tax administrations.[19]

c) The limits of compensation

Statutory compensation in tax matters is only possible for the non-disputed part of the claim of the treasury against a taxpayer. Thus, compensation cannot be carried out when an income tax demand is disputed. With regard to VAT, the administrative guidelines set out that the person in question has to agree with the claim of the treasury, e.g., by stating the debt in his tax form or by expressly acknowledging the debt. A second

limit was clarified recently by the jurisprudence. In the case of bankruptcy, compensation of a tax debt dating before the bankruptcy with a tax credit, resulting from the continuation of the activity of the person involved by the *curator bonis*, is impossible.[20]

d) Some final remarks as a conclusion

The present text of Art. 16*bis* § 2 of the COSC law reads as follows:

> The Central Office may, without the necessity of further formalities, place any sum, due to be returned or paid, at the disposition of civil servants responsible for collection of taxes and to the institutions responsible for the collection of the social security contributions (...) for the purposes of paying such sums of money as may be owed by the beneficiary of said return of payment.
>
> The first paragraph remains applicable in the case of seizure, transfer, concurrence or insolvency procedure.

With this text, a fair balance is achieved between the payment procedure for fiscal and social debts with seized sums of money that have to be reimbursed and the legal protection of the beneficiary of the reimbursement. There are no formalities and terms to be taken in consideration even though the person whose debts are paid is evidently informed of the compensation in writing. Compensation is only possible, however, with debts that are definitively due, which of course implies that all possible disputes concerning the debt in question have already taken place. Consequently, it comes as no surprise that the actual system of compensation, in spite of its wide application in practice, never gave rise to any legal claim or difficulty.

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1 Art. 3 § 2 of the law concerning the establishment of a Central Office for Seizure and Confiscation and containing provisions for the value-safeguarded administration of seized goods and the enforcement of certain financial sanctions (*Official Gazette*, 26 March 2003 − since then repeatedly modified − hereafter "COSC law").
2 *Official Gazette*, 8 September 2005.
3 *Parlementary Documents*, Belgian Senate, 2004–2005, 3-1305/2, p. 3, www.senate.be.
4 Royal Decree of 12 July 2009 regarding implementation of Art. 16*bis* § 3 of the Law of 23 March 2009 concerning the establishment of a Central Office for Seizure and Confiscation and containing provisions for the value-safeguarded administration of seized goods and the enforcement of certain financial sanctions (*Official Gazette,* 12 August 2009).
5 In Belgium, Ministries are called Federal Public Services.
6 Art. 19 COSC-Law.
7 The cooperation with the institutions responsible for the collection of social security contributions is provided for by e-mail.
8 With reference to Art. 1 of the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances, Art. 2 of the 2000 UN Convention against Transnational Organized Crime and Art. 2 of the 2003 UN Convention against Corruption, we can define "freezing" or "seizure" as the temporary prohibition of the transfer, conversion, disposition, or movement of property, or the temporary assumption of custody or control of property on the basis of an order issued by a court or a competent authority. "Confiscation" can be defined as the permanent deprivation of property by order of a court or other competent authority.
9 "Verbeurdverklaring bij equivalent" (Dutch) or "confiscation par equivalent" (French).
10 According to Belgian law, the sale of real estate always requires the intervention of a notary. Other institutions are competent only as an exception. The sale of government buildings, for instance, requires the intervention of the Ministry of Finance. Hereinafter, what is said about notaries also applies to the other institutions that can intervene.
11 An example of such regulation is found in Arts. 72 and 73 of the Royal Decree of 9 August 1920 that introduced a system of income taxes for the first time in Belgium (*Official Gazette*, 14 August 1920).
12 Art. 433–437 Code direct taxes; Art. 93*ter*-93*septies* Code VAT; Art. 23 § 1 to 6 of the Royal Decree no. 38 dd. 27 July 1967 concerning the organization of the social statute of the self-employed (*Official Gazette*, 29 July 1967); and Art. 41*quater* § 1 to 6 of the law of 27 June 1969, revision of the law of 28 December 1944 concerning the social security of employees (*Official Gazette*, 25 July 1969).
13 *Parliamentary Documents,* Chamber of Deputies, Doc 51 3058/014, p. 7, www.dekamer.be.
14 *Official Gazette*, 8 May 2007.
15 Art. 1289–1299 Belgian Civil Code.
16 Court of Cassation, 29 November 1923, *Pas*, 1924, 52; Court of Cassation, 29 May 1973, *J.T.*, 1973, 656.
17 Art. 334 Program Law of 27 December 20045 (*Official Gazette*, 31 December 2004).
18 Constitutional Court, judgment 54/2006 of 29 April 2006 (*Official Gazette*, 26 September 2006) and judgment 107/2006 of 21 June 2006 (*Official Gazette*, 15 September 2006).
19 Art. 194 Program Law of 22 December 2008 (*Official Gazette*, 29 December 2008).
20 Constitutional Court, judgment 55/2009 dd. 19 March 2009 (*Official Gazette*, 20 May 2009); Court of Cassation, 24 June 2010, judgments C.09.0365.N and F.09.0058.N, www.cass.be.

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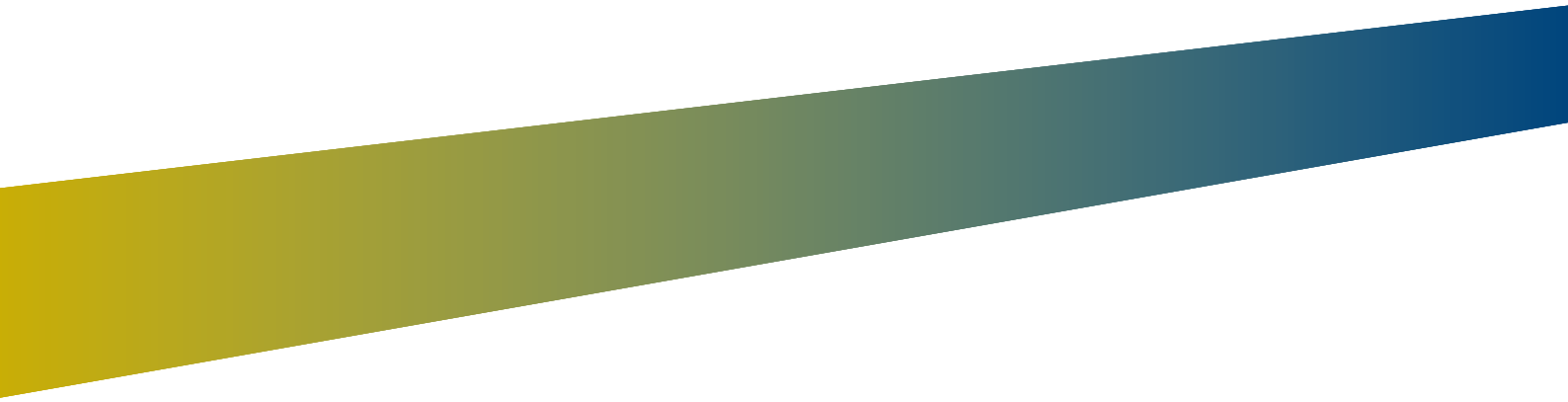

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