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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

Focus: The Costs of Non-Europe
Dossier particulier: Les coûts de la non-Europe
Schwerpunktthema: Kosten des Verzichts auf EU-politisches Handeln

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

Contents

News*

European Union

Council of Europe

Articles

The Costs of Non-Europe

Imprint

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Guest Editorial

Dear Readers,

The notion of the "cost of non-Europe" was introduced by Michel Albert and James Ball in a 1983 report that had been commissioned by the European Parliament. The notion was also a central element of the report by Paolo Cecchini who contributed to shaping the progressive establishment of a European single market by the end of December 1992.

The method consists of estimating common economic costs in the absence of measures at the European level within a particular domain. It highlights the gain of efficiency that derives from the concrete and effective implementation of a policy as defined in the primary law of the European Union. Whereas, in the past, public debate has focused on the "cost of Europe" and on the need for more political action to reduce the unnecessary administrative burdens that Union law can create, the topic of the "cost of non-Europe" is now experiencing a resurgence. This is a logical development in a period in which the Member States of the European Union are facing major challenges – challenges that more than ever require concerted, coherent, and common responses.

The recent adoption of the better law-making agreement between the European Parliament, the Council of the European Union, and the European Commission confirms this trend. This agreement, which was negotiated and finalised under the Luxembourg Presidency of the Council, sets the guiding principles for the three institutions when they legislate. It stipulates that an assessment of the "cost of non-Europe" in the absence of action at the Union level should be fully taken into account when setting the legislative agenda. Impact assessments, which accompany specific legislative proposals, must also address the "cost of non-Europe."

This approach, which was initially applied to policies that deal directly with the integration of the internal market, is transferable to the area of freedom, security and justice. The added value of a European judicial area cannot be measured exclusively in terms of the quantification of economic costs that are generated by the absence of judicial cooperation. Other factors must also be considered: the quality of justice, better efficiency of procedures, the concretisation of a fundamental right in the Charter of Fundamental Rights of the EU, such as the protection of personal data. We must, however, integrate the aspect of the cost of non-Europe more systematically into initiatives in the field of "justice and home affairs".

Félix Braz

An interesting example is the establishment of a European Public Prosecutor's Office. This new judicial body of the Union would investigate, prosecute, and bring to judgment the perpetrators of offences affecting the Union's financial interests. It is essential that the funds of the EU budget that serve to support policies and European programmes, are correctly used in order to prevent any fraud. The establishment of a coherent European system for the investigation and prosecution of these offences will also significantly contribute to combating corruption.

By ensuring greater efficiency in investigating and prosecuting these offences, the future European Public Prosecutor's Office will, at the same time, increase the number of prosecutions; this will lead to more convictions and a more significant recovery rate of fraudulently obtained funds. In parallel, the deterrent effect on committing these offences will have consequences for a reduction of the costs linked to corruption and fraud.

The European Public Prosecutor's Office remains a political flagship project for the development of a European judicial area. It will render European justice more efficient and reduce the overall costs that are caused by corruption and fraud in the European Union.

Although quantification of the "cost of non-Europe" is not always easy, it is crucial to incorporate this aspect into our analyses. Consideration of this factor will contribute to better explaining the added value of action at the European level.

Félix Braz
Luxembourg Minister of Justice

European Union*

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

Foundations

Charter of Fundamental Rights

Commission Report on Application of CFR in 2015

The Commission's 6th annual report reviews how the EU and its Member States applied the EU Charter of Fundamental Rights (CFR) in 2015. The main items of the report, which was presented on 19 May 2016, are:

- Note on the legislative projects promoting fundamental rights, such as the data protection reform package, the Directives on the presumption of innocence and the right to be present at trial and on special safeguards for children in criminal proceedings, and the Victims' Rights Directive.
- Overview of the instances in which European institutions took into account the Charter in their legislative and policy work, such as the measures put forward to better manage migration at the EU level (European Agenda on Migration) or to reinforce security (the European Agenda on Security).
- Showcase of the mainstreaming of the Charter in the EU's external action (e.g., EU-US Data Protection "Umbrella Agreement", Commission Guidelines on the analysis of human rights impacts in trade-related impact assessments).
- Provision of examples of how the CFR was applied in and by Member States when implementing Union law and presentation of main (CJEU and national) case law developments.

A focus section reports on the first Annual Colloquium on Fundamental Rights on "Tolerance and respect: preventing and combating antisemitic and anti-Muslim hatred in Europe", which took place in October 2015.

With the presentation of the 2015 annual report, the Commission also launched a public consultation in view of the preparation of the second Annual Colloquium on "Media Pluralism and Democracy", which will be held in Brussels on 17 and 18 November 2016. (TW)

➤eucrim ID=1602001

FRA Perspective on Fundamental Rights in 2015

Shortly after the aforementioned Commission report, on 30 May 2016, the EU Agency for Fundamental Rights (FRA) presented its perspective on the situation of fundamental rights in the EU. The chapters in its report summarise and analyse the main developments from January to December 2015 in the following areas:

- The EU Charter of Fundamental Rights and its use by Member States;
- Equality and non-discrimination;
- Racism, xenophobia, and related intolerance;
- Roma integration;
- Information society, privacy, and data protection;
- Rights of the child;
- Access to justice, including the rights of victims of crime.

Each chapter concludes with opinions of the FRA in the respective fundamental rights fields that were launched in 2015. The focus section of the FRA report illustrates various fundamental rights challenges in the context of asylum and migration. (TW)

➤eucrim ID=1602002

Council Reflections on EU Fundamental Rights in 2015

Taking into account the above-mentioned reports of the Commission and the EU Agency for Fundamental Rights, the Council adopted conclusions on the application of the CFR in 2015. The Council emphasised the importance of awareness-raising, training, and best practice sharing with regard to the application of the Charter, both at the national and EU levels, and gives guidance in this respect. It also calls for a strengthening of efforts in countering hate crime. (TW)

➤eucrim ID=1602003

* If not stated otherwise, the news reported in the following sections cover the period April–15 July 2016.

Schengen

Temporary Border Controls Prolonged

On 12 May 2016, the Foreign Affairs Council backed a Commission Proposal to allow Austria, Germany, Denmark, Sweden, and Norway to maintain control of certain internal borders for up to six months. The countries had already taken measures as a result of threats to public policy and internal security, following the secondary movements of migrants from Greece. Such circumstances allow for the temporary reintroduction of border controls at internal borders of the Schengen area according to the Schengen Borders Code. The decision of the Council points out that the Schengen states must ensure that the reintroduction of internal border controls is necessary and proportionate as foreseen in the Code. The decision does not affect the introduction of controls of passengers arriving from or departing to Greece by air or sea.

The recommendation of the Council is part of a more coordinated and coherent approach to remedy the deficiencies at the EU's external borders. As proposed in March 2016 by the Commission, the aim is to lift all internal border controls by the end of December 2016, with a view to returning to the normal functioning of the Schengen area (see also eucrim 1/2016, p. 4). (TW)

➤eucrim ID=1602004

Institutions

Council

Working Programme of the Slovak EU Presidency

On 1 July 2016, Slovakia took over the Presidency of the Council from the Netherlands. Regarding the area of justice and home affairs, asylum and migration dominate the agenda. A sustainable asylum and migration policy is a priority area of the work programme.

The presented programme further states that in the "justice configuration", the Slovak Presidency will follow up on the work done by previous presidencies as regards negotiations on the proposal for a Regulation establishing the European Public Prosecutor's Office and on related proposals concerning the protection of the EU's financial interests and the European Union Agency for Criminal Justice Cooperation (Eurojust). Another focus is, *inter alia*, on more efficient cross-border judicial cooperation and the fight against cybercrime, with particular emphasis on the use of e-justice.

In the area of taxation, the Slovak Presidency seeks to make progress in the fight against tax fraud and evasion. Which instruments are able to achieve the EU's objectives on growth, competitiveness, and strengthening of the single market are being considered. Another objective is to obtain clear political guidelines from all Member States as regards the modernisation of the existing EU system on value added tax. (TW).

➤eucrim ID=1602005

OLAF

OLAF Annual Report 2015

When presenting OLAF's 2015 Annual Report, Director-General *Giovanni Kessler* stressed the efficiency gain in the Office's work in all areas after its reorganisation in 2012. Despite more legal constraints, OLAF assessed more items of information and opened and concluded more investigations faster than ever. The figures for the period 1 January 2015–31 December 2015 indicate the following:

- 304 investigations concluded – a record number;
- 219 new investigations opened;
- 1372 incoming items of information recorded and 1442 selections completed;
- 90% of selections completed within two months;
- 364 recommendations issued by OLAF to the relevant Member State and EU state authorities;
- A total of €888.1 million for financial recovery recommended to the national and EU authorities;
- €624 million for financial recovery concerning structural and social funds.

For the first time, the Report provides a comparison between the financial recommendations issued by OLAF and the financial impact of irregularities detected and reported by Member States. This makes the important contribution of OLAF's investigations apparent.

In 2015, OLAF's contribution was especially valuable in the cigarette smuggling sector. OLAF helped national authorities seize 619 million cigarette sticks.

As regards the legal and policy fields, OLAF actively supported the ongoing negotiations on the establishment of a European Public Prosecutor's Office (EPPO) throughout 2015. The report outlines that the transnational character of fraud cases has increased, requiring more powers and more capacity than OLAF currently has. Thus, the EPPO would, according to the report, streamline the process of identifying fraudsters and bringing them to justice more swiftly. The EPPO would, in OLAF's view, significantly reduce the current fragmentation of national law enforcement efforts to protect the EU budget, thus strengthening the fight against fraud in the European Union.

A further factor strengthening the actions against cross-border fraud are the administrative cooperation agreements that OLAF concluded with international organisations in 2015, such as the European Bank for Reconstruction and Development, the Organisation for Economic Cooperation and Development, and the World Food Programme. (TW)

➤eucrim ID=1602006

Administrative Arrangements with ECB

On 16 June 2016, OLAF and the European Central Bank (ECB) signed administrative arrangements that set out a practical framework for the two bodies. The

aim is enhanced cooperation between their services. In particular, the arrangements concern information on suspected fraud sent by the ECB to OLAF and subsequent information exchanges between the two cooperation partners. (TW)
➤eucrim ID=1602007

OLAF and World Bank Integrity Vice Presidency Agree on New Investigative Database

On 14 June 2016, OLAF and the World Bank Integrity Vice Presidency (INT) signed an arrangement that sets up the so-called Investigative Data Cross-Matching Platform (IDCP). The IDCP creates a database that enables the identification of cases involving the double or multiple funding of development projects as well as cases in which persons or economic operators defraud the respective budgets of OLAF and INT. OLAF, its selected international partners, and INT will regularly insert investigative data into the IDCP system. The key innovative feature of the system is the automatic identification of "cross-matches", such as the name of the same economic operator or the same persons in OLAF and INT investigations and notification of the partners. (TW)
➤eucrim ID=1602008

Expertise Exchange between OLAF and Italian Prosecutors

Investigators from OLAF and prosecutors from various Italian regions exchanged expertise, in particular on the possible infiltration of criminal networks in the processes of applying for and receiving EU agricultural funds. The discussion included better coordination of investigative activities and better cooperation in the fight against fraud detrimental to the EU's financial interests. Furthermore, OLAF and the National Anti-Mafia and Anti-Terrorism Directorate (DNAA) of Italy explored an update of the existing cooperation arrangement between the two bodies. As a result, efficiency in their joint work could be boosted, complex fraud structures better identified, and fraudsters brought to justice more promptly.
➤eucrim ID=1602009

Common abbreviations

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

Europol

Europol Regulation Adopted

After the adoption by the European Parliament the new Regulation for Europol with the aim to strengthen Europol's mandate was finalised and published in the Official Journal of 24 May 2016 (for Europol's reform see also eucrim 2/2013, pp. 36-37; eucrim 2/2014, p. 49, and eucrim 1/2016, p. 6). Changes under the new regulation include the following:

- Easier rules to set up specialised units to immediately respond to emerging threats;
- Clear rules for existing units or centres such as the European Counter Terrorism Centre;
- The direct exchange of information with private entities in specific cases;
- An obligation for the Member States to provide information;
- Parliamentary scrutiny
- Stronger data protection safeguards.

Hence, the European Data Protection Supervisor (EDPS) will monitor Europol's work, and there will be a clear complaints procedure for citizens under EU law. Europol's work will also be overseen by a Joint Parliamentary Scrutiny Group made up of members from both national parliaments and the European Parliament.

The regulation will take effect as of 1 May 2017. (CR)
➤eucrim ID=1602010

Further Cooperation with CEPOL

On 13 April 2016, representatives of CEPOL's National Contact Points (NPCs) and Europol's National Units met to discuss how to improve cooperation and coordination between the two agencies.

NCPs are the points of contact for CEPOL in each EU Member State and associated countries implementing training activities and facilitating the participation of law enforcement officers in such trainings. (CR)
➤eucrim ID=1602011

Memorandum of Understanding (MoU) with SUMURI LLC Signed

On 24 June 2016, Europol's European Cybercrime Centre (EC3) and SUMURI LLC signed a Memorandum of Understanding allowing for the exchange of knowledge and expertise on cyber forensics.

SUMURI LLC is a US based company founded in 2010 with the aim to provide forensic training, services and software relating to the preservation, examination, and reporting of digital evidence. (CR)

➤eucrim ID=1602012

Statistics on the Value of Seized, Frozen and Confiscated Assets across the EU

At the end of June 2016, Europol's Asset Recovery Unit published its first survey ("Does crime still pay") on criminal asset recovery in the EU. The study aims to collect statistics from 2010 and 2014 on the value of frozen, seized, and/or confiscated assets from each EU Member State.

According to the study's key findings, 98.9% of estimated criminal profits are not confiscated and remain at the disposal of criminals. Illicit markets in the EU generate an estimated €110 billion annually, i.e., approximately 0.9% of the EU's GDP in 2010. From 2010 to 2014, 2.2% of the estimated proceeds of crime were provisionally seized or frozen, while only 1.1% of the criminal profits were ultimately confiscated at the EU level. According to the study, the annual value of provisionally seized and frozen assets in the EU is around €2.4 billion, with about €1.2 billion ultimately confiscated each year.

The study finds the following obstacles to carrying out effective financial investigations and tracing criminal assets:

- Limited resources within the law enforcement of many EU Member States;
- The lack of a centralised data collection system;
- Different criteria in each EU Member State for the inclusion of data in the datasets;
- Limited access of the Asset Recovery Offices to other databases or information. (CR)

➤eucrim ID=1602013

200 Investigators Deployed to Migration Hotspots

Europol is deploying 200 counter-terrorist and other investigators to migration hotspots in Greece and other countries. On 12 May 2016, Europol's Management Board approved their recruitment, aiming to reinforce the secondary security controls in the migration hotspots. The investigators, who are seconded from their national services, will, for instance, cross-check data against data held in specialist counter-terrorist and other databases at Europol. This will facilitate the rapid and secure information exchange between Member States. The primary purpose of these enhanced controls is to identify movements of suspected terrorists, but they will also support Europol's ongoing efforts to disrupt organised criminal networks involved in migrant smuggling. (CR)

➤eucrim ID=1602014

Report on Migrant Smuggling Networks Published

On 17 May 2016, Europol and Interpol published a joint report on migrant smuggling networks. The report offers a comprehensive situational picture of the role of organised criminal networks in the current migration crisis.

According to the report, more than 90% of the migrants entering the EU are facilitated, mostly by members of a criminal network. Looking at the migratory routes, the report expects further diversification of routes to avoid controls. Migrant smuggling networks are loosely organised, consisting of leaders who loosely coordinate activities along a given route, organisers who manage activities locally through personal contacts, and opportunistic low-level facilitators.

The report finds migrant smuggling a multi-national and highly profitable business with low overall costs and a high turnover (average of USD 5 to 6 billion in 2015). The report sees an increased polycriminality linked to migrant smuggling. In order to repay their debts to the smugglers, migrants are often targeted for labour and sexual exploitation. According to the report, these types of exploitation will increase over the coming years. Ultimately, the report sees an increased risk that foreign terrorist fighters may use the migratory flows to (re)enter the EU. (CR)

➤eucrim ID=1602100

Latest Trends in Migrant Smuggling

According to Europol's latest statistics on migrant smuggling, this crime remains an increasingly profitable business in which prices have tripled, with migrants paying up to €3000 for only one leg of the journey while, previously, prices were between €2000 and €5000 for the entire trip. Migrants are also increasingly subject to labour exploitation, at 5% in 2016 so far compared to 0.2% in 2015.

In the future, the report expects smugglers to offer new sea routes that bypass the current hotspots as well as increased pressure on secondary movement routes. Prices for migrant smuggling and exploitation of migrants are expected to continue to rise. (CR)

➤eucrim ID=1602015

European Counter Terrorism Centre (ECTC) Established at Europol

On 25 January 2016, JHA Ministers presented the launch of a European Counter Terrorism Centre (ECTC) to be hosted by Europol. Furthermore, the Counter Terrorism Group − a cooperation platform of the (security) intelligence services of EU Member States, Norway, and Switzerland − was tasked with setting up a platform for information sharing by 1 July 2016.

After the Brussels terrorist attacks of March 2016, the JHA Council also called for a Joint Liaison Team (JLT) of

national counter-terrorism experts to be reinforced at the ECTC in order to support Member States' law enforcement authorities when investigating the wider European and international dimensions of the current terrorist threat. On 13 April 2016, the European Parliament adopted budget amendments to support the ECTC. (CR)
➤eucrim ID=1602016

Eurojust

Cooperation Agreement with Ukraine Signed

On 27 June 2016, Eurojust signed a cooperation agreement with Ukraine in order to enhance their cooperation in the fight against serious crime. The agreement allows for the exchange of operational data, including personal data, and the secondment of a liaison prosecutor from Ukraine to Eurojust as well as the posting of a Eurojust liaison magistrate to Ukraine. (CR)
➤eucrim ID=1602017

Cooperation Agreement Signed with Montenegro

On 3 May 2016, Eurojust and Montenegro signed a Cooperation Agreement with the aim of combating serious crime, particularly organised crime and terrorism.

Under the agreement, operational data, including personal data, can be exchanged in accordance with EU data protection regulations. Furthermore, a Liaison Prosecutor can be seconded from Montenegro to Eurojust and a Eurojust Liaison Magistrate to Montenegro. (CR)
➤eucrim ID=1602018

Action Day Against Money Laundering

On 31 May 2016, a major operation against money laundering was carried out in Italy, Portugal, and Slovenia. Operation "*Barqueiro*" led to the arrest of six key targets and a seizure equivalent to approximately €11 million.

Eurojust provided judicial assistance and hosted several coordination meetings in the course of the one-year preparation phase prior to the operation. (CR)
➤eucrim ID=1602019

First Annual EU Day against Impunity for Genocide, Crimes against Humanity and War Crimes

On 23 May 2016, the first annual EU Day Against Impunity for genocide, crimes against humanity and war crimes took place in The Hague. The initiative intended to raise awareness of these crimes and to promote the common efforts of the EU Member States and the EU in enforcing international criminal law amongst national law enforcement and prosecution.

The event was hosted by Eurojust and organised by the European Commission and the Network for investigation and prosecution of genocide, crimes against humanity and war crimes. (CR)
➤eucrim ID=1602020

European Judicial Network (EJN)

MLA Compendium Upgraded and *Fiches Belges* Updated

At the beginning of July, the EJN published an update of its *Fiches Belges* – online fact sheets providing practical information on Member States' criminal laws and procedures with regard to judicial cooperation measures and concerning mutual legal assistance or mutual recognition instruments.

Furthermore, the EJN Compendium – a tool to draft MLA and EAW requests – was upgraded and now also incorporates additional mutual recognition instruments, e.g.:

- Freezing orders;
- Confiscation orders;
- Financial penalties;
- Custodial sentences;
- The exchange of criminal records (ECRIS);
- Probation and supervision measures;
- Protection orders.

It is also ready to use in conjunction with the European Investigation Order once it becomes applicable. (CR)
➤eucrim ID=1602021

Frontex

New FRONTEX Regulation and New Name

On 22 June 2016, the European Parliament, Council, and Commission reached an agreement on the new Frontex Regulation reforming the agency into the European Coast Guard and Border Agency, with additional powers, and repealing its previous legal bases, namely Council Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007, and Council Decision 2005/267/EC.
The Council endorsed the new Regulation on 23 June 2016, which was followed by the European Parliament on 6 July 216. Based on the proposal of the European Commission of December 2015, the new agency shall establish an operational and technical strategy for the European integrated border management and promote and ensure the implementation of this strategy in all Member States.

Under the regulation, Member States will keep their sovereignty, and national border guards will remain the key actors. The agency can, however, step in in exceptional cases (i.e., when a Member State is unable to cope with a situation), drawing on a pool of resources provided by the Member States.

Compared to Frontex, new features of the agency according to the Commission's proposal include:

- Establishing a monitoring and risk analysis centre;
- Deployment of agency liaison officers to the Member States;
- A supervisory role for the agency to assess the capacity of Member States to face challenges at their external borders;
- New procedures to deal with situations requiring urgent action;

- Enhanced tasks, including setting up and deploying European Border and Coast Guard teams for joint operations and rapid border interventions;
- Mandatory pooling of human resources by establishing a rapid reserve pool;
- Deployment of a new technical equipment pool;
- A key role in assisting the Commission with the coordination of migration management support teams at hotspot areas;
- A stronger role for the agency upon return by establishing a return office within the agency;
- Participation by the agency in the management of research and innovation activities;
- European cooperation on coast guard functions by developing cross-sectoral cooperation among the European Border and Coast Guard Agency, the European Fisheries Control Agency, and the European Maritime Safety Agency;
- Increased cooperation with third countries;
- Strengthening the mandate of the agency to process personal data;
- Guaranteeing the protection of fundamental rights by setting up a mechanism to handle complaints concerning possible violations of fundamental rights in the course of activities carried out by the European Border and Coast Guard Agency. (CR)

➤eucrim ID=1602022

European Union Regional Task Force (EURTF) in Sicily

On 27 April 2016, new premises were inaugurated for the European Regional Task Force (EURTF) in Catania, Sicily.

The EURTF was already set up in June 2015 as a hotspot to coordinate the work of the EU agencies involved in the management of migration crises in the most affected Member States, i.e., Italy and Greece. The office in Catania currently hosts 20 officers from Frontex, the European Asylum Support Office (EASO), EUROPOL, and the European Naval Force Mediterranean (EUNAVFOR Med). It will also provide both logistical and operational support to the experts and technical equipment to other operations such as the Frontex-coordinated joint operation Triton and the Europol-led Joint Operational Team MARE. (CR)

➤eucrim ID=1602023

Risk Analysis 2016 Published

At the beginning of April 2016, Frontex's Risk Analysis Unit published the Annual Risk Analysis 2016, providing a situational picture of the security at the EU's external borders in 2015.

According to the report, in 2015, more than 1,820,000 illegal border-crossings were detected along the external borders of the EU, the highest number since record-keeping began, and more than six times the number of detections reported in 2014. Of all detections, the largest number was reported on the Eastern Mediterranean route (885,386), mostly between Turkey and the Greek islands in the Eastern Aegean Sea while the number on the Central Mediterranean route (154,000) had slightly decreased compared to 2014. On the Western Mediterranean route, detections are at a relatively low level as well as on the Western African route connecting Senegal, Mauritania, and Morocco with the Spanish Canary Islands where the numbers remain negligible. However, according to the report, a new route emerged in 2015 at the Eastern land border of Norway and Finland with the Russian Federation (the so-called Arctic route).

Looking at nationalities, the report finds Syrians (594,059) and Afghans (267,485) representing the highest share of detections of illegal border-crossing on entry to the EU in 2015.

For the future, the report outlines three major challenges:

- An unprecedented rise in migratory pressure;
- An increasing terrorist threat;
- A steady rise in the number of regular travellers. (CR)

➤eucrim ID=1602024

Consultative Forum on Fundamental Rights Published its Third Annual Report

At the end of April 2016, the Frontex Consultative Forum on Fundamental Rights published its Annual Report for the year 2015, providing an overview of its activities.

An important element of 2015 was the renewal of the Consultative Forum's mandate as some of its members' mandates came to an end. Most of the members requested and were selected for new three-year terms. Furthermore, the AIRE Centre (a specialised charity with the mission to promote awareness of European legal rights and to assist marginalised individuals and those in vulnerable circumstances in asserting those rights) also joined the Forum.

Other activities included the following:

- Strengthening the Consultative Forum's working structures;
- Cooperating with the Fundamental Rights Officer;
- Monitoring fundamental rights in the context of Frontex-coordinated Joint Operations such as Joint Operation Poseidon, Joint Operation Triton, and Joint Operation VEGA Children;
- Participating in the revision of the Frontex' Fundamental Rights Strategy;
- Providing advice on fundamental rights implications regarding the application of the external maritime borders surveillance regulation;
- A study on gender mainstreaming in Frontex' activities;
- Exchanging views on Frontex' cooperation with third countries;
- Supporting Frontex' training activities.

Despite its expectations, the Forum was not involved in the external evaluation of Frontex' activities.

In conclusion, the report also sets out the Forum's priorities for the year 2016:

- Monitoring of the fundamental rights implications of the development of the Frontex mandate and the outcome of the negotiations on the Commission's proposal for a Regulation on the European Border and Coast Guard;

- Revision and further development of the Frontex Fundamental Rights Strategy and action plan;
- Monitoring of fundamental rights in Frontex-coordinated Joint Operations, with a specific focus on pre-identification and screening activities;
- Development and evaluation of Frontex training tools and methodologies in areas related to fundamental rights. (CR)

➤eucrim ID=1602025

Defence Lawyers' Networks

New European Association on Fraud and Compliance Established

In June 2016, the association "European Fraud and Compliance Lawyers" (EFCL) was established. The association is a non-governmental organisation of lawyers practicing throughout Europe and involved in all aspects of economic crime, fraud, and compliance. It is a sub-association of the European Criminal Bar Association (ECBA). Members of the ECBA will automatically become members of the EFCL. The objectives of EFCL are:

- Creating a forum for lawyers from all European countries working in the areas of economic crime, fraud, and compliance;
- Establishing a network that will allow its members to efficiently handle international cases and deal with the various law enforcement and governmental institutions on at least an equal level;
- Providing advanced training in all aspects of economic crime, fraud, and compliance in transnational cases, again to enable its members to provide their clients with the best possible advice.

The association aims at becoming Europe's preeminent organisation in fraud and compliance. The EFCL provides a platform for members to meet, share knowledge, work together and expand professional networks. Chairperson of the EFCL is German defence lawyer Dr. *Oliver Kipper*. (TW)

➤eucrim ID=1602026

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Still Impasse in PIF Directive because of VAT

The Council and the European Parliament still disagree on the possible inclusion of some aspects of VAT fraud into the scope of the Directive on the protection of the EU's financial interests by means of criminal law ("PIF Directive", see also eucrim 1/2016, p. 9). After a debate between the Justice and Home Affairs Ministers, the Dutch Council Presidency concluded that neither consensus on the inclusion of VAT nor on the modalities of a possible inclusion had been reached. It is now up to the Slovak Presidency to find a solution. (TW)

➤eucrim ID=1602027

Council Conclusion on VAT Action Plan and VAT Fraud

At its 25 May 2016 meeting, the Economic and Financial Affairs Council adopted conclusions concerning the Commission Communication "Towards a single EU VAT area – Time to decide" (VAT action plan, issued on 7 April 2016) and the Court of Auditors No. 24 special report "Tackling intra-Community VAT Fraud: More action needed" (issued on 3 March 2016).

The VAT Action Plan sets out the Commission's ideas for making the EU's VAT system simpler, more fraud-proof, and more business-friendly.

The Court of Auditors' special report contains a series of recommendations addressed to the Commission, the Council, and the European Parliament as well as to the Member States so that intra-Community VAT fraud can be tackled more effectively.

As regards urgent measures to fight VAT fraud and tackle the so-called VAT gap (the difference between expected VAT revenue and VAT actually collected in Member States), the Council concludes, *inter alia*, the following:

- Agreeing with the Commission and the Court of Auditors that improving administrative cooperation between tax authorities is very important;
- Acknowledging that information exchange must be improved and calling upon the Commission to propose ways of addressing legal obstacles and practical limitations that might exist in the EU and in the Member States that prevent a qualitative step in this field from being taken;
- Underlining the importance of automatic exchange of information;
- Calling on the Commission to present measures that enable Member States to implement Transaction Network Analysis (a risk assessment instrument) if they so wish;
- Taking note of the possibility to allow certain Member States the temporary derogation to apply the reverse charge mechanism.

Furthermore, the Council welcomed the Commission's plans to reduce VAT compliance burdens for businesses, in particular for small and medium-sized enterprises, regarding transactions both within Member States and across borders. The Council also highlighted the need to simplify cross-border e-commerce. Ultimately, the Council welcomed the Commission's plan to propose increased flexibility for Member States for VAT rates. (TW)

➤eucrim ID=1602028

Dutch Presidency and EPPO

The negotiations on a regulation establishing the European Public Prosecutor's Office continued under the Dutch Council Presidency. The Dutch Presidency was successful in going ahead with the remaining parts of the regulation and a compromise was reached at the expert level on the case management system and data protection, on simplified prosecution procedures, and on financial and staff provisions with general provisions.

It is worth mentioning that especially the rules on data protection have been

redrafted substantially in order to bring the EPPO regulation in line with the new Data Protection Directive 2016/680 (see below). Regarding simplified prosecution procedures, the rules of the regulation will enable the EPPO to apply (or to refuse to apply) simplified prosecution procedures that, at the level of the national legal systems, aim at the final disposal of a case on the basis of terms agreed on with the suspect, such as "transactions." The rules foresee situations in which the EPPO may exercise its right to apply these procedures. The competent Permanent Chamber should always be called on to give its consent to the use of such procedures.

At its meeting in June 2016, the Justice and Home Affairs Ministers supported the work done on the articles at the expert level and encouraged the continuation of the negotiations. However, the Ministers stressed that nothing can be considered to have been agreed upon before an overall agreement on the text has been reached (the maxim that nothing is agreed until everything is agreed). (TW)

➤eucrim ID=1602029

Money Laundering

Commission Proposes Amendments to Anti-Money-Laundering Legislation

In view of the evolution of new forms of terrorist financing and money laundering as well as tax evasion ("Panama Papers") the Commission, on 5 July 2016, tabled a proposal with several amendments to the fourth anti-money laundering Directive (Directive (EU)2015/894 – in short: "4AMLD"), which had been passed in May 2015 (for the 4AMLD, see also eucrim 2/2015, p. 39). The proposal also implements the plans set out in the last Action Plan against terrorism financing (see eucrim 1/2016, p. 11).

The proposed measures concern the tackling of terrorism financing, stricter transparency rules on the prevention of tax avoidance and money laundering, and the protection of the EU's financial system from "high-risk third countries".

Proposals tackling of the use of the financial system for terrorist purposes are:

- Adding virtual currency exchange platforms as well as custodian wallet providers under the scope of the 4AMLD. As a consequence, these entities must apply the preventive and reporting obligations of the Directive; it is hoped that anonymity associated with such entities will come to an end;
- Minimising the anonymous use of prepaid cards, by lowering thresholds (from €250 to €150), so that customer due diligence measures apply, as well as suppressing the exemption for customer due diligence measures on the online use of prepaid cards. As a consequence, identification will be enhanced and customer verification requirements widened. Furthermore, anonymous prepaid cards issued outside the EU can only be used in the EU if compliance with the requirements equivalent to those of the 4AMLD exists;
- Facilitating cooperation among Financial Intelligence Units (FIUs) by giving them new powers to request information from any obliged entity;
- Improving the possibilities for FIUs to identify holders of bank and payment accounts by the establishing automated centralised registers or electronic data retrieval systems in all EU Member States.

Regarding better transparency for the prevention of tax evasion and money laundering, measures already proposed in the 4AMLD are to be accompanied by the following:

- Full public access to the beneficial ownership registers of companies and trusts engaged in commercial or business-related activities;
- Interconnection of the national central registers allowing Union-wide, easy, and efficient access to the beneficial ownership information;
- Extending the information available to authorities.

In addition, the Commission proposed harmonising the list of checks applicable to countries outside the EU that have deficiencies in their anti-money laundering and counter-terrorism financing regimes. (TW)

➤eucrim ID=1602030

Commission Formally Adopts List of High-Risk Countries

One week after having brought forward the above-mentioned plans for better transparency rules to tackle terrorism financing and money laundering, the Commission formally adopted a list of "high-risk third countries." These countries outside the EU are considered to have strategic deficiencies in their regimes on anti-money laundering and countering terrorist financing. The main purpose of the list is to prevent that certain undertakings, such as banks, do not apply enhanced customer due diligence measures towards natural or legal persons established in high-risk countries as a means to attract customers. The list is part of the Commission's mandate of the fourth anti-money laundering Directive. It is reviewed at least three times a year and takes into account the assessments of the FATF. (TW)

➤eucrim ID=1602031

MEPs Call for Task Force to Monitor Virtual Currencies

In a non-legislative resolution, adopted on 26 May 2016 and based on a report by German MEP Jakob von Weizsäcker, the EP called for the establishment of a task force that helps better understand the new technologies of virtual currencies, e.g., Bitcoin. The resolution analyses the possible risks of virtual currencies and its basis on distributed ledger technology (DLT), including the potential for "black market" transactions, money laundering, terrorist financing, tax fraud and evasion, and other criminal activities. The MEPs also stress, however, the significant opportunities for consumers and the economic developments this quite new technology can involve. Therefore, the EP favours a precaution-

ary approach rather than pre-emptive regulation.

The proposed task force's mandate should be the following:

- Providing the necessary technical and regulatory expertise across the various sectors of pertinent DLT applications;
- Supporting the relevant public actors at EU and Member State levels in their efforts to monitor DLT use;
- Fostering awareness and analysing the benefits and risks – including for/to end-users – of DLT applications
- Making timely proposals for specific regulations;
- Developing stress tests for all relevant aspects of virtual currency schemes.

According to the resolution, the task force should be led by the Commission and a technical team with regulatory experts. (TW)

➤eucrim ID=1602032

Tax Evasion

Commission's Communication on Better Tax Transparency

The revelation of the "Panama Papers" has had an impact on the Commission's policy to tackle tax evasion and to strive for improved tax transparency in the EU. Hence, in parallel to the above-mentioned presentation of the proposed new anti-money laundering legislation, the Commission also published a Communication "on further measures to enhance transparency and the fight against tax evasion and avoidance." The Communication outlines the progress made so far and the priority areas for action in the coming months, at the EU and international levels, in order to strengthen the fight against tax evasion, tax avoidance, and illicit financial activity. Beyond the proposed AMLD reform, future plans of the Commission include:

- Reinforcing synergies between EU anti-money laundering and EU tax transparency rules, e.g., by giving tax authorities access to national anti-money laundering information, particularly beneficial ownership, and due diligence information;
- Creating an appropriate framework for the automatic exchange of information on beneficial ownership at the EU level;
- Exploring the best way to increase oversight and ensure that effective disincentives apply for promoters and enablers of aggressive tax planning schemes;
- Working further on an EU list of third countries that do not respect tax good governance standards;
- Examining horizontal or additional sectorial measures in order to strengthen the protection of whistle-blowers.

The Commission points out that some measures are already in the legislative pipeline, such as the proposal on access to information for tax authorities (amendment to the Directive on Administrative Cooperation). The Commission will also take forward the measures set out in the Communication over the coming months. (TW)

➤eucrim ID=1602033

EP Inquiry Committee on "Panama Papers"

The European Parliament also reacted to the revelation of the "Panama Papers" and, by vote on 8 June 2016, set up an inquiry committee. The committee's mandate is the investigation of alleged contraventions of Union law and alleged maladministration in the application of Union law, which appear to be the act of the Commission, and of public administrative bodies of Member States. The EP addresses the questions of whether European legislation is adequate and whether it has been maladministered or contravened by Member States, the Commission or financial institutions. The committee will constitute 65 members and have 12 months to present its report. The report is to provide the scale of the revelations and to make any recommendation deemed necessary to improve the relevant EU legislative framework in the future. (TW)

➤eucrim ID=1602034

Counterfeiting & Piracy

Directive on Euro Counterfeiting to Be Applied

The deadline for implementing the Directive on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, ended on 23 May 2016. The Directive introduces tougher sanctions for criminals and improved tools for cross-border investigations (cf. eucrim 2/2014, p. 55). The Commission did not reveal which and how many Member States implemented the Directive on time. (TW)

➤eucrim ID=1602035

Organised Crime

Council Conclusion on Administrative Approach to Organised Crime

At its meeting on 9-10 June 2016, the Justice and Home Affairs Council adopted conclusions on the administrative approach to preventing and fighting serious and organised crime. The conclusions mainly encourage the EU Member States to prevent persons involved in criminal activities from using the legal administrative infrastructure for criminal purposes, such as procedures for obtaining permits, tenders, and subsidies. The conclusions contain several recommendations and calls addressed to Member States, the European Commission, and Europol in order to further the "multi-disciplinary approach" towards effectively preventing and countering organised crime as set out in the 2015 European Agenda on Security. It is considered essential that administrative measures, in addition to criminal law measures, are taken at the (local) national and European levels as well as in cross-border situations between two or more Member States, in order to prevent infiltration into the licit economy by criminals. (TW)

➤eucrim ID=1602036

Cybercrime

Council Conclusions on Criminal Justice in Cyberspace

The topic of e-evidence and other issues of criminal justice in cyberspace remain high on the agenda of the EU institutions. At its meeting on 9 June 2016, the Justice and Home Affairs Council adopted conclusions on this matter by requesting the Commission to present deliverables on the following three work streams by June 2017:

- Streamlining mutual legal assistance (MLA) proceedings and, where applicable, mutual recognition related to cyberspace through the use of standardised electronic forms and tools;
- Improving cooperation with service providers through the development of a common framework (e.g., use of aligned forms and tools) by which to request specific categories of data;
- Launching a reflection process on possible connecting factors for enforcement jurisdiction in cyberspace.

According to the conclusions, two topics require deeper reflection and political guidance: the possible grounds for enforcement jurisdiction in cyberspace and the differentiated treatment of specific categories of data in criminal proceedings. (TW)

➤eucrim ID=1602101

Council Gives Framework for European Judicial Cybercrime Network

The fight against cybercrime also entails new structures at the European level. The Justice and Home Affairs Council concluded at its meeting on 9 June 2016 that the European Judicial Cybercrime Network should be formalised and enhanced. The network, which was initiated by Eurojust in 2015, aims at providing a centre of specialised expertise supporting judicial authorities, i.e., prosecutors and judges. The main tasks of the network are:

- Facilitating the exchange of expertise, best practices, and other relevant knowledge and experience on the investigation and prosecution of cybercrime, cyber-enabled crime, and investigations in cyberspace;
- Fostering dialogue among different actors and stakeholders that have a role in ensuring the rule of law in cyberspace, such as Europol/EC3, Eurojust, ENISA, CEPOL, etc. and including the service providers at the private sector level.

The network will be hosted and supported by Eurojust. (TW)

➤eucrim ID=1602037

Commission Prepares for Cybersecurity Attacks

On 5 July 2016, the Commission presented several measures that aim to strengthen Europe's cyber resilience system and to foster a competitive and innovative cybersecurity industry in Europe. The measures, which were detailed in a Communication, find their roots in the 2015 Digital Single Market Strategy and the 2013 EU Cybersecurity Strategy. The intended actions will accompany the achievements already made, such as the EU legislation on attacks against information systems (Directive 2013/40/EU).

The action plan includes the launch of a European public private partnership on cybersecurity. A respective agreement was signed by *Günther H. Oettinger*, Commissioner for the Digital Economy and Society, and the European Cyber Security Organisation (ECSO) in Strasbourg on 5 July 2016. The contractual public private partnership (cPPP) aims to combine industrial and public resources in order to deliver excellence in research and innovation. The cPPP aims at fostering cooperation in the early stages of the research and innovation process and to develop cybersecurity solutions in various sectors (energy, health, transport, and finance). It is expected that €1.8 billion will be invested by 2020. The EU will invest €450 million in this partnership, under its research and innovation programme Horizon 2020. (TW)

➤eucrim ID=1602038

Trafficking Human Beings

Council Addresses THB for Labour Exploitation

At its meeting on 9-10 June 2016, the Justice and Home Affairs Council adopted conclusions that aim to strengthen multidisciplinary cooperation against trafficking in human beings (THB) for labour exploitation. The conclusions are also intended to provide an input for the post-2016 anti-trafficking strategy to be developed by the Commission as far as THB for labour exploitation is concerned.

The conclusions address mainly the Commission and the Member States. The Commission is, *inter alia*, requested to do as follows:

- Continue to promote the exchange of best practices on multidisciplinary cooperation to provide assistance, support, and compensation to victims of THB;
- Encourage Member States to strengthen the sharing of best practices and measures to reduce the demand for goods produced by and services from victims of THB for labour exploitation;
- Strengthen a coordinated external EU action against THB;
- Stimulate cooperation against THB for labour exploitation with companies.

Member States are invited to fully implement and apply the international and EU legal framework on THB. Furthermore, Member States should, *inter alia*, also do the following:

- Strengthen multidisciplinary national and cross-border cooperation and information exchange against THB for labour exploitation, including the involvement of a wide range of stakeholders;
- Pro-actively use financial investigations in all cases of THB (including for labour exploitation) for the purpose of gathering evidence, mapping criminal organisations, gathering financial intelligence, and identifying, freezing, and confiscating criminal assets;
- Provide labour and other inspectorates with sufficient tools to improve multidisciplinary cooperation against THB.

The conclusions also call for the exploration of possibilities to set up an EU network for labour and other inspectorates on the issue of THB for labour exploitation. (TW)
➤eucrim ID=1602039

EP Sends Signal for Better Protection of Victims of THB

In a non-legislative resolution of 12 May 2016, MEPs called upon Member States to protect victims of human trafficking better. In particular, MEPs stressed that Member States must better address the gender-specific aspects of trafficking when it comes to prevention, assistance, and support measures. According to the EP, the police, judiciary, medical staff, and social workers should all receive adequate training, so that they can identify vulnerable victims early on and offer them the necessary support. This includes accommodation, medical treatment, translation, legal counselling, also for the purpose of claiming compensation, and a recovery period of at least 30 days. Furthermore, the resolution states that Member States should grant victims residence permits and access to the labour market in the state into which they were trafficked. (TW)
➤eucrim ID=1602040

Racism and Xenophobia

Partnership with IT Companies to Tackle Hate Speech

On 31 May 2016, the Commission, together with the four major IT companies involved in social media – Facebook, Microsoft, Twitter, and YouTube – announced a code of conduct to tackle the spread of illegal hate speech online in Europe. The code of conduct aims at guiding the activities of the above-mentioned IT companies and sharing best practices with other Internet companies, platforms, and social media operators. It contains a series of public commitments for the aforementioned IT companies on the following issues:

- Development of internal procedures and staff training to guarantee that the IT companies review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary;
- Strengthening of ongoing partnerships between the IT companies and civil society organisations who will help flag content that promotes incitement to violence and hateful conduct;
- Continuation of the mutual work with the European Commission in identifying and promoting independent counter-narratives, new ideas, and initiatives;
- Support for educational programmes that encourage critical thinking.

The code of conduct is not binding and does not replace national legislation, in particular criminal law prosecution on the basis of Council Framework Decision 2008/913/JHA on racism and xenophobia. However, the code of conduct supplements national legislation in order to improve the enforcement of the framework decision and to provide a common approach at the EU level. (TW)
➤eucrim ID=1602041

Procedural Criminal Law

Procedural Safeguards

Directive on Protection of Children in Criminal Proceedings

The EU closed a further gap in the roadmap on strengthening procedural safeguards in criminal proceedings. The roadmap set out that special safeguards for suspected or accused persons who are vulnerable should be established at the EU level.

On 21 May 2016, Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings was published in the Official Journal. The Directive aims at establishing special safeguards to ensure that suspected or accused children, i.e., persons under the age of 18, are able to understand and follow criminal proceedings and to exercise their right to a fair trial. Furthermore, children are to be prevented from reoffending and their social integration is to be fostered. The Directive's purpose is also to foster mutual trust among the Member States and to remove obstacles to the free movement of citizens throughout the EU.

One of the core provisions is that children should be assisted by a lawyer early in the process, if necessary by providing legal aid (Art. 6). Exceptions from the right to assistance are allowed only if it is not deemed proportionate in the light of the circumstances or in exceptional cases, at the pre-trial stage.

Also of importance is that Member States must ensure that deprivation of liberty is imposed on children only as a measure of last resort and that it be limited to the shortest appropriate period of time (Art. 10). Children who are detained should be held separately from adults, unless it is considered to be in the child's best interest to do otherwise (Art. 12).

Further safeguards include:

- Right to information: Member States must ensure that children are promptly informed about their rights and general aspects of the conduct of the proceedings (Art. 4);
- Right of the child to have the holder of parental responsibility, or another appropriate adult nominated by the child and accepted as such by the competent authority, informed (Art. 5);
- Right to be accompanied by that person during court hearings or other stages of the proceedings, e.g., police questioning (Art. 15);
- Right of the child to be individually assessed, taking into account in particular the child's personality and maturity; the child's economic, social, and family background; and any specific vulnerabilities that the child may have (Art. 7);
- Right to medical examination in case of deprivation of liberty with a view, in

particular, to assessing the child's general mental and physical condition (Art. 8);
- Right to audiovisual recording of questioning (Art. 9);
- Right to protection of privacy of the child during criminal proceedings: This includes the requirement for Member States to ensure that court hearings involving children are usually held in the absence of the public (Art. 14);
- Right of children to appear in person at and participate in their trial (Art. 16).

The rights referred to in Arts. 4, 5, 6, and 8, Arts. 10-15, and Art. 18 (legal aid) also apply *mutatis mutandis* in European Arrest Warrant proceedings in the executing state. Art. 19 of the Directive stipulates that children who are suspects or accused persons in criminal proceedings and children who are requested persons (EAW cases) have an effective remedy under national law in the event of a breach of their rights under the Directive.

Member States must transpose the Directive by 11 June 2019. Denmark, the UK, and Ireland have opted out and are not bound by the Directive. (TW)
➤eucrim ID=1602042

Political Agreement on Legal Aid Directive

On 30 June 2016, the Council and the European Parliament announced that they had reached a political agreement on the Directive on the right to legal aid for citizens suspected or accused of a criminal offence and for those subject to a European Arrest Warrant. The Directive will introduce Union-wide minimum standards concerning the right to legal aid for persons accused or suspected of committing crimes.

The agreement contains two main modifications in comparison with the initial Commission proposal:
- Broadened scope, including a right to ordinary legal aid and not only to provisional legal aid;
- A means and merits test to determine the eligibility of a person for legal aid.

It is now up to the lawyer-linguists to revise the text before it can finally be adopted by the Council and the European Parliament (expected for the end of the year 2016). The UK and Ireland decided not to "opt in." Denmark will also not be part of the Directive since the country has an "opt out" by default from justice and home affairs legislation. (For the development of the negotiations on the Directive on legal aid, see also eucrim 4/2013, pp. 120/121; eucrim 1/2015, p. 8, and eucrim 2/2015, p. 41.)

The Directive on legal aid is the last piece of legislation foreseen as part of the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings adopted by the Council in November 2009. (TW)
➤eucrim ID=1602043

CJEU Ruling on Translation and Interpretation Directive and ECRIS ("Balogh")

On 9 June 2016, the CJEU delivered a judgment that deals with the interpretation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (Case C-25/15, *Istvan Balogh*). The main question was whether the Regional Court of Budapest, Hungary may charge Hungarian national Mr. Balogh for the translation of a criminal judgment that was delivered by the Regional Court of Eisenstadt, Austria. The translation is a pre-condition for the recognition of foreign judgments within a special procedure under Hungarian law that results in the entry of the foreign conviction into the European Criminal Record System (ECRIS).

The first question the CJEU had to deal with was whether the "special procedure" at issue falls within the scope of Directive 2010/64/EU, as a consequence of which Mr. Balogh could not be made responsible for bearing the costs of the translation. The CJEU negated this question, arguing that the special procedure at issue in the main proceedings has nothing to do with the defendant's right to a fair hearing or his right to effective judicial protection and, therefore, falls outside the scope and objectives of the Directive on interpretation and translation.

However, the CJEU found that the EU legislation organising and establishing ECRIS (Framework Decision 2009/315 and Decision 2009/316) precludes the implementation of the special procedure at issue under Hungarian law. According to the CJEU, the special procedure on the recognition of the effects of foreign criminal judgments – applied systematically in Hungary – runs counter to the said EU legislation that intends to establish a rapid and effective system for the exchange of information relating to criminal convictions handed down in other EU Member States and that already foresees an automatic translation system. (TW)
➤eucrim ID=1602044

CCBE Seeks Setting Standards for Lawyer-Client Confidentiality

On 23 May 2016, the Council of Bars and Law Societies of Europe (CCBE) published a paper with recommendations on the protection of client confidentiality within the context of surveillance activities. The paper states that its purpose is "to inform legislators and policy makers about the standards that must be upheld in order to ensure that professional secrecy and legal professional privilege are not undermined by surveillance practices undertaken by the state." The paper discerns the minimum standards applicable across Europe by analysing the relevant EU law, the fundamental guarantees of the ECHR, and the approach of the European courts. The analysis comes to the conclusion that data and communications protected by legal professional privilege and by obligations of professional secrecy are inviolable and not amenable to interception or surveillance. The subsequent recommendations seek to ensure respect for that principle and address the following items:
- Need for legislative control;
- Scope of admissible interception;

- Judicial and independent oversight;
- Use of intercepted material;
- Legal remedies and sanctions.

The overall conclusion of the paper states: "Whilst it is appreciated that it is an obligation of the state to its citizens to ensure their safety and security, legal professional privilege and professional secrecy are essential underpinnings of the rule of law. Where the state seeks to abrogate or erode the principles of legal professional privilege and professional secrecy, even in the name of national security, this constitutes an attack on the rule of law itself." (TW)

➤eucrim ID=1602045

Data Protection

New Data Protection Rules

The Council and the European Parliament adopted the so-called data protection package. It consists of two instruments:

- The General Data Protection Regulation (Regulation (EU) 2016/679), which repeals Directive 95/46/EC;
- The Data Protection Directive for the police and criminal justice sector; it repeals the 2008 Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

The official texts were published in the Official Journal of 4 May 2016.

The Regulation aims that people can better control their personal data relating to the free movement of personal data. It also modernises the data protection rules of the European Community, which date back to 1995. The now unified EU law brings about benefits for businesses by cutting red tape and reinforcing consumer trust. The Regulation entered into force on 24 May 2016 and shall apply from 25 May 2018.

The Data Protection Directive lays down the rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and prevention of threats to public security.

The Directive mainly follows two aims:

- First, a better protection of an individuals' personal data processed by law enforcement authorities in the Member States. Everyone's personal data should be processed lawfully, fairly, and only for a specific purpose. All law enforcement processing in the Union (in cross-border or domestic situations) must comply with the principles of necessity, proportionality, and legality, along with appropriate safeguards for the individuals. Supervision is ensured by independent national data protection authorities, and effective judicial remedies must be provided.
- Second, by harmonising the varying national data protection legislation in the EU Member States in the criminal law enforcement sector, data should be able to be more efficiently and effectively exchanged.

The Directive also provides clear rules for the transfer of personal data by criminal law enforcement authorities outside the EU. They will ensure that these transfers take place with an adequate level of data protection.

The Directive entered into force on 5 May 2016 and EU Member States have till 6 May 2018 to implement it into their national law.

On the data protection reform, which was initiated by the Commission in 2012, see also eucrim 4/2015, p. 135 and 2/2015, p. 41 with further references. (TW)

➤eucrim ID=1602046

EU PNR Directive Published

The official text of the "Directive on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime" was published in the Official Journal of 4 May 2016. The Directive was formally adopted by the Council and the European Parliament in April 2016 after successful trilogue meetings (see eucrim 1/2016, p. 14). The EU PNR Directive regulates the following:

- The transfer by air carriers of passenger name record (PNR) data of passengers of extra-EU flights, and
- The processing of the PNR data, including its collection, use, and retention by Member States and its exchange between Member States.

Member States must designate passenger information units (PIUs) that are responsible for collecting PNR data from air carriers, for storing and processing these data as well as for exchanging PNR data or processing results with PIUs of other Member States or Europol.

The Directive foresees several measures for the protection of personal data, some of which are:

- Prohibition of the collection and use of sensitive data;
- Retention period of 5 years and obligation to depersonalise the data after 6 months, so that the data subject is no longer immediately identifiable;
- Inclusion of a data protection officer within the PIUs who will be responsible for monitoring the processing of PNR data and for implementing relevant safeguards;
- Obligation of Member States to clearly inform passengers of the collection of PNR data and of their rights;
- Limitation of the transfer of PNR data to third countries.

The Directive harmonises the PNR system within the EU. Bilateral PNR agreements already exist between the EU and the United States, Australia, and Canada – they allow EU carriers to transfer PNR data to these countries. In June 2015, the Council adopted a decision authorising the opening of negotiations for a PNR agreement with Mexico. (TW)

➤eucrim ID=1602047

EU and US Sign "Umbrella Agreement"

On 2 June 2016, Dutch Minister of Security and Justice *Ard van der Steur* and Commissioner *Vera Jourová* and Attorney General *Loretta Lynch* signed the "EU-US Umbrella Agreement" on behalf of the EU and US, respectively. It provides data protection safeguards for transatlantic information sharing between the relevant criminal law enforcement authorities (see also eucrim 1/2016, p. 15).

The baton is now in the EP, which must give its consent to the agreement. An opinion in January 2016 by the judicial service of the EP already considered the agreement incompatible with primary EU law and fundamental rights. Beyond this, the "Umbrella Agreement" has been met with fierce criticism from other parties, including the European Data Protection Supervisor. (TW)

➤eucrim ID=1602048

EDPS Gives Guidance to Charter's Necessity Requirement

The European Data Protection Supervisor presented a background paper, including a "toolkit" to help assess the necessity of new legislative EU measures or whether an EU policy is interfering with or limiting the exercise of the fundamental rights to privacy and data protection laid down in the Charter of Fundamental Rights. The "necessity test" is required by Art. 52 of the Charter. It must be distinguished from the "necessity principle" as enshrined in secondary EU data protection law, which is not the subject of the EDPS paper.

The paper of the EDPS stresses the significance of the necessity to limit the said fundamental right. In this context, several measures which had been triggered by the Paris and Brussels terrorist attacks increasingly made use of personal data in new, complex ways and interfere with the private sphere of individuals. This raises concerns with regard to the respect of the rights to privacy and data protection. (TW)

➤eucrim ID=1602049

Ne bis in idem

No Detailed Investigation – Fresh Proceedings Admissible CJEU Says

On 29 June 2016, the CJEU rendered its judgment in the *Kossowski* case (C-486/14). For the facts and the opinion of the AG, see eucrim 1/2016, p. 15.

The Higher Regional Court of Hamburg asked the CJEU whether a decision by Polish authorities to terminate criminal proceedings for the same offence committed on German territory without a detailed investigation can be considered "final" in the sense of the *ne bis in idem* principle enshrined in Art. 54 CISA and Art. 50 of the Charter of Fundamental Rights.

The CJEU reiterated its former case law that, for the purpose of Art. 54 CISA, a decision on the part of the prosecuting authority of a Schengen state must have been made that determines the merits of the case. In this context, the CJEU recalled that the European *ne bis in idem* rule does not intend to protect a suspect from being the subject of investigations (may be undertaken successively) in respect of the same criminal acts in several Schengen States and that the interpretation of Art. 54 CISA must not only consider the free movement of persons but also the prevention and combating of crime.

In view of these considerations, the CJEU holds that the decision at issue where the prosecuting authority in Poland, without a more detailed investigation, did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them in the course of the investigation and had therefore not been possible to verify statements made by the victim – does not constitute a decision given after a determination has been made as to the merits of the case.

The CJEU did not answer the other question posed by the Hamburg Court, i.e., whether Art. 55 CISA remains in force despite the limitation set out in Art. 50 of the Charter. The CJEU said that this question can only be raised if a person's trial is considered "finally disposed of" within the meaning of Art. 54 CISA, which was not the case here. (TW)

➤eucrim ID=1602050

Victim Protection

European Network on Victims' Rights

By adopting respective conclusions, the Justice and Home Affairs Council established the (Informal) European Network on Victims' Rights at its meeting on 9-10 June 2016. The network was created in view of Art. 26 (1) of Directive 2012/29/EU, which provides that Member States shall take appropriate action to facilitate cooperation between them to improve victims' access to the rights set out in the Directive and under national law.

The network aims at stimulating and aiding the implementation of existing EU legislation on victims' rights and suggesting, where appropriate, any possible areas for improvement of the EU *acquis* in this field. It should further facilitate and contribute to enhancing cooperation between the competent authorities responsible for victims' rights in the Member States, with a view to enhancing access of victims to their rights.

In practice, the Network should, *inter alia*, facilitate and enhance the following:

- Exchange of best practices and experiences;
- Cooperation between the competent authorities, in particular in cross-border cases and with respect to the compensation of victims;
- Cooperation and dialogue among different actors that come into contact with victims, including civil society.

The network will be composed of policy officers working at the competent authorities, such as ministries, which are responsible for victims' rights in the Member States. The European Commission will also be involved; other Euro-

pean institutions, agencies, and bodies as well as other stakeholders, including the civil society, can be invited. (TW)
➤eucrim ID=1602051

Greens Initiate Whistle-Blowers Directive

The Greens/European Free Alliance (EFA) group in the European Parliament urged the Commission to take action in favour of the protection of whistle-blowers. In May 2016, the Greens/EFA handed over a draft for a directive to establish minimum standards of protection in the EU Member States for whistle-blowers. The draft aims at providing the Commission with the impetus to start a legislative initiative.

The draft stresses the need for harmonised EU rules on whistle-blowers, since legislation in the EU Member States is very fragmented. In six EU countries there is no protection at all whereas some countries have established a certain level of protection in anti-corruption laws, others in public service laws, and yet others in labour, criminal and sector-specific laws. As a consequence, there are numerous legal loopholes and gaps, and the levels of protection of whistle-blowers in the European Union are very uneven.

Regarding the scope of the directive, it would encompass both current and former workers, including trainees and apprentices, in all sectors of activity, public or private. Other legal elements of the proposal include:

- Protected disclosures;
- Reporting channels;
- Whistle-blowing procedures;
- Protection of whistle-blowers:
- Burden of proof;
- Reporting mechanisms and the introduction of sanctions for breaches of the directive.

The lack of whistle-blower legislation at the EU level has often been criticised. Most recently, the special TAXE committee of the EP called on the Commission to present whistle-blower legislation by June 2016. However, the Commission has remained silent so far. (TW).
➤eucrim ID=1602052

Cooperation

European Arrest Warrant

CJEU Confirms Need for National Arrest Warrant

On 1 June 2016, the CJEU rendered its preliminary ruling judgment in the case *Bob-Dogi* (C-2412/15). The case raised the questions on the formal requirements of the Framework Decision (FD) on the European Arrest Warrant, i.e., whether a national arrest warrant must be issued prior to and separate from the European Arrest Warrant. The CJEU confirmed the opinion of Advocate-General *Bot* (cf. eucrim 1/2016, p. 18). It ruled that 'Art. 8 para. 1 li. c) of the FD is to be interpreted as meaning that the term "arrest warrant" must be understood as referring to a national arrest warrant, which is distinct from the European Arrest Warrant. The Court in Luxembourg also confirmed that the non-existence of a reference to a national arrest warrant is a refusal ground for the non-execution of an EAW.' (TW)
➤eucrim ID=1602053

CJEU Interprets Refusal Ground on Trials *in absentia*

The Rechtbank Amsterdam requested the CJEU to give guidance on the interpretation of certain concepts in Art. 4a lit. a) i) of the Framework Decision (FD) on the European Arrest Warrant as amended by Framework Decision 2009/299/JHA. The case concerned a European Arrest Warrant for the execution of custodial sentences imposed by Polish courts against Polish citizen Mr. Dworzecki who did not appear in person at trial. The main question in the present case was whether notification of a summons to an adult known to the defendant (here: Mr. Dworzecki's grandfather), a member of the same household as the requested person, may be regarded as satisfying the conditions set out in Art. 4a lit. a) i) of the FD. If these conditions are met, the surrender of the requested person is possible despite a trial *in absentia*.

In its judgment of 24 May 2016 (case C-108/16 PPU), the CJEU first states that the notions of Art. 4a lit. a) i) of the FD ("summoned in person" as well as "received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial") must be interpreted autonomously and receive a uniform interpretation in the entire European Union.

As regards the subsequent question of how the notion must be interpreted in the present case, the CJEU found that it must be unequivocally established whether the requested person (Mr. Dworzecki) had been made aware of the trial in due time by having actually received official information on the scheduled date and time of the trial. If receipt of this information cannot be established without a doubt (that the adult person effectively delivered the summons to Mr. Dworzecki), as in the present case, the conditions have not been met.

However, this result might only be a Pyrrhic victory for the defendant, since the Court clarifies that other circumstances described in the subparagraphs of Art. 4a of the FD may allow the surrender, such as the possibility to request a retrial.

The CJEU followed the opinion of Advocate-General (AG) *Bobek*. Interestingly, in the general observations of his opinion, the AG emphasised that Art. 4a of the FD is intimately linked with fundamental defence rights; thus, an interpretation based on the practical effect of the FD viewed solely from the aspect of strengthening mutual recognition is not possible. (TW)
➤eucrim ID=1602054

Criminal Records

MEPs Back Commission Proposal on the Use of ECRIS for Non-EU Citizens

On 27 June 2016, rapporteur *Timothy Kirkhope* (ECR, UK) from the LIBE Committee submitted his report for a

plenary vote on the Commission's proposal for a better exchange of the criminal records of non-EU citizens within the EU (see eucrim 1/2016, p. 18). The LIBE Committee strongly supported the Commission's plans to develop a common European procedure and mechanism so that information on convictions of non-EU citizens can efficiently be exchanged via the existing European Criminal Records Information System (ECRIS). It was stated that the inclusion of third country nationals into ECRIS is an important step forward in fighting cross-border crime and terrorism and restoring public confidence.

The rapporteur also suggests expanding the scope of the plans presented by the Commission:

- Obligating Member States to enter any bilateral information received on criminal convictions of persons residing on EU territory into their national criminal records database and to share such information on the index system;
- Enabling Europol and Frontex to access the data bases upon request and case by case, to perform their tasks;
- Enabling employers to request background checks of all individuals working with vulnerable persons or children.

However, the report calls for the introduction of clear references on data protection provisions, the presumption of innocence and fair trial, as well as a clear list of provisions to form part of a detailed review of the system. After approval by the plenary of the EP trilogue, debates can start between the EP rapporteur, the Commission, and the Council. (TW)

➤eucrim ID=1602055

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EDPS Checks ECRIS Upgrade Concerning Non-EU Citizens

The European Data Protection Supervisor (EDPS) carefully examined the tabled legislative proposal by the Commission on the extension of ECRIS to non-EU citizens/third country nationals (see eucrim 1/2016, p. 18) in view of its compliance with the European data protection requirements. In its report of 13 April 2016, the EDPS made several recommendations while welcoming the integration of non-EU citizens' convictions into the existing decentralised system. The EDPS mainly raises the following issues:

- Putting in place a corresponding regime for third country nationals similar to the one for EU nationals regarding the compulsory use of fingerprints;
- Clarification on the process of pseudonymisation for the purposes of ECRIS with regard to third country nationals;
- Uniform categorisation of the data stored at the national level regarding convicted EU citizens and convicted third country nationals;
- Exclusion of EU nationals with a third country nationality from the measures in the proposal on third country nationals.

The opinion of the EDPS intends to give advice to the EU legislator but is not binding. (TW)

➤eucrim ID=1602056

E-Justice

Best Practices on Videoconferencing with Third Countries

At the expert level, the Council elaborated best practices concerning videoconferencing with third countries. The suggestions were endorsed by the Justice and Home Affairs Council on 9-10 June 2016. The suggestions on best practices are part of the Multiannual European e-Justice Action Plan 2014-2018, which foresees the better use of videoconferencing, including the use of videoconferencing for the taking of evidence in the context of a civil or criminal procedure. The suggestions address the general legal framework (both international and bilateral) in order to implement videoconferencing between EU Member States and third countries that enable videoconferencing in civil and criminal matters. (TW)

➤eucrim ID=1602057

Law Enforcement Cooperation

Roadmap to Enhance Information Exchange and Information Management

At its meeting of 10 June 2016, under the impression of the latest terrorist attacks and the ongoing migration crisis, the JHA Council endorsed a roadmap setting out actions to enhance information exchange and information management, including interoperability solutions in the Justice and Home Affairs area to tackle migratory, terrorist, and criminal challenges.

The roadmap comprises four chapters dealing firstly with an analysis of key JHA broad challenges, principles, and strategic orientation as well as a way forward to monitor and follow-up on the actions in the roadmap.

The remaining three chapters look at information exchange and information management actions in the following areas:

- Law enforcement, including judicial cooperation in criminal matters;
- Detection of travel movements in the area of counter-terrorism;
- Border management and migration, highlighting their interconnections in order to ensure cooperation between the authorities and agencies that are active in these areas. (CR)

➤eucrim ID=1602058

Ten of Europe's Most Wanted Arrested

Since the launch of the "Europe's Most Wanted Fugitives" website (see eucrim 1/2016, p. 18) at the end of January 2016, ten of the fugitives presented on the website were able to be arrested. In at least six of these arrests, information provided by the public to the website and/or increased media attention due to the website played a direct role in locating the fugitives. (CR)

➤eucrim ID=1602059

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Factsheets Available in Greek

On 29 June 2016, the ECtHR made some of its factsheets available in Greek at the Court's website. Further translations of other factsheets into Greek will be made available in future. Since September 2010, the Court has published some 60 factsheets, aiming to assist in the implementation of both the European Convention on Human Rights and the Court's case law by raising awareness of its judgments among journalists, national authorities, and the general public.

➤eucrim ID=1602061

Launch of Practical Handbook on Access to Justice in European Law

On 22 June 2016, the ECtHR – together with the EU Agency for Fundamental Rights (FRA) – launched a new practical guide in English and French (with other languages to follow) on access to justice in European law, a right that enables the use of other fundamental rights. It seeks to raise awareness and improve knowledge of relevant standards set by the European Union and the Council of Europe, particularly through the case law of the CJEU and the ECtHR. With a primary focus on civil and criminal law, the handbook addresses such issues as:

- A fair and public hearing before an independent and impartial tribunal;
- Legal aid;
- The right to be advised, defended, and represented;
- The right to an effective remedy;
- The length of proceedings;
- Other limitations on access to justice.

In addition, it examines access to justice in selected areas, such as:

- Victims of crime;
- People with disabilities;
- Prisoners and pre-trial detainees;
- Environmental law;
- e-justice.

The handbook shall assist, *inter alia*, judges, prosecutors, and non-governmental organisations by provideing a key legal resource on the right to access justice.

➤eucrim ID=1602062

Other Human Rights Issues

HR Commissioner Publishes Annual Activity Report for 2015

On 18 April 2016, *Nils Muižnieks*, CoE Commissioner for Human Rights, published his annual activity report for 2015. The primary thematic activities of the Commissioner in 2015 focused on the following:

- Freedom of expression and media freedom;
- Human rights of immigrants, refugees, and asylum seekers;
- Children's rights;
- Women's rights;
- Counterterrorism measures;
- The systematic implementation of human rights.

The report also summarises the Commissioner's cooperation with the EU, where discussions focused on the refugee movement and the human rights situation in EU enlargement countries. Additionally, the report gives an overview of the Commissioner's on-site visits and the results thereof.

➤eucrim ID=1602063

Specific Areas of Crime

Corruption

GRECO: Sixteenth Annual Report

On 1 June 2016, GRECO published its annual report for 2015. In 2015, GRECO completed 10 on-site evaluation visits with regard to the third and fourth rounds of evaluation and has published 10 evaluation reports, the key findings of which are included in the annual report. The annual report also offers an overview of the impact of GRECO evaluations on the national legislations. As to Members of Parliaments, these impacts included the adoption of code of conducts, clarification of the meaning of conflict of interest, and the lowering of certain thresholds of assets in order to ensure broader transparency. With regard to judges, certain Member States have introduced periodic quality assessments of their professional performance; others have adopted codes of judicial ethics and introduced criteria for the selection and evaluation of judges. In respect of prosecutors, new legislations included rules on gifts and transparent promotion. The report welcomes the changes introduced but also emphasises the importance of also implementing the adopted rules.

The annual report also announced the launch of a new, fifth evaluation round in 2017, which shall focus on corruption prevention and promoting integrity in central governments (top executive posts in particular) and law enforcement agencies.

➤eucrim ID=1602064

* If not stated otherwise, the news reported in the following sections cover the period April–15 July 2016.

GRECO: Liechtenstein to Ratify and Implement Criminal Law Convention on Corruption

On 2 June 2016, GRECO published its Third Round Evaluation Report on Liechtenstein. GRECO called on Liechtenstein to ratify and fully implement the Criminal Law Convention on Corruption and to substantially improve legislation on political funding. Liechtenstein signed the Criminal Law Convention on corruption at the end of 2009 and joined GRECO on 1 January 2010. Nevertheless, the country has not as yet ratified the Convention.

The report notes deficiencies in legislation on bribes, including the reference to "financial value" in the criminal code and the inadequate coverage of bribery involving assembly members and foreign and international public officials, so that they cannot be prosecuted for taking a bribe. GRECO calls on Liechtenstein to ensure that corruption involving intangible benefits can be prosecuted with effective, proportionate, and dissuasive sanctions.

In addition, Liechtenstein has no arrangements in place on the transparency of political financing. The current legislation also neither regulates private support, nor are parties required to include all related activities and entities in their accounts. Furthermore, important legal rules that require the submission and publication of annual financial statements are not applied in practice.

➤eucrim ID=1602065

GRECO: San Marino to Ratify and Implement Criminal Law Convention on Corruption

On 12 July 2016, GRECO published its Third Round Evaluation Report on San Marino. GRECO called for San Marino to ratify and fully implement the Criminal Law Convention on Corruption. In order to improve legislation on political funding, the report called particularly for the criminalisation of private sector corruption and trading in influence. In addition, legislative improvements are necessary with regard to non-monetary donations, to splits or shutdowns of political parties and their remaining funds, and to accounting obligations of independent members of Parliament.

The report also recommends further strengthening the supervisory system on political financing and providing for more effective sanctions.

➤eucrim ID=1602066

GRECO: Fourth Round Evaluation Report on Moldova

On 5 July 2016, GRECO published its Fourth Round Evaluation Report on the Republic of Moldova. This latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of MPs, judges, and prosecutors (for more recent reports, see eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45; 3/2015, pp. 87-88; 1/2016, pp. 20-22). GRECO called on Moldova to improve and effectively implement anti-corruption legislation in respect of parliamentarians, judges, and prosecutors. In particular, the country needs more consistent application of related laws (including the new law on the prosecution service) and strengthening of the capacities and independence of the institutions in charge of fighting corruption (notably the National Integrity Commission). The sanction regime also still suffers from crucial flaws.

As regards MPs, the report welcomed the positive steps taken in order to enhance access to information regarding parliamentary work but called for proper democratic debate and public participation in the legislative process as well as more transparency as to the interaction of parliamentarians with third parties. The report also stressed that parliamentary immunity is a significant obstacle to bringing MPs suspected of corruption to justice and called for the adoption of a code of conduct for parliamentarians.

GRECO noted the negative public perception of the judiciary and called for actions to rebuild public trust. This process could be enhanced, in particular, by reviewing the composition and operation of the Superior Council of Magistracy, including the objectivity and transparency of its decisions as regards recruitment, promotion, and the disciplinary liability of judges. In addition, judges need to become better aware of rules on ethics and integrity on gifts and other advantages.

GRECO welcomed the new Law on the Prosecution Service, which contains positive measures aimed to enhance the autonomy and professionalism of prosecutors and to provide for more transparence. However, GRECO stressed that the achievement of new goals will depend on a thorough application of the new law.

➤eucrim ID=1602067

Money Laundering

MONEYVAL: Fourth Evaluation Round on Jersey

On 24 May 2016, MONEYVAL published its Fourth Round Evaluation Report on Jersey. It acknowledges the country's mature and sophisticated regime for tackling ML and the CFT, the key offences being in line with the international standards. The report also underlines that Jersey has well-functioning AML/CFT coordination processes at both the policy and operational levels and that the authorities have adopted a proactive approach to international cooperation. The report, however, urges Jersey to increase ML convictions and confiscations, as this number is still relatively low, given the size and characteristics of the island's financial sector. MONEYVAL also recommends that FIU reports identifying ML and CFT trends and patterns should be issued on a more frequent basis.

➤eucrim ID=1602068

MONEYVAL: Fifth Round Evaluation Report on Serbia

On 9 June 2016, MONEYVAL published its Fifth Round Evaluation Re-

port on Serbia. The report praised the improved legal and institutional framework established since the last evaluation in 2009 but called for a more systematic and consistent fight against money laundering and financing of terrorism. The report stresses the threat emanating from organised criminal groups involved in the smuggling and trafficking of narcotic drugs and the trafficking of human beings, the substantial criminal proceeds generated by tax evasion and corruption offences, and the risk of terrorism financing the country faces. The banking, remittance, and real estate sectors are especially prone to money-laundering risk, as the criminal proceeds are preferentially laundered through the purchase of real estate, valuable moveable property, and investment in securities.

Acknowledging the fact that Serbia was the first MONEYVAL country to have conducted a full-scale national risk assessment, MONEYVAL stressed that especially real estate agents do not apply effective measures to counter these risks. MONEYVAL urged the establishment of a clear criminal policy on money laundering investigations and prosecutions, including a centralised database for all the cases and a coordinated strategy.

Additionally, faced with the separatist and/or extremist groups situated in the region, the country also faces an elevated risk of financing of terrorism. Although the authorities have taken measures to address the risk, there have been no convictions for financing of terrorism. This indicates that efforts in the field of fighting the financing of terrorism should be intensified.

➤eucrim ID=1602069

Counterfeiting

The CoE Medicrime Convention

After having been ratified by the requisite five states, the Council of Europe Convention on the counterfeiting of medical

Council of Europe Treaty	State	Date of ratification (r), signature (s) or accession (a)
European Convention on the International Validity of Criminal Judgements (CETS No. 70)	Slovenia	11 April 2016 (r)
Additional Protocol to the European Convention on Extradition (CETS No. 86),	Turkey	11 July 2016 (r)
Convention on the Transfer of Sentenced Persons (CETS No. 112)	Mongolia	7 April 2016 (a)
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 117)	Turkey	2 May 2016 (r)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (CETS No. 167)	Turkey	2 May 2016 (r)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No. 182)	Turkey	11 July 2016 (r)
Convention on Cybercrime (CETS No. 185)	Israel	9 May 2016 (a)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No. 189)	Turkey	19 April 2016 (s)
Protocol amending the European Convention on Suppression of Terrorism (CETS No. 190)	Monaco	4 July 2016 (s)
Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)	Monaco Liechtenstein	25 April 2016 (s) 18 May 2016 (s)
Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)	Czech Republic Turkey	2 May 2016 (s) 2 May 2016 (r)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Turkey	2 May 2016 (r)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Czech Republic	2 May 2016 (r)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Germany Turkey Switzerland	25 May 2016 (r) 11 July 2016 (r) 15 July 2016 (r)
Convention on preventing and combating violence against women and domestic violence (CETS No. 210)	Bulgaria Czech Republic Latvia Romania Albania	21 April 2016 (s) 2 May 2016 (s) 18 May 2016 (s) 23 May 2016 (r) 6 June 2016 (r)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or accession (a)
Convention on the counterfeiting of medical products and similar crimes involving threats to public health (Medicrime Convention) (CETS No. 211)	Albania Armenia	6 June 2016 (r) 5 February 2016 (r)
Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)	Turkey Switzerland	11 July 2016 (r) 15 July 2016 (r)
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213)	FYR Macedonia Croatia Switzerland Denmark	16 June 2016 (r) 12 July 2016 (s) 15 July 2016 (r) 22 July 2016 (r)
Council of Europe Convention against Trafficking in Human Organs (CETS No. 216)	Albania	6 June 2016 (r)
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217)	Denmark Malta Finland Albania	3 May 2016 (s) 4 May 2016 (s) 18 May 2016 (s) 6 June 2016 (r)

➤eucrim ID=1602072

products and similar crimes involving threats to public health (in short: Medicrime Convention) entered into force on 1 January 2016. It is the first binding international instrument in the criminal law field on the counterfeiting of medical products and similar crimes involving threats to public health that have a global relevance. These offences threaten the right to life enshrined in the ECHR and undermine public trust in healthcare systems and authorities' surveillance thereof. Consequently, the Medicrime Convention aims to safeguard public health against criminal behavior, to protect victims and witnesses, and to provide for preventive measures. It obliges state parties to criminalise, *inter alia*:

- The manufacturing of counterfeit medical products;
- Supplying, offering to supply, and trafficking in counterfeit medical products;
- The falsification of documents;
- The unauthorised manufacturing or supplying of medicinal products.
- Furthermore, it foresees the establishment of a monitoring body to oversee the implementation of the Convention by the state parties.

The Medicrime Convention is open to all countries of the world. As of July 2016, the treaty has been ratified by Albania, Armenia, Guinea, Hungary, Moldova, Spain, and Ukraine. Eucrim will regularly provide information on the status of ratifications of the convention.

➤eucrim ID=1602070

Procedural Criminal Law

CCJE/CCPE Report on Judicial Impartiality and Independence

The Bureaus of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) have drafted a joint report entitled "Challenges for judicial independence and impartiality in the member states of the Council of Europe". The report is a reaction to the Secretary General of the CoE who, in his 2015 report "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe",- called upon the CCJE and the CCPE to "urgently draft a comprehensive review of the main challenges for judicial impartiality and independence in member states". By assembling information and reporting incidents on a country-by-country basis, the authors of the report aim to show, where possible, where challenges to independence and impartiality of judges and prosecutors may be found, how they may occur and what their effects on the justice system could be. The report identified challenges in the following areas:

- Appointment of judges and prosecutors free from undue influence;
- Organisational independence of judges and prosecutors as exercised by councils for the judiciary and the administration of courts;
- Independence of prosecutors within the hierarchical structure of prosecution services;
- Infringement of the security of tenure of judges and prosecutors, their status and their independence in their working environment;
- Shortcomings in the effective enforcement of judicial decisions;
- Impartiality of judges and prosecutors;
- Economic basis of the work of judges and prosecutors;
- Public criticism of judges and prosecutors and their decisions, reaching a degree encouraging disobedience and violence against judges and prosecutors;
- Corruption by and of judges and prosecutors and the role of standards of professional conduct.

The report was published together with a document in which the comments of the member states on the report are compiled. (TW)

➤eucrim ID=1602073

Previous Issues of eucrim*

4/2015 | Criminal/Punitive Law Protection of the Financial Sector

- Guest Editorial – Prof. Dr. *Christos Hadjiemmanuil*
- A Heavily Regulated Industry. The Varied Objectives of Financial Regulation – Prof. Dr. *Christos Hadjiemmanuil*
- Criminal Liability of Heads of Business. A Necessary Pillar in the Enforcement of the Protection of the Financial Interests of the EU – *Prof. Dr. Katalin Ligeti*
- Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism. Mapping the Complexity of a New Enforcement Model – *Prof. Dr. Silvia Allegrezza and Olivier Voordeckers*
- The "Europeanization" of Financial Supervision in the Aftermath of the Crisis – *Konstantina Panagiannaki*

3/2015 | European Criminal Law and Human Rights

- Guest Editorial – *Guido Raimondi*
- Judicial Concepts of Trust in Europe's Multi-Level Security Governance – Prof. Dr. *Valsamis Mitsilegas*
- ECHR and the CJEU. Competing, Overlapping, or Supplementary Competences? – *Alexandros-Ioannis Kargopoulos*
- Protection of Fundamental Rights and Criminal Law – *Valeria Scalia*
- Principles of the European Criminal Policy – *Nicoletta Parisi and Prof. Dino Rinoldi*
- Le Principe de Légalité aux Termes de l'Article 7 de la Convention Européenne des Droits de l'Homme – *Andrea Tamietti*
- Council of Europe Convention Against Trafficking of Human Organs – *Oscar Alarcón Jiménez*
- The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism – *Kristian Bartholin*

2/2015 | Judicial Cooperation

- Guest Editorial – *Carlo Chiaromonte*
- Transnational Evidence Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters Prof. Dr. Lorena Bachmaier – Is the EU Ready for Automatic Mutual Recognition … in the Fight Against Crime? – *Jean Albert and Dr. Jean-Baptiste Merlin*
- Information Sharing between OLAF and National Judicial Authorities. The Advantages of a Supranational Structure and the Legislative Limitations Specific to a European Hybrid Body – *Dr. Romana Panait*
- Der Rahmenbeschluss zu Abwesenheitsentscheidungen. Brüsseler EU-Justizkooperation als Fall für Straßburg? – *Thomas Wahl*

1/2015 | Terrorism and Financing of Terrorism

- Guest Editorial – *Věra Jourová*
- The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters – *Nicola Piacente*
- Coping with Unpredictability: the EU and Terrorism – *Sanderijn Duquet and Prof. Dr. Jan Wouters*
- Terrorismusfinanzierung in Griechenland – *Dr. Emmanouil Billis*
- The French "War on Terror" in the post-Charlie Hebdo Era – V*asiliki Chalkiadaki*

4/2014 | EU Criminal Policy

- Guest Editorial – *Francesco de Angelis*
- Better Regulation in European Criminal Law: Assessing the Contribution of the European Parliament – *Wouter van Ballegooij*
- European Perspectives on Rights for Victims of Crime – *Dr. Ioannis N. Androulakis*

3/2014 | Threats to the EU's Internal Market

- Guest Editorial – *Heinz Zourek*
- The New Market Abuse Directive – *Dr. Margherita Cerizza*
- VAT Carousel Fraud in the EU – The Need for Reform in Italy and on a Supranational Level – *Giangaspare Donato Toma*

2/2014 | Judicial Control in the EU

- Guest Editorial – *Prof. Dr. John Vervaele*
- Judicial Control of the Prosecutors' Activities in the Light of the ECHR – *Dr. Celina Nowak*
- Extradition and the European Arrest Warrant in the Netherlands – *mr. dr. Jaap van der Hulst*
- Great Expectations from the Court of Justice – *Dr. Els De Busser*

1/2014 | EU Criminal Policy – Successor to the Stockholm Programme

- Where Should the European Union Go in Developing Its Criminal Policy in the Future? – *Dr. h.c. Hans G. Nilsson*
- EU's Criminal Policy and the Possible Contents of a New Multi-Annual Program – From One City to Another… – *Lorenzo Salazar*
- All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020 – *Prof. Dr. Ester Herlin-Karnell*
- The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings – *Steven Cras*

4/2013 | Protection of Financial Interests of the European Union

- Guest Editorial – *Viviane Reding/Algirdas Šemeta*
- An Overall Analysis of the Proposal for a Regulation on Eurojust – *Prof. Dr. Anne Weyembergh*
- The Dutch Judge of Instruction and the Public Prosecutor in International Judicial Cooperation – *mr. dr. Jaap van der Hulst*
- The Use of Inside Information – *Anna Blachnio-Parzych, Ph.D.*

* For an overview of the previous issues 2006–3/2013 please refer to eucrim 4/2013, pp. 124–126.

The *fil rouge* of this issue is "the cost(s) of non-Europe in the area of freedom, security and justice," i.e., the prejudice suffered by unaware European citizens because they have not (yet) been provided with a true single criminal justice area. The choice of this subject was stimulated by a recent study of the European Parliament indicating that the cost of non-Europe in this field would amount to an economic loss, roughly estimated at far above €200 billion annually in terms of GDP.
In a climate in which Brexit has now additional negative influence, Schengen and the fundamental freedoms granted by the Treaties take a back seat after any terrorist attack or refugee emergency, while the revival of "national" sentiment seems to be considered by many as the only response to the – true or presumed – general atmosphere of insecurity.
Against this background, we have asked a group of eminent contributors (the Luxembourg Minister of Justice, the EU Commissioner for Justice, the President of the LIBE Committee, a defense lawyer, a policy analyst, an academic) to provide their variegated views on the possibility for the Union to provide genuine added value when confronted with phenomena, which, by their very nature, do not take into any account "internal" or "external" borders and therefore cannot be successfully addressed by Member States if done in a dispersed and uncoordinated manner. Such phenomena include migration, the fight against terrorism and transnational organized crime, and protection of the Union's financial interests.
The contributions, though each of them approaches the subject from a different perspective, seem to concur in indicating that, far from being a *per se* objective, "more Europe" is not the problem but the *solution* if we wish to provide more security in the Union without reducing the area of fundamental freedoms. The problem remains of how to pass on this message to the European citizens.

Lorenzo Salazar, Deputy Prosecutor General in Naples, Editorial Board Member of eucrim

A Europe of Costs and Values in the Criminal Justice Area

Claude Moraes

The notion of the "cost of non-Europe" brings us back to 1988, when a report bearing his name was published by Professor *Paolo Cecchini*, who had been asked at the time by the *Delors* Commission to investigate and quantify the untapped potential of the Single Market and to make the economic case for the removal of physical, technical, and fiscal barriers between the, then, twelve Member States of the European Communities.[1]

Now, in 2016, the Internal Market is perceived by citizens and politicians as a done deal, while the European Union is seen as a complex entity of a somehow different nature. Indeed, the Community evolved into the Union – as prescribed by the Member States via the subsequent Treaties[2] – incorporating competences in the field of justice and home affairs and aiming at the creation of an area of freedom, security and justice for EU citizens.

The multiannual programmes of Tampere, The Hague, and Stockholm served as roadmaps to guide the efforts of Member States in moving from an intergovernmental approach to the "community method" (including the role of the European Parliament as a co-legislator) in fields such as police and judicial cooperation, asylum, border control, and the free movement of people. The process has been driven by the firm conviction of the need to find common solutions to common problems and has brought about remarkable achievements.

Nowadays, in the context of global economic and humanitarian crises, many voices are questioning the role and the very existence of the Union. It is therefore time to look back on Professor Cecchini's report and reflect on the cost of non-Europe in the area of freedom, security and justice in order to calculate its economic value – not always an easy task[3] – and the cost to citizens in terms of their fundamental rights and freedoms.

The European Parliament, namely its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), contributes in its day-to-day work to the creation of an area of freedom, security and justice for EU citizens and to the development of EU criminal law. In terms of the fight against organised crime, corruption and terrorism, and the protection of the EU's financial interests, the work of the LIBE Committee is particularly relevant. The following gives an overview of the costs of non-Europe and the values in the various fields of the area of freedom, security and justice, and it highlights the European Parliament's contributions to its creation.

I. Fight against Organised Crime and Corruption

The fight against organised crime and corruption has been a recurrent concern for the European Parliament. In 2012, a Temporary Parliamentary Committee on Organised Crime, Corruption and Money Laundering (known as the CRIM Committee) was created to investigate the misappropriation of public funds, infiltration of the public sector, and the contamination of the legal economy and financial systems that threaten the EU. The Committee completed its work in 2013 and the European Parliament adopted a resolution with a number of policy recommendations[4]. During the 8th Parliamentary term (2014-2019) the LIBE Committee has been following the work of the CRIM Committee on the related issues, in cooperation with the Anti-Mafia Commission in the Italian parliament. In 2015, MEP *Laura Ferrara* (EFDD) was appointed rapporteur to draft a further report on the fight against organised crime and corruption and which would follow up on the CRIM Committee resolution.[5]

During the preparation of the report, the LIBE Committee called upon the European Parliament's research service to commission a study on the cost of non-Europe in the area of organised crime and corruption to the European Added Value Unit in the European Parliament. The conclusions of the study show that losses to the European economy due to corruption range from €179 to €990 billion every year, depending on different scenarios.[6] In the area of organised crime, the economic losses are extremely difficult to quantify but the social harm cannot be denied.

In this regard, it is clear that to tackle corruption, the EU Member States should increase their efforts to implement existing legislation at the international and EU levels, including recommendations from the Council of Europe's anti-corruption monitoring body GRECO (Group of States against Corruption). Membership of the EU itself to GRECO has been put on the table in several parliamentary resolutions. A missing element in EU law, which would further contribute to strengthening the fight against corruption, is the protection of whistleblowers. It is worth noting in this respect that the Council of Ministers of the Council of Europe adopted a Recommendation on this particular issue in 2014.[7]

The Anti-Corruption Report published by the European Commission for the first time in 2014[8] introduced a monitoring mechanism that should be maintained and enhanced. The cross-border nature of organised crime in terms of environmental crime, drug trafficking, counterfeiting, and cybercrime necessitates coordinated action by Member States to face the different threats. In their respective competences, Europol and Eurojust have brought about important progress in joint actions and operations.

The cost of non-Europe in police and judicial cooperation in the EU is directly related to the ability of citizens to fully enjoy their fundamental rights and freedoms in a society free of corruption, where the justice system can be trusted. In this regard, it is worth noting the work currently being carried out in the LIBE Committee by MEP *Sophie in 't Veld* (ALDE) on a legislative own-initiative report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights, which stresses access to justice as an indicator of rule-of-law standards.[9]

II. Fight against Terrorism

It is difficult to justify a "non-European" approach to the fight against terrorism, a multifaceted phenomenon that needs to be tackled at the global level – from local communities to the international community, including action by Member States and the EU itself. Member States should join forces in different policy fields, with an emphasis on prevention. While crim-

inal justice is only part of what should be a comprehensive approach, the EU needs a solid criminal justice response to terrorism, covering investigation and prosecution of those who plan terrorist acts or are suspected of recruitment, training, and financing of terrorism as well as incitement to commit a terrorist offence. In July 2016, the LIBE Committee adopted its mandate to start negotiations with the Council on the proposal for a Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA.[10]

III. Money Laundering

Money laundering is closely related to organised crime and terrorism and has become an increasingly sophisticated activity. As with many other forms of criminality, technology has turned the cross-border element into an advantage for the perpetrators. The EU has a solid legal framework for tackling money laundering: Directive (EU) 2015/849 "on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing" (the fourth anti-money laundering directive) was adopted in May 2015 with the involvement of the Committee on Economic Affairs and the LIBE Committee. In July 2016, before the entry into force of the Directive, the European Commission proposed that some amendments on the following be taken:

- Enhanced due diligence measures regarding high-risk third countries;
- Virtual currency exchange platforms;
- Prepaid instruments.

The proposed amendments aim at enhancing the powers of EU Financial Intelligence Units (FIUs) and facilitating their cooperation.[11]

IV. Protection of the Union's Financial Interests

If there is an area where "non-Europe" should be ruled out, it is that of the protection of the financial interests of the Union. Fraud and related illegal activities pose a serious problem to the detriment of the Union budget and therefore of taxpayers, who are urgently calling on the European institutions to ensure that public money is devoted to structural growth, fiscal consolidation, and job creation. When it comes to fraud to the Union's budget, the differences between the Member States' legal systems and levels of sanctions is a matter of concern. The *acquis communautaire* in the field of fight against fraud has been insufficiently implemented by the Member States and this fragmented legal framework may create incentives for *forum shopping*. The Union and the Member States should be united in their response to fraud and any other illegal activities affecting the financial interests of the Union via deterrent measures and, in this way, provide effective and equivalent protection throughout the EU. In 2012, the European Commission presented a proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law (known as the PIF Directive) in order to approximate the definition of offences against the EU budget and the level of sanctions applied. The negotiations between the European Parliament and the Council have not been easy, as is usually the case with criminal law instruments and, in this particular case, a disagreement about the inclusion of VAT-related fraud in the scope of the Directive has kept the proposal on hold since June 2015.[12]

The adoption of the PIF Directive is the *sine qua non* for the creation of a European Public Prosecutor's Office (EPPO) with the power to investigate, prosecute, and bring to judgment the perpetrators of the criminal offences affecting the financial interests of the Union and thus protecting the EU budget. The establishment of the EPPO represents an ambitious step and a revolution in terms of judicial cooperation in the development of the European area of freedom, security and justice.

The EPPO proposal was submitted by the Commission in 2013. It has undergone fierce criticism, prompted a "yellow card" from national parliaments, and has had to justify its European added value in every step of the procedure. While negotiations in the Council continue, the European Parliament has repeatedly encouraged Member States to proceed with their efforts and to keep it fully involved and informed. In its two resolutions of March 2014 and April 2015, the Parliament called for a fully independent and efficient EPPO, ensuring a high level of protection of the rights of defence and providing for a clear division of competence between the EPPO and national authorities. Once the Council reaches a final agreement, it will be for the Parliament to give or to refuse its consent to the new EPPO.[13]

V. A Way Forward in Procedural Rights

With agreement on the proposal for a Directive on the right to legal aid, the 2009 procedural rights roadmap is now complete, providing solid and harmonised protection for suspects and accused persons in criminal proceedings and persons subject to an EAW – irrespective of the Member State in which they are caught. It is now time to look at the existing gaps in legislation, propose other legal measures that could bring real added value to the area of freedom, security and justice, and to improve the mutual trust between Member States. The latter is particularly difficult in a time that is characterised by severe terrorist attacks in the EU. In addition, a frank discussion on the situation of prisons and prison conditions throughout the EU is needed.

VI. Conclusion

In the current political climate, the need to reflect on the cost of non-Europe in the area of freedom, security and justice is more important than ever. Given the obvious costs involved, the LIBE Committee pledges to continue its work to ensure the development of EU criminal law, to strengthen cooperation in the EU's fight against organised crime, corruption and terrorism, to protect the EU's financial interests, and to create an area of freedom security and justice for each and every European citizen.

We will continue carry out this role via key ongoing legislation which will help to tackle organised crime and corruption, establish a solid criminal justice response to terrorism, covering investigation and prosecution of those who plan terrorist acts, prevent money laundering and fraud in order to protect the financial interests of the Union, and pursue further measures to demonstrate the added value of the area of freedom, security and justice in the EU.

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1 Cf. P. Cecchini, M. Catinat, A. Jacquemin, *The European challenge: 1992: the benefits of a single market*, Aldershot 1988.
2 For an overview, cf: http://europa.eu/eu-law/decision-making/treaties/index_en.htm.
3 See also the article by W. van Ballegoij in this issue.
4 European Parliament resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0444+0+DOC+PDF+V0//EN.
5 Report on the fight against corruption and follow-up of the CRIM resolution http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/2110%28INI%29&l=en.
6 Cf. eucrim 1/2016, p. 10.
7 Recommendation CM/Rec(2014)7 on the protection of whistleblowers.
8 COM(2014) 38 final.
9 Report on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/2254%28INL%29&l=en.
10 For the proposal and the legislative procedure, see: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/0281%28COD%29&l=en.
11 COM(2016) 450 final of 5.7.2016. See also the news section on "European Union – Money Laundering" in this issue.
12 For the state of play, cf.: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0193%28COD%29&l=en.
13 See: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0255%28APP%29&l=en.

Measuring the Added Value of EU Criminal Law

Dr. Wouter van Ballegooij*

As part of its efforts to ensure better law-making at the EU level, together with the other EU institutions, the European Parliament is paying increasing attention to the added value of European action ("European added value") as well as the costs of not taking action at the EU level ("cost of non-Europe").

This article looks at the questions of how and to what extent these concepts can be applied to the area of EU criminal law. It will do so based on an assessment of two studies produced by the European Parliament's Directorate for Impact Assessment and European Added Value:

- a European added value assessment accompanying a legislative initiative report on the reform of the European Arrest Warrant;[1]
- a cost of non-Europe report on organised crime and corruption,[2] supporting an own-initiative report on the matter.[3]

The article concludes by identifying a number of challenges and limitations to measuring the added value of EU criminal law.

I. Better Law-Making

In the context of its agenda on better law-making,[4] the EU aims at ensuring that EU policy is prepared, implemented, and reviewed in an open, transparent manner, supported by the best available evidence, and backed up by involving stakeholders.[5] In this context, impact assessments prepared by the European Commission collect evidence to assess whether future legisla-

tive or non-legislative EU action is justified. An impact assessment must identify and describe the problem to be tackled, establish objectives, formulate policy options, and assess the impacts of these options. The Commission's impact assessment system follows an integrated approach that assesses the environmental, social, economic, and fundamental rights impacts of the options identified in accordance with the Better Regulation Guidelines and an accompanying "Toolbox."[6] All relevant impacts should be assessed quantitatively, if possible, as well as qualitatively. Similarly, impacts should be expressed in terms of money whenever possible.[7] The European Parliament also contributes to the quality of EU law-making, *inter alia* through its Directorate for Impact Assessment and European Added Value, which is part of its Directorate General for European Parliamentary Research Services. This directorate provides *ex-ante* and *ex-post* impact assessment support to parliamentary committees, together with assessments of the added value of future or current EU policies. This includes the option of providing complementary or substitute impact assessments to those prepared by the European Commission.[8]

II. European Added Value and the Cost of Non-Europe

In their latest interinstitutional agreement on better law-making adopted in March 2016,[9] the European Commission, the European Parliament, and the Council of the European Union agreed that analysis of the potential "European added value" of any proposed Union action, as well as an assessment of the "cost of non-Europe" in the absence of action at Union level, should be fully taken into account when setting the legislative agenda.[10] This includes the situation in which the Commission decides not to submit a proposal in response to a request based on a legislative initiative[11] put forward by the European Parliament.[12]

The cost of non-Europe and European added value are two mirror concepts. The first one focuses on assessing the cost of non-action at the EU level; the second one concentrates on the benefits of action at EU level. The European added value concept originates from discussions on the added value of EU spending,[13] whereas the cost of non-Europe concept derives from the 1988 Cecchini report on the cost of non-Europe in the single market, defined as the untapped potential of the single market due to its incomplete implementation.[14]

Benefits of action at the EU level could, for instance, be financial (cost savings due to efficiency gains), legal (more legal certainty, coherence), social (reduction in inequality), or political (enhanced mutual trust, effectiveness in achieving the policy aims of the Union in the area concerned). The cost of non-Europe and European added value concepts are linked to the requirements of subsidiarity and proportionality laid down in Art. 5 TEU and the relevant protocol, particularly in assessing whether the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e., necessity) and whether the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e., added value).[15]

III. Measuring the Added Value of EU Criminal Law

The EU aims at developing into an area of freedom, security and justice, combining rules on the free movement of persons with measures related to the prevention and combating of crime. This includes minimum rules regarding the definition of criminal offences for particularly serious "Euro crimes" and for ensuring the effectiveness of a harmonised EU policy area, such as environmental policy, the facilitation of judicial cooperation, the adoption of minimum standards for procedural rights, and the protection of the Union's financial interests. However, the principles of subsidiarity and proportionality remain particularly relevant in the area of EU criminal law,[16] given the need to take into account the differences between the legal traditions and criminal justice systems of the Member States, as underlined in the relevant legal bases provided for by the TFEU.[17] Another important consideration for this policy area concerns the need for law enforcement measures to comply with fundamental rights in accordance with Art. 6 TEU and the EU Charter of Fundamental Rights.[18]

Since 2009, each of the three EU institutions has taken a position regarding EU criminal policy: the Council adopted conclusions containing model provisions guiding Council deliberations on criminal law,[19] the Commission adopted a communication on EU criminal policy,[20] and the European Parliament adopted a resolution entitled "An EU approach to criminal law."[21] All EU institutions have outlined ideas to ensure that the necessity for EU criminal law is demonstrated based on factual evidence.[22] However, the Commission's communication also addresses the benefits of action at the EU level from a policy perspective, notably strengthening the confidence of citizens in exercising their free movement rights, enhancing mutual trust among judiciaries and law enforcement, ensuring effective enforcement of EU law in areas such as the protection of the environment or illegal employment, and ensuring a consistent and coherent system of legislation.[23] The European Parliament's resolution also led to the establishment of an informal contact group of representatives of the European Parliament, the Council, and the Commission, the so-called "Criminal Law Contact Group" (CLCG). The group aims to discuss the quality and consistency of legislation in the field of EU criminal law, including the topics of subsidiarity, proportionality, and EU added value.[24] The idea of the three EU institutions exchanging information on best

practice and methodologies relating to impact assessments is also covered by the aforementioned 2016 interinstitutional agreement on better law-making.[25] Measuring the added value of EU criminal law entails a number of challenges and limitations. These challenges and limitations will be identified in the following on the basis of the two studies mentioned in the introductory remark.

1. The European added value of reforming the European Arrest Warrant

The European Parliament's legislative own-initiative report on the revision of the European Arrest Warrant and the accompanying European Added Value Assessment (EAVA) focused on the benefits of addressing deficiencies in the operation of surrender procedures based on the European Arrest Warrant, notably the lack of safeguards preventing its disproportionate use and ensuring the protection of the fundamental rights of requested persons. The EAVA concluded that the weaknesses of the existing European Arrest Warrant regime not only undermine the credibility of the process but are also costly for the individuals concerned, for their families, and for the taxpayer in general. Between 2005 and 2009, almost 75% of incoming EAWs (43,059) were not executed. The EAVA estimated the costs of these inefficiencies to be approximately €215 million for the EU as a whole.[26] The European Parliament called for amendments to the Framework Decision or horizontal EU legislation and non-legislative measures. The added value of these measures was expressed both in quantitative terms (cost savings for Member States) and qualitative terms (more coherence, legal certainty, and mutual trust based on respect for fundamental rights).[27]

The European Commission responded[28] that proposing legislative change would be premature in the light of the increased enforcement power of the Commission since December 2014. It also referred to the development of other mutual recognition instruments "that both complement the European arrest warrant system and in some instances provide useful and less intrusive alternatives to the European arrest warrant;" and the ongoing work "to further improve this context by ensuring respect for fundamental rights by providing common minimum standards of procedural rights for suspects and accused persons across the European Union."[29]

In its judgment of 5 April 2016 (Joined Cases *Aranyosi & Căldăraru*), the Court of Justice has now partially addressed the fundamental rights and proportionality deficiencies by interpreting Art. 1 para. 3 of the Framework Decision on the European Arrest Warrant in a manner that ultimately allows the surrender procedure to be brought to an end if there is a real risk of inhuman or degrading treatment.[30] This judgement, however, leaves many questions open as regards the mandate of the executing judicial authority when dealing with violations of the right to liberty, fair trial, family life, and free movement. From the perspective of legal certainty, legislative intervention therefore remains the preferred option.

2. The cost of non-Europe in the fight against organised crime and corruption

The Cost of Non-Europe Report on Organised Crime and Corruption sought to identify the costs of organised crime and corruption in social, political, and economic terms at the European Union level and examined the potential benefits of more concerted action at the EU level compared to the lack of action or action by Member States alone.

Based on the research conducted, the report concludes, however, that establishing the "cost of non-Europe" in this area is difficult given the lack of clarity related to the concepts of "serious"[31] and "organised" crime[32] as well as "corruption."[33] Furthermore, information on crime and corruption is uneven across the Member States. And when it is available, it is often not coherent and comparable. Criminal justice statistics may also be interpreted in different ways, depending on the perspective taken and whose "costs" are measured (law enforcement, victim, suspect, society as a whole, etc.). This is of particular importance given the close relationship this area has with the protection of individual rights.[34]

Given the limitations described above, the report provides scenarios showing the extent of organised crime and corruption in the European Union as well as the potential benefits of decreasing their impact. Based on the research conducted by RAND, the report estimates the economic loss to the European economy in terms of GDP due to corruption to be between €218 and €282 billion annually. The study also builds on existing estimates of the size of illicit markets representing a value of approx. €110 billion.[35] As combatting organised crime and corruption is a shared competence between the EU and its Member States, the report estimates the potential that could be achieved by the EU and its Member States acting together at €71 billion annually. This could be done above all by improvements in monitoring mechanisms (possibly integrating them into a broader rule-of-law monitoring framework), digitalisation of procurement procedures (reducing the risk of corruption), and the expected increase in prosecution and conviction rates (due to the establishment of a European Public Prosecutor's Office).[36] It is clear, however, that the benefits of more concerted action at the EU level can only be clearly assessed based on the ultimate shape of the policy options mentioned. Their impact will have to be further evaluated both *ex ante* and *ex post*.[37]

IV. Challenges and Limitations to Measuring the Added Value of EU Criminal Law

The concepts of the cost of non-Europe and European added value can be, and have been, applied to the area of EU criminal law. However, the various positions adopted by EU institutions as regards the development of EU criminal policy and the two case studies on the European Arrest Warrant and organised crime/corruption also point to challenges and make apparent the limits of quantifying the costs and benefits of EU intervention in an area mostly guided by qualitative considerations.

EU criminal law contributes to the development of the Union as an area of freedom, security and justice. As the case study on the European Arrest Warrant shows, ensuring compliance with the Union's fundamental rights obligations remains a challenge. The currently predominant focus on effectiveness from a law enforcement perspective overlooks the wider aims of the Union. The case study on organised crime and corruption further illustrates the need to overcome the lack in comparable data and clear definitions of serious and organised crime at the operational level. Without them, a proper assessment of the need for and impact of EU criminal law is not possible.

These challenges should be addressed through a proper inter-institutional discussion, including discourse within the context of the Criminal Law Contact Group. Agreement needs to be found on data collection needs, the development of quantitative and qualitative criteria to determine the added value of EU criminal law, as well as the joint commitment to measure the impact of specific proposals on fundamental rights.

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1 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174; M. del Monte, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative-own-initiative report (rapporteur: Baroness Ludford MEP)*, PE 510.979; Annex I, A. Weyembergh with the assistance of I. Armada and C. Brière, *Critical Assessment of the Existing European Arrest Warrant Framework Decision*; Annex II A. Doobay, *Assessing the Need for Intervention at EU level to Revise the European Arrest Warrant Framework Decision*.

2 W. van Ballegooij and T. Zandstra, *Organised Crime and Corruption, Cost of non-Europe Report,* European Parliamentary Research Service, PE 558.779; Annex I, Centre for European Policy Studies (CEPS), *The Cost of Non-Europe in the Area of Organised Crime*; Annex II, RAND Europe, *The Cost of Non-Europe in the Area of Corruption*; Annex III, F. Varese, Briefing paper providing an overall assessment of organised crime and corruption. See also eucrim 1/2016, p. 10.

3 Fight against corruption and follow-up of the CRIM committee resolution, 2015/2110 (INI).

4 For background information, see the Commission website on better regulation: http://ec.europa.eu/smart-regulation/index_en.htm . See also A. Renda, "Too good to be true, A quick assessment of the European Commission's new Better Regulation Package", CEPS special report, No. 108, May 2015, available at https://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf.

5 Commission Staff Working Document, Better Regulation Guidelines, SWD (2015) 111of 19.05.2015.

6 Better Regulation "Toolbox", available at http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf .

7 European Commission, Guidelines on Impact Assessment, section 2.5.3, available at http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm

8 European Parliament, Conference of Committee Chairs, Impact Assessment Handbook, available at http://www.europarl.europa.eu/EPRS/impact_assesement_handbook_en.pdf , paragraph 13-15.

9 Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission, available at: http://ec.europa.eu/info/files/inter-institutional-agreement-better-law-making_en.

10 Interinstitutional Agreement on Better Law-Making, *op. cit.* (n. 9), recital 5.

11 Art. 225 TFEU: "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons."

12 Interinstitutional Agreement on Better Law-Making, *op. cit.* (n. 9), paragraph 10.

13 Commission Staff Working Paper, "The added value of the EU budget", SEC(2011) 867 of 29.6.2011, p. 2: "European added value is the value resulting from an EU intervention which is additional to the value that would have been otherwise created by Member State action alone." For an example see Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No. 1291/2013 and (EU) No. 1316/2013 – the European Fund for Strategic Investments, O.J. L 169, 1.7.2015, pp. 1–38, Art. 16.

14 For a summary, see European Commission, Europe 1992, the overall challenge, SEC(88) 524 of 13.4.1988, available at http://penguincompaniontoeu.com/wp-content/uploads/2012/10/Cecchini-Report-Summary-April-1988.pdf.

15 Art. 5 TFEU; Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, O.J. C 326, 26.10.2012, pp. 47–390; The Commission elaborated the concept of European added value in a number of specific questions mentioned in its Better Regulation "Toolbox #3", available at http://ec.europa.eu/smart-regulation/guidelines/tool_3_en.htm.

16 For a more general reflection on the application of the principles of subsidiarity and proportionality in the area of EU criminal law, see E. Herlin Karnell, *The constitutional dimension of European Criminal Law*, Oxford 2012, chapter 4 section IV; P. de Hert and I. Wieczorek, "Testing the principle of subsidiarity in EU criminal policy, The Omitted Exercise in Recent EU Documents on Principles for Substantive European Criminal Law", *New Journal of European Criminal Law*, 3 (2012), pp. 394-411.

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18 O.J. C 115 of 9 May 2008, p. 1. For a commentary on the EU Charter, see

S. Peers, T. Hervey, J. Kenner, A.Ward (eds.), *The EU Charter of Fundamental Rights*, Oxford et al., 2014.
19 "Model provisions guiding Council's criminal law deliberations", Council doc. 16798/09.
20 "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", COM (2011) 573.
21 European Parliament resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208; Commented by A. Klip, *European Criminal Law, An integrative approach,* 3rd edition, Cambridge-Antwerp-Portland, 2016, pp. 241-243.
22 As compared in the Annex to Council Doc. 10137/15 of 24 June 2015; '"Meeting of the Criminal Law Contact Group on 12 May 2015 – Information by the Presidency"'.
23 COM (2011) 573, p. 5.
24 "Meeting of the Criminal Law Contact Group on 12 May 2015 – Information by the Presidency", Council Doc. 10137/15 of 24 June 2015.
25 Interinstitutional Agreement on Better Law-Making, *op. cit.* (n. 9),, paragraph 17
26 M. del Monte, *op. cit.* (n. 1), p. 30.
27 M. del Monte, *op. cit.* (n. 1), p. 32.
28 Commission response, SP(2014)447, available at: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/2109%28INL%29&l=en#tab-0. The position of the Commission was confirmed by Justice Commissioner Věra Jourová during her nomination hearing procedure by the European Parliament in October 2014, see p. 5, 6: http://www.europarl.europa.eu/hearings-2014/resources/library/media/20141021RES75568/20141021RES75568.pdf .
29 Commission response, *op. cit.* (n. 28). For comments, see W. van Ballegooij; *The nature of mutual recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Cambridge-Antwerp-Portland, 2015, Chapter 3, section 5.3.1.
30 CJEU, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru*, 5 April 2016, not yet published.
31 Cf. CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* and *Seitlinger and others*, 8 April 2014, ECR [2014] 238, para. 60: "Secondly, not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law". See also P. de Hert and I. Wieczorek, *op. cit.* (n. 16), p. 406.
32 CEPS, *op. cit.* (n. 2), section 2.2.
33 RAND Europe, *op. cit.* (n. 2), section 1.4.
34 CEPS, *op. cit.* (n. 2), sections 1.1.4. and 1.2.4.; P. Bárd, "The benefits of the EU from a criminal law perspective", *Social Security Network/ CEPS blogpost*, 2016, available at http://societalsecurity.net/blog/ceps-blog-post-benefits-eu-criminal-law-perspective-0.
35 E.U. Savona and M. Riccardi (eds.), *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*. Final Report of Project OCP, 2015, available at: http://www.ocportfolio.eu/_File%20originali/OCP%20Full%20Report.pdf.
36 W. van Ballegooij and T. Zandstra, *op. cit.* (n. 2), p. 24-27.
37 A. Davies, *Initial appraisal of a Commission Impact Assessment. European Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office*, Ex-Ante Impact Assessment Unit, European Parliament, PE 514.087, December 2013; W. van Ballegooij and T. Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, *Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld)*, European Added Value Unit, European Parliament, PE.579.328, April 2016. For an example of an *ex-post* impact assessment, see A. Scherrer and H. Werner, *Trafficking in Human Beings from a Gender Perspective (Directive 2011/36/EU): European Implementation Assessment*, Ex-Post Impact Assessment Unit, European Parliament, PE 581.412, April 2016.

The Cost(s) of Non-Europe in the Area of Freedom, Security and Justice

The European Public Prosecutor's Office as a Guardian of the European Taxpayers' Money

Věra Jourová

I. Introduction

After many years of reflection and preparation, negotiations on the European Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office (hereinafter EPPO)[1] commenced three years ago.[2] The proposal is well known to readers of the eucrim journal. During the course of negotiations in the Council of the European Union, the proposal has evolved substantially and in a number of ways, now envisaging a collegiate structure, shared competences between the EPPO and national authorities, and wide autonomy on the part of the European Delegated Prosecutors handling the cases, accompanied by supervisory powers vested in the European Prosecutors at the central level.[3]

Despite the various changes made during the Council negotiations, the core objective of the EPPO remains unchanged: to set up a single European prosecution office, equipped with full investigatory and prosecutorial powers, to fight crimes affecting the financial interests of the Union[4] in an efficient and coherent manner.

After three years of negotiations – and almost 40 years after the idea of a "European judicial space" had been formulated by the then President of France, Valerie Giscard d'Estaing[5] – it may be that, finally, at the end of this year, an agreement will be reached on the EPPO's foundation. This requires clarity on what is at stake and the objective it should achieve.

II. Which Costs Are at Stake?

In the same way that Member States provide for comprehensive measures and legal provisions to protect their national budgets, including through criminal law, the European Union is determined to ensure, in the same way, an effective and uniform protection of its budget. This cannot be limited to administrative or civil law only, as fraud must also be deterred and sanctioned by means of criminal law. The duty to protect the Union's financial interests follows directly from the Treaty and concerns both the Union and the Member States equally (Art. 325 TFEU).

III. What Do We Need to Protect?

The EU budget for the year 2016 foresees a total of €288 billion[6] with revenues and expenditure included. On the revenue side, the total revenues amount to more than €144 billion[7] and include Member States' contributions, which account for more than 85% of the revenues,[8] as well as the Union's traditional own resources resulting from, e.g., customs duties on imports from outside the EU or sugar levies.[9] On the expenditure side, the total attributions of Union expenditures correspond to the amount of revenues, i.e., €144 billion,[10] earmarking the largest amount for "smart and inclusive growth" and "sustainable growth: natural resources," accounting for 45% and 38% of the expenditures respectively.[11] A large part thereof is disbursed by way of subsidies or grants to beneficiaries, in the majority of cases indirectly, i.e., through the involvement of national or local authorities in the Member States managing the funds.

In view of the amounts described, one may assume that there is a serious risk that crimes such as fraud, corruption, money laundering, or VAT carousel fraud affect the financial interests of the Union, both on the revenue side as well as on the expenditure side. The question, of course, is what does that damage amount to? This depends on the method of calculation.

In 2015, the EU Anti-Fraud Office (OLAF) recommended a total of €888 million for financial recovery as a result of fraudulent irregularities,[12] although it remains unknown how much has ultimately been recovered. The amounts presented by OLAF have at times been referred to as constituting "only a glimpse"[13] of the real scope of EU fraud. According to the preparatory study for the Commission's Impact Assessment for the EPPO, VAT fraud and cigarette smuggling are each estimated to cost the EU budget some €1 billion per year. On the spending side, a "low-risk" assumption comes to more than €4 billion each year, although, as the study admits, it is not possible to calculate the exact damage with certainty.[14]

However, VAT fraud appears in a different league altogether. Given the sheer extent of the total VAT revenues of the EU-28 (almost €1000 billion),[15] the impact of VAT fraud on national budgets, and hence the EU, is grossly underestimated, even if there is growing awareness that it results in an illegal diminution of the resources available to the EU budget and thus falls under the scope of the PIF Convention, as recognised by the Court of Justice.[16]

While reliable figures on the magnitude of VAT fraud in the EU are scarce, several studies suggest that the amounts involved range from €20 billion[17] to €100 billion[18] per year. A recent study estimates that cross-border VAT fraud alone accounts for €50 billion in loss of revenue each year.[19] Another approach to the magnitude of VAT fraud is to look at the VAT Gap. The VAT Gap is defined as the difference between the theoretical VAT liability and the collections of VAT, in any country and in any year (in absolute or percentage terms). [20] The most recent study on the VAT Gap, published in May 2015,[21] states that the overall VAT Gap in the EU-26[22] reached €168 billion (which is an increase of €2.8 billion in absolute terms, but constant at 15.2% compared with the previous year). The VAT Gap does not constitute VAT fraud alone, as it provides an estimate of revenue loss due to fraud and evasion, tax avoidance, bankruptcies, financial insolvencies as well as miscalculations; it may nonetheless be considered an indicator of the overall effectiveness of VAT enforcement and compliance measures. Moreover, VAT fraud undermines the functioning of the internal market and prevents fair competition, which may also have a considerable adverse financial impact. Lastly, crimes affecting the financial interests of the Union, including VAT fraud, also tend to attract structures of organised crime, as illustrated in the European Parliament Study on the Economic, Financial & Social Impacts of Organised Crime in the EU in 2013.[23]

It follows from the above that crimes affecting the financial interests of the Union are likely to cause damage that is significantly higher than the figures OLAF suggest. Further, the damage to national budgets resulting from VAT fraud seems significant. Overall, the damage caused each year is in the range of several billions or, more likely, in the tens of

billions of Euros. This loss is ultimately to the detriment of the European taxpayer.

IV. Why Is Our Current System of Fighting Union Fraud Not Good Enough?

Although the EU developed various instruments in the area of criminal law over the past 20 years that may be conducive to fighting crimes affecting the Union's financial interests – particularly with the creation of Europol,[24] Eurojust,[25] and the Anti-Fraud Office (OLAF)[26] – none of the Union bodies mentioned has been granted any criminal investigation and prosecution powers that would enable them to effectively fight crimes affecting the Union's financial interests. This had not been contemplated until the idea of EPPO emerged.

While Europol primarily collects, processes, and exchanges information and coordinates the investigative action of the Member States' police authorities,[27] Eurojust – Europol's judicial sister – supports coordination and cooperation between national investigating and prosecuting authorities and contributes to strengthening judicial cooperation.[28] Neither of them can by itself undertake, or compel national authorities to undertake, criminal investigations. While OLAF may conduct administrative investigations, which has led to some considerable successes,[29] its powers cannot in any way be compared with the full investigatory or prosecutorial powers of a police service or a public prosecution office. In addition, OLAF's recommendations on the follow-up of a case do not bind the Member States' authorities.[30]

This means that, to date, the protection of the Union's financial interests is primarily left in the hands of competent national authorities in the Member States. In view of the likely significant scope of crimes affecting the financial interests of the Union, as described above, there seems to be a stark discrepancy between the cases reported by Member States and the scale of the problem. Despite the obligations under Art. 325 TFEU to protect the Union's financial interests, objective and clear statistical information demonstrates that the Treaty objective of an effective, deterrent, and equivalent level of protection is not achieved in general across the Union.[31] Overall, national criminal proceedings seem neither effective nor equivalent, and the degree of successful prosecution varies from Member State to Member State. In the period between 2006 and 2011, conviction rates concerning cases transferred by OLAF to Member States' judicial authorities ranged from 19.2% to 91.7%,[32] while the indictment rate varied from 17% to 75% for the period between 2007 and 2014 (not including Member States with rates of 0% and 100%).[33]

In view of the aforesaid, it is not surprising that the creation of the EPPO has been on the European agenda for more than 20 years.[34]

V. Our Need for a Novel European Approach to Fighting Crimes Affecting the Financial Interests of the Union

The Commission has been advocating the establishment of a European Public Prosecutor's Office since 2000, but its proposal to create a treaty basis was rejected in the context of the Intergovernmental Conference of Nice. Its proposal of July 2013, using the legal basis ultimately created by Art. 86 TFEU, underwent several significant changes during the negotiations in the Council (and the negotiations are not yet fully finished); it will therefore be crucial to thoroughly scrutinise the text upon its completion. However, the EPPO's core features, as foreseen in the Commission proposal, remain. In contrast to the rather fragmented approach currently in place, the EPPO will be conceived as a European prosecutorial body, equipped with full investigatory and prosecutorial powers and operating as a single office across all participating Member States. It will have the power to start criminal investigations and to prosecute fraudsters. This is what distinguishes it from national authorities and the EU bodies OLAF and Eurojust. With the EPPO in place, the current duplication of work between OLAF and national authorities will also be avoided.

The EPPO follows an integrated approach, whereby European Prosecutors at the central level and European Delegated Prosecutors located in all participating Member States are to work hand in hand with national law enforcement authorities. It will fill the gap that currently exists between national criminal authorities whose competences stop at national borders and Union bodies that do not have the power to conduct criminal investigations. The EPPO will ensure that European and national law enforcement efforts are combined in a unified, seamless, and efficient manner.

The Office will be fully independent in conducting its work and will place its focus entirely on the fight against crimes affecting the financial interests of the Union – its activities will stem from a unified prosecution policy across the participating Member States when it comes to Union fraud.

As a single office operating across the EU, the EPPO will be best placed to recognise the full dimensions of criminal conduct, beyond national borders. This may lead to a better detection rate, not only but in particular as regards cross-border cases. Being one single office will also allow for the pooling of expertise and experience in tackling complex and lengthy

financial crimes, in particular VAT carousel fraud. This may, in turn, lead to a far higher quality of the investigations and prosecutions and hence greater effectiveness.

On the basis of the current text, the EPPO will also benefit from a common toolbox of investigation measures, which will complement the instruments available under national law. In particular, in cross-border situations, the EPPO will not need to revert to instruments of mutual legal assistance and mutual recognition but will operate as a single office across all participating Member States.

The strong investigation powers of the EPPO are balanced with robust safeguards to guarantee the rights of the persons involved in the EPPO's investigations, which are laid down in national law and Union law, including the Charter of Fundamental Rights. Finally, the EPPO will be subject to comprehensive judicial review, primarily by the national courts but also the Court of Justice of the European Union, e.g., through preliminary rulings pursuant to Art. 267 TFEU.

To draw a preliminary summary: The EPPO will ensure a consistent and efficient protection of the EU budget throughout the Union. It is anticipated that this will increase conviction and recovery rates and counter the weak deterrent effect of the current fragmented and at times porous system. The EPPO will thus facilitate the recovery of the estimated enormous damage of several billion or tens of billions of Euros – provided that the features, described above, remain safeguarded in the text of the Regulation.

What is the way forward? Following the Justice Council in June 2016, there is now political endorsement for the entire text of the regulation.[35] Further amendment to the text will surely be necessary in order to obtain the European Parliament's consent. The Parliament has consistently underlined the need for a stronger protection of the Union's financial interests and supports the creation of a strong, independent, and efficient EPPO. In its two Interim Reports[36] on the EPPO, the Parliament particularly stressed the need for a clear division of competences between the EPPO and national authorities as well as a clear "priority competence" for the EPPO: the EPPO must become competent for crimes affecting the financial interests of the Union, particularly also for VAT fraud – which has recently also been highlighted by the European Court of Auditors.[37] Organisationally, the Parliament underlined the need for an equal distribution of workload within the Office – the EPPO must resist the temptation of a "prosecution along national lines", not only for efficiency reasons. The Parliament also, quite rightly, reiterated the need to enhance the procedural rights of suspects and other persons involved in the EPPO's proceedings, including provision of the necessary legal aid in EPPO proceedings. The Parliament also reiterated that a comprehensive level of judicial review is a *conditio sine qua non* for the EPPO. I expect that the Slovak Presidency will consolidate the text of the Regulation and reach agreement on it by the end of this year.

VI. Conclusion

We are at a crucial phase now in the negotiations on the EPPO. The consolidation of the text of the Regulation by the end of the year will determine the fate and success of the EPPO.

For the EPPO to become the guardian of European taxpayers' money, the EU legislator needs to ensure that the EPPO becomes a strong, independent, and efficient prosecution office with the features laid out in the Commission's proposal and as described above.

The EU legislator must particularly ensure that the EPPO's material competence is safeguarded. The EPPO must become competent for the crimes for which it is being set up: crimes affecting the financial interests of the Union. Diminishing the EPPO's material competence over these crimes will not only counter the very rationale of establishing the EPPO but will also lead to parallel investigations, potential disputes over competences, and eventually gaps in the protection of the financial interests of the Union. In the same vein, crimes affecting the financial interests of the Union must include VAT fraud – at least the most serious forms of VAT fraud, such as VAT carousel fraud in all its forms, as well as VAT fraud committed by criminal organisations. This requires swift agreement on the Directive on the fight against fraud affecting the Union's financial interests by means of criminal law, since the Directive, which has been in the legislative procedure since 2012, is inextricably linked with the EPPO – the EPPO will derive its material competence from that Directive.

The costs of non-Europe – the failure to establish the EPPO – in this important area of freedom, security and justice would be directly to the detriment of the Union, the Member States, and European taxpayers. The EPPO will be, and must be, a leap forward in the protection of the Union's financial interests. But the EPPO is more than that. The foundation of a unified Europe is built on common values, such as securing lasting peace, justice, equality, freedom, and security as well as solidarity. The EPPO will also be about bringing justice to Europe and about solidarity – sharing the advantages (such as prosperity, growth, and development) and the burdens equally and justly among all its Members.

We cannot afford the costs of non-Europe!

Věra Jourová
Commissioner for Justice, Consumers and Gender Equality

1 Proposal of 17 July 2013, COM(2013) 534 final.
2 On the initial proposal in general, cf. V. Alexandrova, "Presentation of the Commission's Proposal on the Establishment of the European Public Prosecutor's Office", in: L.H. Erkelens et al. (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, The Hague 2015), pp. 11 et. seq.
3 Cf. the text of the Luxembourg Presidency of 22 December 2015 (Council doc. 15100/15).
4 Cf. the Convention on the protection of the European Communities' financial interests (95/C 316/03) and the Commission proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.
5 Cf. an extract of his speech at: http://www.cvce.eu/content/publication/2005/9/19/c7f7171f-f73a-4ab4-829e-faa221acaeca/publishable_fr.pdf.
6 Definitive adoption (EU, Euratom) 2016/150 of the European Union's general budget for the financial year 2016, O.J. L 48, 24.2.2016, 1.
7 Ibid.
8 Ibid. Resulting from value added tax-based contributions and contributions on the basis of Member States' gross national income. For the year 2016, the foreseen VAT-based own resources will amount to more than €18 billion, while the Gross National Income-based own resources amount to almost €105 billion.
9 Ibid. Traditional own resources accounted for approx. 13% of the total revenues.
10 Ibid.
11 Ibid.
12 Olaf Report 2015, http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf.
13 House of Lords EU Committee, 12th Report of Session 2012–13 on the "The Fight Against Fraud on the EU's Finances", published 17 April 2013.
14 Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (SWD(2013) 275 final), p. 7.
15 Figure for 2014. Source: Eurostat, cf. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=gov_10a_taxag&lang=en.
16 Case C105/14,*Taricco and others*, 8 September 2015, para 41.
17 F. Borselli, *Organised VAT fraud: features, magnitude, policy perspectives*, Banca d'Italia Occasional Papers 106, October 2011, p. 16.
18 Interview with Chris Perryman, Project Manager and senior specialist, Focal Point MTIC, Europol, cf.: http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2011%20%28march%202014%29%20on%20mtic%20fraud/eurojustnews_issue11_2014-03-en.pdf, thereby referring to the Joint Report of the Belgian, Dutch, and German Courts of Auditors on "Intra-Community VAT fraud", of 2009, p. 6, which in turn makes reference to the Economic Committee of the European Parliament in 2003 without specifying further.
19 Final Report, Implementing the 'destination principle' to intra-EU B2B supplies of goods, Feasibility and Economic Evaluation Study, Ernst & Young, Contract: TAXUD/2013/DE/319, 30 June 2015.
20 Cf. Study to quantify and analyse the VAT Gap in the EU Member States, 2015 Report, available at: http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/vat_gap2013.pdf.
21 Ibid.
22 Figures for Croatia and Cyprus not available due to incomplete national account statistics.
23 The study can be found under http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET%282013%29493018_EN.pdf.
24 The Convention of 26 July 1995 on the establishment of a European Police Office (Europol Convention), came into force on 1 October 1998. It was replaced by the Council Decision of 6 April 2009 establishing the European Police Office (EUROPOL) as of 1 January 2010, O.J. L121, 15.5.2009, 37;
25 Eurojust was set up with Council Decision 2002/187/JHA of 28 February 2002 as subsequently amended. The legislative proposal COM(2013) 535 final of 17 July 2013 on Eurojust, which is currently under negotiation, is based on Art. 85 TFEU and aims at making Eurojust operational and reducing the administrative burden of the national members of Eurojust. The legal basis, however, does not allow for entrusting Eurojust with any investigative or prosecutorial powers.
26 Regulation No. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). OLAF (l'Office européen de lutte antifraud) was initially established with Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 (O.J. L 136, 31.5.1999,20).
27 Cf. Art. 88 TFEU.
28 Cf. Art. 85 TFEU.
29 Cf. details at http://ec.europa.eu/anti_fraud/investigations/fraud-in-figures/index_en.htm.
30 On the nature of the OLAF recommendations, cf. Art. 11 of Regulation No. 883/2013..
31 OLAF Report 2011, pp. 18-20.
32 OLAF Report 2011, table 6, p. 20. Cf. also the Commission Communication on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2 of 27 November 2013, COM(2013) 851 final.
33 OLAF Report 2014, p. 24.
34 For the historical background on the EPPO, cf. K. Ligeti and M. Simonato, "The European Public Prosecutor's Office: Towards a truly European Prosecution Service?", *New Journal of European Criminal Law*, 4 (2013), p. 7 with further references. In 1976 already, the European Commission submitted to the Council a draft text amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, cf. O.J. C 222, 22.9.1976, pp. 2–17.
35 With the only issue for in-depth discussion being the provisions on judicial review and, respectively, on relations with non-participating Member States and third countries.
36 European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, P7_TA(2014)0234 and European Parliament resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, P8_TA(2015)0173.
37 ECA special report No. 24/2015 "Tackling intra-Community VAT fraud: More action needed", 3.3.2016 (http://www.eca.europa.eu/Lists/ECADocuments/SR15_24/SR_VAT_FRAUD_EN.pdf).

No Added Value of the EPPO?

The Current Dutch Approach

mr. dr. Jaap van der Hulst

I. Introduction

To promote the protection of the financial interests of the European Union, the Commission has introduced a proposal for the establishment of the European Public Prosecutor's Office (in the following: EPPO initiative).[1] This initiative is based on Arts. 86 and 325 TFEU that provide the competence for the European Union to counter fraud and other offenses affecting its financial interests. The objective of this initiative is to establish a coherent European system for more efficient and effective investigation and prosecution as well as to enhance the deterrence of offenses affecting the financial interests of the European Union. It also aims at ensuring closer cooperation and the effective information exchange between the European Union and competent authorities of the Member States. Therefore, the initiative sets forward the establishment of a European Public Prosecutor's Office that will be exclusively competent in cases of fraud against the European Union. For such cases, the establishment of the European Public Prosecutor's Office includes the introduction of investigative competences, the right to prosecute, and the right to bring a case before the competent national judge in any Member State of the European Union. In each Member State, one or more delegated public prosecutors will be appointed who, on behalf of the European Public Prosecutor's Office, will bring these cases before the competent national authorities.

The shaping of the EPPO initiative has gone on for many years and been discussed many times in the Member States by government officials and scholars.[2] Some of these discussions tended to take a critical approach to the EPPO initiative. The Dutch government also made critical comments on this initiative. This has even led the Dutch government to continue to withhold its approval on the EPPO initiative. Against this background, the present article addresses the following questions: How has it come so far? Are the Dutch really against this initiative (cf. 2)? And what are the main current Dutch concerns in conjunction with the EPPO initiative (cf. 3 and 4)? Many of these concerns seem to have a common denominator: the EPPO initiative does not respect the sovereignty of the Dutch State. Is this really true (cf. 5)? And if this initiative were eventually to be accepted, what are key issues for its success or failure (cf. 6)?

II. General Dutch Approach to the EPPO Initiative

The relationship between European community law and Dutch criminal law has always been problematic. In 1992, the Dutch Minister of Justice described this relationship as being politically extremely sensitive.[3] The first ideas for the establishment of the EPPO – laid down in the Corpus Juris[4] and later in the Green Paper on the establishment of a European Public Prosecutor (in the following: Green Paper)[5] – also met with criticism. Although, some Dutch scholars had been working on the Corpus Juris for several years, other Dutch scholars eyed this project critically. Strong criticism was voiced by *Fijnaut* who disqualifies some of the starting points of the Corpus Juris as nonsense. The whole idea of an EPPO seems unrealistic to him because such an office cannot be expected to develop an effective investigation and prosecution policy without having any effective competence over the police and the public prosecuting offices in the Member States.[6] *Fijnaut* and *Groenhuijsen* also considered fundamental arguments in the Green Paper to be unconvincing and inadequate for implementation in the Member States.[7]

On the political level, there also seems to be little support for the institutions of the EU. Since the millennium, Dutch politicians have been critical of the general policies of these institutions and their efforts towards harmonization. This attitude is probably influenced by critical sentiments in Dutch public opinion. A first sign of the lack of support for the European harmonization was the negative referendum on the Treaty establishing a Constitution for Europe when the majority of the Dutch voted against it in June 2005. Things became worse when the European Union was faced with banking crises, Euro crises, and refugee crises. The overall Dutch sentiment seems to be that the institutions of the European Union are unable to fix these problems and therefore the legitimation of these institutions is in decline. Recently, this sentiment was reflected in the outcome of an advisory referendum on the Association Agreement between the European Union and Ukraine. A few days before the referendum, its initiators declared that, in their opinion, the referendum was really about the policy of the institutions of the EU. The Dutch voted in majority for the rejection of the Association Agreement at the end of 2015; because the referendum was advisory, this outcome does not however bind the Dutch government to heed the result.

This euroscepticism in Dutch public opinion is reflected in a growing euroscepticism in both right-wing and left-wing political parties. This is also true for the EPPO initiative. The debate on the EPPO initiative led the Dutch parliament to instigate the so-called yellow card procedure at the end of October 2013. This procedure was supported by national parliaments in eleven other Member States and has resulted in further discussion on the EPPO initiative with the European Commission. A general observation is that, in the beginning, these discussions did not lead to more consensus: the Dutch government repeated its arguments against the EPPO initiative and the Commission repeated its arguments in favor of it. This response of the Commission led to considerable irritation in the Dutch parliament as it felt that it had not been taken seriously.[8] However, the latest outcome of this discussion shows that the Commission has changed the EPPO initiative into a more "Member State-oriented" proposal. This new orientation of the Commission has certainly improved the level of support for the initiative in the Member States.[9] But the Dutch parliament is still following a far-reaching motion on the Dutch approach towards this initiative. This motion clearly stipulates that the Dutch Minister of Justice is not entitled to give his consent to the EPPO initiative, neither as a whole nor to any part of this initiative.[10] Accordingly, consent to the EPPO initiative may only be given by the Dutch parliament. This means that during the Dutch presidency of the European Union, the Dutch Minister of Justice may only discuss certain issues concerning the EPPO initiative but has to refrain from any form of consent.[11]

III. Arguments of the Dutch Parliament against the EPPO Initiative

So far it is clear that the legal framework of the EPPO may only be approved by the Dutch parliament. But what hinders this approval? The main arguments against the EPPO initiative were formulated in the position paper of the Dutch parliament on the EPPO initiative of 11 April 2014.[12] This position paper follows the basic arguments of the Dutch Senate that have led to the aforementioned yellow card procedure and a letter to the European Commission in which these arguments are communicated.[13] The vast majority of the Dutch parliament holds the opinion that the investigation, prosecution, and sentencing of criminal activities must be undertaken at the national level. Any transfer of these competences would be in breach of the concept of sovereignty of the state.[14] Therefore, the legal foundation of the EPPO is not recognized. Furthermore, and in contrast with the view of the European Commission, the necessity for the EPPO is denied. Or, to put it in European terms: the principle of subsidiarity[15] effects that the EPPO lacks a sufficient legal basis because the Member States already deal with the investigation and prosecution of criminal acts that endanger the financial interests of the European Union. Also, there seems to be little belief in the view of the Commission that the protection of financial interests will improve in the hands of the EPPO. This belief seems to follow the observation of *Fijnaut* and *Groenhuijsen* that there is a lack of empirical research, meaning that cross-border crimes such as EU-fraud are poorly investigated and prosecuted in the Member States, that legal cooperation between these Member States lacks efficiency, and that this would improve if the EPPO were to take over the investigation and prosecution of EU fraud.[16]

Other arguments question the necessity of competences foreseen in the EPPO initiative and suggest that they are not in line with the principle of proportionality.[17] There is too much uncertainty about which criminal activities the EPPO is competent to investigate and prosecute. The foreseen general competence of the EPPO for each criminal activity that endangers the financial interests of the EU is considered too broad and not in conformity with the legality principle. It would create a lack of democratic control over the EPPO and also too much uncertainty on what this means for the (breach of) sovereignty in the Member States.[18] There should be accountability at the Member State level for the actions and results of investigation, prosecution, and sentencing of criminal activities. It is considered unacceptable that democratic control over the EPPO is foreseen in an annual report that only will be presented to the European Parliament, whereas the actual investigation and prosecution would take place in the Member States.

The better alternative for the EPPO initiative would be more effective cooperation between Member States as well as in Eurojust and Europol, and with OLAF.[19] The Commission should focus more on how to facilitate this cooperation. In addition, there is no convincing argument for decreasing the role of OLAF to pave the way for the installation of the EPPO. Even if there would be a sound legal basis for OLAF, then it would be well advised to have an advisory and supervisory role in the efforts of the Member States to investigate and prosecute EU fraud. The primary responsibility for these efforts lies at the level of the Member States. The EPPO is only an institution of last resort. It could only take action if a Member State were to neglect its responsibility to investigate and prosecute a case of EU fraud.[20]

Moreover, it is unclear how the exclusive competence of the EPPO really relates to the responsibility of Member States to investigate and prosecute national fraud cases. It seems curious that Member States which actively combat EU-fraud are excluded once the EPPO is competent, even if these activities on the part of the Member States appears to be faster, more effective, and less expensive. The general coordinating role that

is foreseen for the EPPO appears problematic because it has consequences for the priorities and the use of financial budgets at the national level of the Member States. Furthermore, the EPPO initiative lacks a concrete procedure in which differences of opinion between the EPPO and Member States can be resolved.[21]

IV. Arguments of the Dutch Government against the EPPO Initiative

Besides the arguments in the position paper of the parliament, the Dutch government holds the opinion that the legal basis of the EPPO should be limited to Art. 86 para. 1 TFEU only. That means that other (related) cross-border crimes are not part of this mandate. The Dutch government rejects the option of the Commission (that Art. 86 as a whole is a legal basis for the EPPO) because this could lead to an enlargement of the mandate of the EPPO for crimes other than EU fraud.[22] This enlargement as such is possible according to Art. 86 para. 4 TFEU upon unanimous consent of the European Council, after approval by the European Parliament, and after consultation of the Commission.

In the view of the Dutch government, the EPPO initiative further implies that a considerable number of OLAF employees would be reallocated as a staff members of the EPPO. This would reduce the operating costs of the EPPO on the one hand but, on the other, the Dutch government is concerned that this reallocation would lead to a shift in administrative enforcement towards a more criminal one. This shift could seriously conflict with the general idea of criminal enforcement as an instrument of last resort *(ultimum remedium)*.[23] The Dutch government only agrees to the EPPO under the condition that the level of enforcement of national fraud cases remains the same. That means that the EPPO hands over the cases that it does not investigate to the Member States at the earliest possible moment, in order to ensure that the Member States can uphold their current level of administrative and criminal enforcement of national fraud cases.

Furthermore, the Dutch government observes that the internal working process of the EPPO in dealing with EU fraud cases is rather centralistic. Although the delegated public prosecutors are appointed for the enforcement in criminal cases in the Member States, according to the Commission's proposal they have to consult the European Public Prosecutor for almost every decision to get his consent. This method of decision-making promotes a uniform policy but does not take into account that, usually, only the public prosecutor and the investigation team dealing with a certain fraud case know the ins and outs of the case and are therefore in a better position to make the necessary decisions. Therefore, it seems that the better position for a European Public Prosecutor would be as a general coordinator in cross-border cases. Also, the European Public Prosecutor is entitled to investigate and prosecute a criminal case without any communication with the delegated public prosecutor. The Dutch government ultimately questions the necessity of the competence of the EPPO to investigate and prosecute a criminal case without any communication with the delegated public prosecutor as well as the practical applicability of this procedure.[24]

V. The Sovereignty Argument

A common denominator in the aforementioned arguments of the Dutch parliament as well as those of the Dutch government is the concept of sovereignty of the state. According to this concept, it is the nation state and parliament that have the exclusive competence over the use of criminal instruments, also when the investigation, prosecution, and sentencing of EU fraud are concerned. Furthermore, this competence can only be shared after consent of the Dutch state and parliament. In accordance with this interpretation, the concept of sovereignty seems obvious and in line with the interpretation of the founding father of the concept, *Jean Bodin*. He introduced this concept at the end of the 16th century and described it as the power to decide that is in the hands of the nation state.[25] In his view, the power of the state is the highest power and cannot be shared. Essentially, it consists of three elements: the people, the territory, and the exclusive power by an authority of the state.

In *Bodin*'s time, it was obvious that these three elements were embedded in the national state. In our times, we must question this position due to the concept of the European Union. First, the European Union does not only consist of national peoples but also of foreign peoples that have equal rights in a European legal space of freedom, security and justice (Art. 3 para. 2 TEU). Second, the national territories of the Member States are part of this European legal space and these Member States are bound to cooperate in good faith with the EU (Art. 4 para. 3 TEU). This European legal space also applies to the responsibility to combat EU fraud in an efficient and deterrent manner, as is shown by the ECJ's judgment in the *Greek Maize* case[26] that lies at the heart of Art. 325 TFEU. Third, the power of the European Union is not exercised by national authorities but in the Commission, the European Council, and the European Parliament. The essence of this observation is that sovereignty in the European Union is a concept that is no longer purely national but European. Both national and EU institutions need each other, especially concerning the combating of cross-border crime that perhaps can be better dealt with

on a European level.[27] What seems characteristic so far for the Dutch approach to the EPPO initiative is the overriding use of a purely national concept of sovereignty. This concept seems outdated and does not recognize the role of EU institutions in the European legal space, especially where the competence to deal with EU fraud is concerned. Given this national concept, it is understandable that the Dutch parliament and government use the principle of subsidiarity as a line of defense against the EU, while the alternative could be to explore together with the EU institutions how EU fraud could be best combatted on a European level.

VI. Effective Competence over the National Enforcement

Even if the EPPO initiative became acceptable for the Dutch parliament and government, it still is not clear whether and to what extent the EPPO really can offer an effective investigation and prosecution policy without having any effective competence over the police and the public prosecuting offices in the Member States. Bearing in mind the basic critique of *Fijnaut* on the Green Paper (see *supra* 2.), this issue is of great importance for the success of the EPPO. The starting point is that the EPPO be exclusively competent for the investigation and prosecution of criminal activities that endanger the financial interests of the EU described in the (proposed) PIF Directive.[28] The EPPO is competent if these criminal activities occur on the territory of a Member State or when the alleged offender is a national of a Member State or an employee of an EU institution.[29] The competence for the investigation and prosecution is assigned to the delegated public prosecutor unless there are conditions for the European Public Prosecutor to claim exclusive competence. The delegated public prosecutor then takes the necessary steps to investigate and prosecute.[30]

At this point, the support of national police forces in the Member States is required. This support could become problematic since the Dutch police is embedded in a national hierarchic structure, i.e., during investigations in criminal cases, the Dutch public prosecutor is in charge of these investigations and competent to give the necessary instructions to the police.[31] The Dutch Minister of Justice is politically responsible for the use of these instructions and therefore entitled to give general and specific instructions to the Dutch public prosecuting office.[32] This political responsibility means that the Minister of Justice is accountable to the Dutch parliament for his criminal policy and the supervision over criminal investigation and prosecution. It is foreseeable that this accountability will be questioned in the Dutch parliament at the moment the Minister has to explain that certain investigations and prosecuting decisions were undertaken within the competence of either the European Public Prosecutor or the delegated Dutch public prosecutor. The implication would then be that the Minister cannot be held accountable for these actions as the EPPO is competent. Hopefully, the Dutch parliament can learn to live with this dual competence over national enforcement.

Also the delegated Dutch public prosecutor will be faced with the consequences of dual competence. Acting on behalf of the EPPO will raise discussions over the required budgets for the investigation and prosecution of EU fraud cases. These budgets usually are reallocated for national fraud cases only, and the use for international cases on behalf of the EPPO probably requires consent from the national government and the parliament. As a consequence the delegated Dutch public prosecutor is confronted with a conflict of loyalties as he is accountable for the use of required budgets to the EPPO and the national authorities.

The position of the delegated public prosecutor is further compromised because his mandate is limited in time. His appointment is foreseen for five years, with the possibility of prolongation, but he may be relieved of his duties exclusively by the European Public Prosecutor.[33] What does this mean for the loyalty of the delegated public prosecutor towards the national public prosecuting office? He should be loyal towards the EPPO,[34] but when his mandate ends will his loyalty towards the national public prosecution office not be questioned? Since Dutch public prosecutors are not appointed for life, this could mean that a delegated public prosecutor might look for another career outside the national public prosecuting office once his mandate for the EPPO has expired. To prevent this from happening, some additional protection should be considered concerning the position of the delegated public prosecutor after his mandate has expired.

The dual competence over the enforcement by national agents becomes more problematic if we look at the ancillary competence of the EPPO as foreseen in Art. 13 of the EPPO initiative. Accordingly, the EPPO has – under certain conditions – competence over criminal activities not mentioned in the PIF Directive but inextricably linked to them. This opens the possibility that national cases be claimed by the EPPO because of their close relationship with EU fraud. In case of such a claim, the EPPO shall consult the national public prosecuting office and possibly Eurojust. If this consultation does not lead to an agreement, the decision will be made by "the national judicial authority competent to decide on the attribution of competences concerning prosecution at national level" (Art. 13 paras. 2 and 3 of the EPPO initiative). This sounds reasonable, but who is this national judicial authority in the Netherlands? It is not the Minister of Justice because he is not a judicial authority and only politically responsible for the prosecuting decisions of the Dutch public prosecuting office. The Dutch

public prosecuting office has the so-called monopoly on the decision to prosecute.[35] This decision does not require any consent of a judge unless on appeal of a directly interested party that disagrees with the decision not to prosecute (further) or the decision to prosecute for a lesser offence.[36] This appeal is foreseen as a counterbalance to the exclusive competence to prosecute assigned to the Dutch public prosecutor. Therefore, the judges are entitled to examine the prosecuting decision as to legal aspects as well as aspects of efficiency in this appeal procedure. It is, however, questionable whether Art. 13 para. 3 of the EPPO initiative does refer to such an action.

A second option would be that this judicial decision be made by the Dutch investigating judge who is addressed by the EPPO to review the required use of certain investigative measures. However, the Dutch investigating judge has no role in any prosecuting decision because of the aforementioned monopoly on the decision to prosecute assigned to the Dutch public prosecutor. The most likely judicial authority in the Netherlands would then be the College of General Prosecutors (*procureurs-generaal*). This college stands at the head of the Dutch public prosecuting office, is entitled to give general and specific instructions to the Dutch public prosecuting office, and is part of the judiciary according to the Dutch constitution.[37]

To prevent the foreseen procedure of Art. 13 para. 3 from leading to unintended controversies, two options should be considered. First, the EPPO could make all the final decisions on ancillary competence. This is a simple procedure but probably unacceptable to the Dutch parliament and government. The second option is that the final decisions on ancillary competence in practice could be taken by the College of General Prosecutors, accepting the fact that these decisions are often influenced by nationally oriented and less European-minded sentiments.

VII. Conclusion

It is unlikely that the Dutch parliament and the Dutch government will support the EPPO initiative in the near future. One argument for its rejection is that the initiative lacks a required legal basis. It is also argued that the foreseen competences of the EPPO do not seem to be in line with the principle of proportionality. Other arguments against the initiative have a common line of reasoning: They follow a distinctive interpretation of the concept of sovereignty by which the nation state, the Netherlands, is the exclusive legal forum to decide on the necessity and implementation of criminal law prosecution and investigation. As outlined above, this interpretation seems to be outdated but is still put forward by the Dutch institutions. However, there are parts of the EPPO initiative – in particular as regards the competences of the EPPO – that deserve further contemplation, so that a successful enforcement at the national level is ensured. To support this enforcement, it seems appropriate to provide for a further clarification of the position of the delegated public prosecutor and the ancillary competence of the EPPO.

What is the way forward? A realistic approach would be not to wait too long for the support of the Dutch for the EPPO initiative. Art. 86 para. 1 TFEU provides for the possibility of enhanced cooperation, i.e., the EPPO can be installed if nine Member States support the initiative. Ultimately, the Netherlands might not take part because of lacking consent on the initiative.

1 COM(2013) 534 final.
2 See, e.g., J. L. Lopes da Mota, "Eurojust – The heart of the Future European Public Prosecutor's Office", in eucrim 1-2/2008, pp. 62-66; S. White, "A decentralised European Public Prosecutor's Office", in eucrim 2/2012, pp. 67-75, and V. Covol, "From Europol to Eurojust – towards a European Public Prosecutor", in eucrim 2/2012, pp. 83-88.
3 TK 1991-1992, 22 300 VI, nr. 39, p. 13.
4 Mireille Delmas-Marty, Corpus Juris, Paris, Economica, 1997, p. 4.
5 COM (2001) 715 final.
6 C. Fijnaut, "De strafrechtelijke bescherming van de financiële belangen van de Gemeenschap tegen fraude; een pleidooi voor een realistische benadering", in Delikt & Delinkwent 2000, pp. 981-985.
7 C. Fijnaut/M. Groenhuijsen, "Een Europees openbaar ministerie: kanttekeningen bij het Groenboek", in Nederlands juristenblad 2002, p. 1234 and 1241.
8 TK 2013-2014, 32 317, nr. 206.
9 TK 2014-2015, 33 709, nr. 9, p. 2.
10 TK 2013-2014, 32 317, nr. 189 and TK 2015-2016, 32 317, nr. 302.
11 EK 2015-2016, 32 317, FQ, p. 4.
12 This paper was undersigned by Ard van der Scheur, at the time the rapporteur of the parliament on the EPPO initiative and currently the Dutch Minister of Security and Justice.
13 EK 2013-2014, 33 709, C, p. 1 and 2.
14 Position paper of the Dutch Parliament on the EPPO, p. 1.
15 Art. 5 para. 3 TFEU.
16 C. Fijnaut/M. Groenhuijsen, *op. cit.*, p. 1237.
17 Art. 5 para. 4 TFEU.
18 Position paper of the Dutch parliament on the EPPO, pp. 2 and 3.

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19 Position paper of the Dutch parliament on the EPPO, p. 1
20 Position paper of the Dutch parliament on the EPPO, p. 5.
21 Position paper of the Dutch Parliament on the EPPO, p. 4.
22 TK 2012-2013, 22 112, nr. 1681, pp. 4 and 6.
23 TK 2012-2013, 22 112, nr. 1681, p. 3.
24 TK 2012-2013, 22 112, nr. 1681, p. 7.
25 Jean Bodin, *Six Livres de la République* 1576 (The Six Bookes of a Commonweale 1606).
26 ECJ, Case 68/88, *Commission of the European Communities v Hellenic Republic*, 21 September 1989.
27 L.J. Brinkhorst, *Europese Unie en nationale soevereiniteit*, Leiden 2008, pp. 9 and 10.
28 COM(2012) 363 final.
29 Art. 11 paras. 4, 12 and 14 EPPO initiative.
30 Art. 16, 18 paras. 5, 26 and 27 EPPO initiative.
31 Art. 148 Dutch Criminal Procedure Code (DCCP).
32 Art. 127 Law on the Organization of the Judiciary (*Wet op de Rechterlijke Organisatie*).
33 Art. 10 paras. 1 and 3 EPPO initiative.
34 Art. 18 para. 1 EPPO initiative.
35 Art. 167 para. 1 DCCP.
36 Art. 12 DCCP.
37 Art. 130 paras. 2 and 4 Law on the Organization of the Judiciary.

L'Europe à la poursuite des droits fondamentaux

Bertrand Favreau

Where does the protection of human and fundamental rights stand in Europe, particularly in the European Union of the 28 European Member States? Where can the « common heritage of political traditions, ideals, freedom and the rule of law », which is evoked in the preamble of the ECHR, be seen today? The article responds to these questions by arguing first that the European Community (later the European Union) has – from the outset – been in a pursuit race regarding the effective protection of fundamental rights. Effects of this phenomenon are still apparent today. Examples given in the article show that the European Union falls short of the aforementioned common heritage. Regarding asylum rights, for example, the CJEU does not completely follow the ECtHR case law. Regarding the European Arrest Warrant, it was a recent call of the German Federal Constitutional Court that triggered a change of thinking at the Court in Luxembourg on how the state of execution can protect the fundamental rights of the person sought. In the second part, the article further elaborates on how the fundamental rights protection is at test regarding the current crises. In this context, it points out the protocols no. 15 and 16 to the ECHR that, according to the author, give the states a margin of appreciation that it too large, thus enabling them to avoid respecting the Convention's guarantees. In the third part, the author addresses the (im)possible accession of the EU to the ECHR as foreseen by the Treaty of Lisbon. He argues that accession currently is in the far distant future and could lead to the persistence of a "double Europe" in which fundamental rights and freedoms are insufficiently protected. However, the article does not conclude pessimistically, but argues that the European Union can win the pursuit race on fundamental rights.

Peut-être se rendra-t-on compte un jour que l'erreur de l'Europe, c'est de ne s'être ralliée que trop tard au primat en terme d'effectivité de ces droits que l'on appelle au gré des pays ou des traductions: droits de l'homme, droits humains ou pour reprendre l'expression de la Charte, droits fondamentaux.

Aujourd'hui, où en sont les droits fondamentaux tels qu'ils résultent de la Charte des droits fondamentaux de l'Union européenne (ci-dessous « la Charte ») mais aussi tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, qui font partie du droit de l'Union en tant que « principes généraux », pour reprendre une expression figurant dans le traité sur l'Union européenne ? Où en est ce « patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de prééminence du droit » qu'évoque le 5ème alinéa du Préambule de la Convention européenne des droits de l'homme, à laquelle tous les États membres de l'Union européenne sont parties?

Cet article s'attache à relater les failles originelles de l'Union Européenne à travers les différentes matières de droit qui ont abouti à une course à la poursuite des droits fondamentaux. L'article évoque ensuite l'incidence de ces droits au regard des crises que traverse l'Europe notamment à l'heure de la

question lancinante et toujours non-résolue de l'adhésion de l'Union à la Convention européenne des droits de l'homme. Il veut en dégager la nouvelle perception qu'engendrent ces droits à l'aune de l'état de l'Europe et des « Europes » et leur force résurgente au-delà des tentations de fragmentation qu'ils pourraient paraître générer.

I. Une course poursuite toujours recommencée

On connait bien la différence – et pour ceux qui nient leur complémentarité, l'antagonisme – entre les deux traités européens, tous deux signés à Rome, entre l'Europe de la Convention des droits de l'homme de 1950, surgeon régional de la Déclaration universelle de 1948, et celle du Marché commun de 1957. Plus que jamais, leur séparation semble peser sur le destin d'une Europe communautaire devenue Union européenne que l'on pourrait croire schizophrène.

Sans doute, cette Europe n'a jamais été une Europe « sans droits », mais force est de le constater, même s'ils étaient présents en filigrane dans le droit communautaire, il existait une carence originelle au point qu'ils n'ont fait qu'une entrée timide ou tardive dans l'Union européenne. Ainsi, même si au gré des traités, les compétences et domaines d'action de l'Europe se sont accrus régulièrement, la garantie des droits fondamentaux, pourtant toujours re-proclamée, semblait toujours en retard, aussi bien dans l'instauration d'une protection effective, que dans la perception qu'en avait le citoyen européen.

Pour ce qui fut la « Communauté européenne », il a fallu attendre 1999 avec l'entrée en vigueur du traité d'Amsterdam pour que soit énoncé en tant que principe général que l'Union européenne doit respecter les droits de l'homme et les libertés fondamentales sur lesquels l'Union européenne est fondée.[1] Leur véritable consécration n'a eu lieu qu'en décembre 2000 et ce n'est que le traité de Lisbonne, en 2007, qui a placé la Charte au même rang que les dispositions des traités, en dépit des réserves de certains États destinées à entraver la pleine efficacité du texte européen.

Le décalage continu entre les politiques entreprises et le niveau de protection qui doit être garanti à tout citoyen dans une société démocratique, a été un frein au développement véritable des politiques européennes et notamment à la mise en œuvre d'un véritable espace judiciaire. Chacun connait le célèbre « paradoxe » de *Zénon d'Elée* : Achille peut bien courir plus vite que n'avance la tortue, Zénon affirme qu'il ne pourra jamais la rattraper, car lorsqu'il atteint le point où celle-ci se trouvait auparavant, elle s'est déjà déplacée et se trouve plus loin. Comme le véloce Achille, de blocages en avancées, de petits pas en «petits bonds», l'Union européenne a été condamnée à une course poursuite, afin de faire coïncider l'ambition de ses projets avec un niveau convenable de protection des droits des citoyens concernés par leur application.

Ainsi, l'Union européenne a été contrainte d'exhorter les États à croire en une Europe théorique et idéale. Elle a été contrainte aussi d'instaurer des principes et des postulats aux louables vertus intégrationnistes et accélératrices. Parmi eux, le principe de la « subsidiarité », génératrice d'ambiguïtés, ou les postulats, principes ou présomptions comme la protection équivalente, la reconnaissance mutuelle et la confiance mutuelle, qui devaient se heurter tôt ou tard à la disparité des standards de respect des droits de l'homme dans certains États et fournir aux adversaires de l'Europe des arguments renouvelés. Quelques exemples permettent d'illustrer cette disparité des standards au sein de l'Union européenne.

1. Protection équivalente

L'arrêt « *Bosphorus* » de la Cour européenne des droits de l'homme (CEDH) du 30 juin 2005, a posé au regard de la théorie de la protection équivalente une présomption non irréfragable, selon laquelle « *la protection des droits fondamentaux offerte par le droit communautaire doit être considérée comme équivalente à celle assurée par le mécanisme de la Convention* ».[2] Cette équivalence proclamée marquait-elle la fin de la course poursuite? Contrairement à ce que d'aucuns avaient cru ou annoncé, le retard qui semblait pris au départ par l'Europe communautaire dans la défense des droits fondamentaux pouvait paraître avoir été rattrapé, au moins sur un plan textuel.

2. Confiance mutuelle et droit d'asile

En matière de droit d'asile, la nécessaire « confiance mutuelle » entre États membres en matière de droits fondamentaux semble démentie par la discordance entre les jurisprudences *N.S. et autres* de la CJUE[3] et *M.S.S. c. Belgique et Grèce* ou *Tarakhel c. Suisse* de la CEDH.[4] Dans l'arrêt *M.S.S. c. Belgique et Grèce*, la Cour de Strasbourg avait posé un standard de caractère élevé en jugeant que la Belgique ne pouvait transférer un demandeur d'asile vers la Grèce en application du système Dublin, si ce demandeur d'asile risquait d'être soumis dans ce pays à un traitement contraire à la Convention. L'arrêt *Tarakhel c. Suisse* de la CEDH condamnait la Suisse pour le renvoi, en application du règlement Dublin II (rendu applicable à la Suisse par l'effet d'un accord du 26 octobre 2004 entre la Communauté européenne et la Suisse) d'un demandeur d'asile en Italie malgré l'insuffisance des conditions d'accueil dans cet État.

Ce raisonnement a bien été repris et « importé » par la Cour de Luxembourg dans l'arrêt *N.S. et autres*, mais il s'agit d'une application que l'on est tenté de qualifier d'incomplète ou *a minima* puisqu'elle semble n'accepter comme critère que les « défaillances systémiques » de l'accueil des demandeurs d'asile en Grèce. Or, ce critère n'était pas utilisé par la CEDH dans son arrêt *M.S.S. c. Belgique et Grèce*. Dans l'arrêt *Tarakhel c. Suisse,* la Cour de Strasbourg a plutôt jugé, qu'il s'impose à l'État auteur de la mesure de renvoi « *d'examiner de manière approfondie et individualisée la situation de la personne objet de la mesure et de surseoir au renvoi au cas où le risque de traitements inhumains ou dégradants serait avéré*».[5] A un constat limité à l'existence de « *défaillances systémiques* », la Cour de Luxembourg oppose donc à l'« examen approfondi et individualisé de la situation de la personne objet de la mesure » de la Cour de Strasbourg.

3. Reconnaissance des jugements étrangers et Mandat d'arrêt européen

Le dogme de la reconnaissance mutuelle, sur lequel repose le mécanisme de coopération dans les matières civiles et pénales au sein de l'Union européenne (reconnaissance des jugements étrangers, procédures d'exécution européenne, mandat d'arrêt européen, etc.), semble devoir être analysé sous l'angle du respect des droits fondamentaux, depuis l'arrêt *Avotins* de la CEDH, du 23 mai 2016. La cour de Strasbourg y précise que dans ce cadre les juridictions des États ont pour obligation d'examiner « *un grief sérieux et étayé dans le cadre duquel il est allégué que l'on se trouve en présence d'une insuffisance manifeste de protection d'un droit garanti par la Convention et que le droit de l'Union européenne ne permet pas de remédier à cette insuffisance (...)*».[6]

C'est sous cet angle qu'il faudra désormais envisager la mise en œuvre et le contrôle juridictionnel du mandat d'arrêt européen (MAE) instauré par la décision-cadre du Conseil du 13 juin 2002. Première mesure d'application du principe de reconnaissance mutuelle, adoptée lors du Conseil européen de Laeken du 14 décembre 2001, elle avait mis en lumière, dès 2003, la disparité des pratiques judiciaires et des garanties pénales accordées aux suspects dans les différents systèmes de droit pénal en vigueur dans les divers pays de l'Union européenne. Ainsi a-t-on dû admettre que la coopération judiciaire en matière pénale exigeait d'abord le développement de garanties équivalentes dans tous les États membres.[7]

De son côté, depuis 2011, la CJUE a dû répondre à de nombreuses reprises à la question de la place des droits fondamentaux dans ce mécanisme de reconnaissance mutuelle. La Cour de Luxembourg a veillé dans un souci d'effectivité du MAE à renforcer le dispositif de reconnaissance mutuelle en aboutissant à la conclusion que le respect des droits fondamentaux ne constitue pas, en soi, un motif de non-exécution d'un mandat d'arrêt européen.[8]

Démonstration évidente que l'Europe ne pouvait oublier trop longtemps la référence aux droits fondamentaux, le 15 décembre 2015, la Cour Constitutionnelle Fédérale allemande (*Bundesverfassungsgericht*) a rendu une décision qui est venue troubler le cours de la jurisprudence, consacrant le primat de la confiance mutuelle sur le strict respect des droits fondamentaux, que l'on aurait pu croire bien établie.[9] Le *Bundesverfassungsgericht* affirme que la protection des droits fondamentaux peut exiger le contrôle de l'exécution d'un mandat d'arrêt européen au nom du respect de « l'identité constitutionnelle » allemande.[10] Les juges constitutionnels allemands rappellent ainsi à la CJUE que, si les juges à Luxembourg s'obstinent à refuser de prendre en compte les droits fondamentaux, ils se chargeront d'assurer cette fonction en tant que « protecteur suprême » de ces droits essentiels.

Face à ce risque de fragmentation au gré de l'« identité » constitutionnelle de chaque État, il semble que la Cour de Luxembourg ait entendu le message dans l'arrêt *Aranyosi et Caldararu* du 5 avril 2016 pour des mandats d'arrêt européens émis par la Hongrie et la Roumanie. Infléchissant sa jurisprudence, elle semble désormais soumettre le régime d'automaticité des remises du MAE à la vérification préalable du respect des droits fondamentaux, notamment en cas de risques de traitements inhumains ou dégradants que pourrait subir la personne remise du fait des conditions de détention dans les États d'émission du MAE.[11] La CJUE estime que la décision-cadre donne force obligatoire de façon égale à la primauté du droit européen et au respect des droits fondamentaux et plus particulièrement au droit à la dignité. Dès lors, l'état d'exécution du MAE a l'obligation de vérifier que l'individu remis ne risque pas de subir des traitements inhumains ou dégradants du fait des conditions de détention, au sens de l'article 4 de la Charte. Mais l'encadrement reste strict. En cas de risque réel, l'autorité judiciaire d'exécution doit reporter l'exécution du MAE jusqu'à ce que l'existence du risque ait disparu.[12]

II. L'Europe des droits de l'homme à l'épreuve des crises

Aujourd'hui, faut-il là encore le rappeler? La crise économique qui sévit depuis 2008 et notamment les crises bancaires et financières de 2008 et 2011 ont donné naissance aux politiques d'austérité qui mettent l'Europe en accusation parce qu'elles menacent non seulement plus de soixante ans de solidarité sociale mais aussi le développement de la protection des droits de l'homme en Europe.

Plus encore, c'est dans ce contexte que l'Europe a dû faire face à la plus grave crise humanitaire depuis la deuxième guerre mondiale. Alors notamment qu'en 2015, près d'une personne sur deux tuées en Syrie était un civil, près de 1.1 million de personnes sont arrivées en Europe pour demander la protection internationale et le nombre ne cesse de croître.[13] L'afflux de migrants a mis sous pression les systèmes d'asile européens qui ne parviennent plus à garantir une procédure d'asile effective, ni un accueil conforme aux normes internationales. Enfin, les politiques de lutte contre le terrorisme ont conduit les États à renforcer leur arsenal interne de répression en exigeant toujours plus de sécurité et en limitant toujours davantage les libertés de leurs ressortissants au regard des garanties en matière de droits fondamentaux, proclamées dans les textes fondateurs de l'Europe.

Non seulement cette crise humanitaire altère la volonté (et parfois les possibilités des États à protéger les droits de l›homme, notamment en cas d'« obligations positives » à leur charge), mais plus encore, elle en vient à servir de motif ou de prétexte à ne pas les respecter. Dès 2011**,** bien avant les craintes suscitées par les attentats islamistes et l'afflux de migrants de 2015, l'organisation non gouvernementale *Human Rights Watch* dans son rapport annuel, s'alarmait d'une Europe moins démocratique, et d'un**e «** *pente descendante en matière de droits au sein de l'UE [qui] semble devoir se poursuivre ».*

Le citoyen européen ne pouvait plus être dès lors préservé que par les organes juridictionnels, la Cour européenne des droits de l'homme au niveau du Conseil de l'Europe et la Cour de Justice de Luxembourg à l'échelle de l'Union européenne, dont la mission est de garantir le respect du droit et des droits fondamentaux dans l'application des traités face à la tentation croissante des États de s'en affranchir.

Las, à bien des égards, l'Europe a reculé face aux États notamment en raison des fortes critiques du Royaume-Uni, exprimées par exemple lors de la conférence sur l'avenir de la Cour européenne des droits de l'homme le 19 et 20 avril 2012 à Brighton. Dans le prolongement des conférences précédentes d'Interlaken en 2010 et d'Izmir en 2011, à Brighton, l'Europe s'est retranché derrière un renforcement du principe de subsidiarité, qualifié de « fondamental ».[14] L'entrée en vigueur des protocoles n° 15 et 16 à la Convention européenne des droits de l'homme, qui en sont issus, peut faire craindre une fragmentation supplémentaire du niveau de protection des droits fondamentaux, remettant en question la conception d'un standard européen élevé de protection des droits.

À cet égard, l›article 1er du protocole n°15 en cours de ratification par tous les États membres du Conseil de l'Europe opère une assimilation entre subsidiarité et marge d'appréciation et ouvre d'inquiétantes perspectives. Selon la nouvelle disposition du Préambule fondateur de la Convention, les États parties doivent garantir le respect des droits définis dans la Convention « conformément au principe de subsidiarité » et *« ce faisant, elles jouissent d'une marge d'appréciation (...)».* L'énoncé n'est pas neutre. Les États seraient désormais habilités, par le protocole n°15, à définir eux-mêmes l'étendue de la marge d'appréciation dont ils disposent.

Quant au protocole n°16, il vise à instaurer la possibilité pour les plus hautes juridictions des États parties d'adresser des demandes d'avis consultatif et non contraignant à la CEDH sur des questions de principe relatives à l'interprétation ou à l'application des droits et libertés définis par la Convention européenne des droits de l'homme ou ses protocoles. Le corollaire en sera une restriction inéluctable du droit de recours individuel qui aurait perdu sa raison d'être. Le risque est donc de confondre subsidiarité et ineffectivité.

On va donc restituer aux gouvernements une très grande latitude. Or, *Pierre-Henri Teitgen*, lors des travaux préparatoires du Conseil de l'Europe en mai 1949 (donc avant la Convention) en indique les buts: « *elle nous donnerait aussi cette garantie internationale européenne, c'est une protection contre tous les retours offensifs toujours possibles de la raison d'état.*»[15] Mais aussi : « *Il s'agit de limiter la souveraineté des* États *du côté du droit et de ce côté-là, toutes les limites sont permises* ».[16]

Fallait-il en période de crise, rendre aux États une latitude plus grande dictée par les circonstances autorisant une extension de la marge d'appréciation? C'est-à-dire la marge dans laquelle il peut être tolérable de ne pas respecter les droits de l'homme? Face à la crise actuelle en Europe, la Cour européenne des droits de l'homme adopte une position qui voudrait être, selon l'un de ses juges « prudente *et ferme* ».[17]

Mais alors, que sont devenus les « *droits non pas théoriques ou illusoires, mais concrets et effectifs* » que la Convention a pour but de protéger -principe prononcé dans l'arrêt *Airey c. Irlande*, et encore rappelé récemment par la Grande Chambre, dans *Dvorski c. Croatie* le 20 octobre 2015 ?*[18]* Qu'en est-il de l'interprétation téléologique si souvent célébrée (oui décriée) reposant sur le principe selon lequel « *la Convention est un instrument vivant à interpréter à la lumière des conditions actuelles* » ?[19] A la lumière des « *conditions actuelles* » n'y aurait-il plus lieu de protéger les droits de l'homme ? Comme le dit encore le philosophe allemand *Jürgen Habermas* : « Les droits de l'homme ne sont pas accordés ou refusés, mais garantis ou bafoués ». *[20]*

On ne peut que mesurer davantage combien il est dangereux d'assouplir les limites, de lâcher la bride, et finalement, sous couvert de marge d'appréciation extensive – et à vrai dire sans borne véritable – de permettre aux États de faire une affaire interne des droits fondamentaux. Les deux cours européennes, issues des deux grands traités européens de la seconde moitié du XXème siècle, avaient pour finalité d'assurer une interprétation uniforme du droit en prévenant l'éclatement des interprétations et en dernier ressort de garantir la primauté du droit européen.

IV. L'impossible adhésion ?

Dans le même temps – ceci étant sans doute en relation avec l'évolution précédemment constatée, l'adhésion de l'Union à la Convention européenne des droits de l'homme, rendue obligatoire par l'article 6, paragraphe 2, du traité sur l'Union européenne, s'avère singulièrement retardée, voire définitivement compromise. En 2013, après presque trois ans de négociations techniques, une proposition d'accord avait été finalisée par les représentants des 47 pays du Conseil de l'Europe et la Commission européenne. Or l'avis 2/13 de la Cour de justice rendu le 18 décembre 2015 en assemblée plénière va, au minimum, retarder la procédure. Les étapes suivantes sont également incertaines, on pense notamment à la nécessité d'une ratification de l'accord d'adhésion par l'ensemble des États membres du Conseil de l'Europe, y compris par le Royaume-Uni (et même par la Russie qui n'a pas caché ses réticences en la matière).[21]

Ainsi, l'Europe est exposée à devoir battre une nouvelle fois en retraite face aux exigences de certains États. Car, sans être péremptoire, on ne pourrait que remarquer que les États qui ne voulaient pas de ces valeurs profondes sont aussi ceux qui rejetaient plus globalement les mécanismes européens. Force est alors de constater, que les États qui voudraient toujours moins d'Europe, sont aussi ceux qui veulent limiter l'incidence d'une véritable garantie européenne des droits de l'homme. Loin de maintenir la cohésion de l'Union, les concessions et les renonciations sur les valeurs fondatrices en viennent à constituer un premier ferment de dilution ou de dislocation.

Sur ce point, on relèverait utilement que les faveurs successivement consenties au Royaume-Uni, qui bénéficie depuis 1984 d'un « mécanisme de correction » en sa faveur, ont abouti à un résultat inverse à celui qui était escompté. Par contre, le Royaume-Uni a entrepris des manœuvres pour neutraliser les effets juridiques éventuels de la Charte des droits fondamentaux de l'UE La Charte "re"-proclamée le 12 décembre 2007 avait dû être légèrement modifiée.[22] Des limites sérieuses avaient été posées à son application avec « l'opting out » britannique et polonais.[23] On ajoutera que les droits sociaux fondamentaux ont dû subir un nouveau recul avec la décision des chefs d'État et de gouvernement réunis au sein du Conseil européen le 18 et 19 février 2016 et donnant gain de cause au Royaume-Uni en lui octroyant la possibilité de limiter les prestations sociales accordées aux travailleurs migrants.[24]

Comment ne pas s'étonner de ce recul de l'Europe des droits ? Cette capitulation ne favorisera assurément pas la marche en avant de l'Europe ? Le résultat des urnes permet de confirmer ou de démentir le précepte du penseur périgourdin *Joubert* : « La faiblesse qui conserve vaut mieux que la force qui détruit »[25]. En l'occurrence, c'est la faiblesse qui aura détruit. En effet, à l'encontre de cette double Europe qui ne le protégeait qu'insuffisamment, le citoyen européen en est venu ou a été poussé à intenter un procès en grande partie injuste en mettant en accusation l'Europe, sans se rendre compte qu'il ne dressait que le réquisitoire de la non-Europe. Parce qu'on a trop longtemps ignoré les droits fondamentaux, l'Europe est donc condamnée à tout reprendre.

V. Conclusion

Les craintes éprouvées ne doivent pas amener à une conclusion pessimiste. Au contraire, le vote du « Brexit » scande l'heure d'une marche nouvelle. Il donne à l'Europe une leçon : reculs et tergiversations ne peuvent rapprocher les États de l'Europe, elles distendent progressivement les liens au point de les dissoudre et de favoriser leur rupture. En présence de ce constat, il faut donc se référer au principe d'espérance d'Hölderlin : « Là où croît le péril, croît aussi ce qui sauve».

Les arrêts *Avotins* de la CEDH et *Aranyosi et Caldararu* de la CJUE scandent-ils à quelques semaines d'intervalle le souci d'un plus grand respect des droits fondamentaux dans la mise en œuvre des politiques européennes ? Pour cela, il faut que les droits de l'homme puissent définitivement rattraper l'Europe et lui permettre de se rapprocher de l'Homme qu'elle protège et qu'elle sauve. Car, nous le savons déjà: Zénon d'Elée avait tort. L'irréfutabilité de son paradoxe reposait sur la segmentation du parcours alors que la course poursuite appartient à l'infini. Il ne s'agissait que d'un paradoxe : Achille peut rattraper la tortue. La construction d'un espace judiciaire de liberté ne saurait se raisonner par étapes successives. *« La Course d'Achille et de la tortue est perpétuelle»*,[26] de même que la construction européenne devra être perpétuellement recommencée, au gré des épreuves, parce qu'elle appartient à un futur infini où nul être humain ne pourra y ignorer l'autre.

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Président de l'Institut des Droits de l'Homme des Avocats européens

1 Article 6 du traité sur l'Union européenne. Voir aussi les décisions «Solange-I» de la Cour Constitutionnelle Fédérale allemande (Bundesverfassungsgericht) du 29 mai 1974 (BVerfGE, 37, 271) et «Solange- II» du 22 octobre 1986 (BVerfGE 73, 339).
2 CEDH, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi c. Irlande,* arrêt du 30 juin 2005, n°45036/98.
3 CJUE, 21 décembre 2011, C-411/10 et C-493/10, *N. S. et M. E.,* Rec. p. I-13905.
4 CEDH [GC], *M.S.S. c. Belgique et Gréce*, 21 janvier 2011, n° 30696/09 et CEDH [GC], *Tarakhel c. Suisse*, 4 novembre 2014, n° 29217/12.
5 CEDH, *Tarakhel, précité,* §104.
6 CEDH [GC], *Avotins c. Lettonie*, 23 mai 2016, n° 17502/07, § *116.*
7 Livre vert, *Garanties procédurales accordées aux suspects et aux personnes mises en cause dans des procédures pénales dans l'Union européenne*, 19 févr. 2003, COM(2003) 0075 final, p. 13. Voir aussi la proposition de décision-cadre du Conseil relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'Union européenne, SEC(2004) 491, 28 avr. 2004, COM(2004) 328 final.
8 CJUE, C396/11, *Ciprian Vasile Radu*, 29 janvier 2013 ; C-399/11, *Melloni,* 26 février 2013.
9 Voir Press Release No. 4/2016 of 26 January 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html;jsessionid=1178D3321FE1D7D5B1DC14D0B0B28BF0.2_cid383
10 Il s'agissait d'un ressortissant américain arrêté en Allemagne faisait l'objet d'un MAE émis par l'Italie après avoir été condamné par défaut en 1992 par Corte di Appello Florence, à trente ans d'emprisonnement. Voir aussi eucrim 1-2016, p. 17.
11 CJUE, affaires jointes C-404/15 et C-659/15 PPU, *Aranyosi et Caldararu*, 5 avril 2016.
12 Voir Marguerite Guiresse, *Confiance mutuelle et mandat d'arrêt européen : évolution ou inflexion de la Cour de justice ?* Réseau Universitaire européen dédié à l'étude du droit de l'Espace de liberté, sécurité et justice (ELSJ), 12 avril 2016. Voir aussi : CJUE, C 241/15, *Niculaie Aurel Bob-Dogi*, 1er juin 2016.
13 20.977 sur 55.219 selon les chiffres de l'Observatoire syrien des droits de l'homme.
14 *Déclaration de Brighton, pt.* 3, disponible sur : http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_FRA.pdf.
15 Pierre Henri Teitgen dans le recueil des travaux préparatoires du Conseil de l'Europe en assemblée consultative du 11 mai au 8 septembre. Publié dans *Aux sources de la Cour et de la Convention Européenne des droits de l'homme*, Confluences, 2000, p. 36.
16 Ibid. p. 39.
17 Linos-Alexandre Sicilianos, Conférence, *Société européenne de droit international*, Cour européenne des droits de l'homme, 16 octobre 2015. http://www.echr.coe.int/Documents/Speech_Judge_Sicilianos_Lecture_ESIL_20151016_FRA.pdf.
18 CEDH, *Airey c. Irlande,* 9 octobre 1979, n° 6289/73; CEDH [GC], *Dvorski c. Croatie,* 20 octobre 2015, n° 25703/11.
19 CEDH, *Tyrer c. Royaume-Uni,* 25 avril 1978, n°5856/72.
20 J. Habermas, *L'intégration républicaine. Essais de théorie politique,* trad. R. Rochlitz, Fayard, 1998, p. 190.
21 Sur l'avis 2/13 en date du 18 décembre 2015, rendu par la Cour de justice de l'Union Européenne, en assemblée plénière, voir H. Labayle, *La guerre des juges n'aura pas lieu. Tant mieux ? Libres propos sur l'avis 2/13 de la Cour de justice relatif à l'adhésion de l'Union à la CEDH, 22 décembre 2014*, http://www.gdr-elsj.eu/2014/12/22/droits-fondamentaux/la-guerre-des-juges-naura-pas-lieu-tant-mieux-libres-propos-sur-lavis-213-de-la-cour-de-justice-relatif-a-ladhesion-de-lunion-a-la-cedh/
22 *J.O.* C 303 du 14 décembre 2007, p. 1.
23 *J.O.* C 306 du 17 décembre 2007, p. 156.
24 *Un nouvel arrangement pour le Royaume-Uni dans l'Union européenne. Extrait des conclusions du Conseil européen des 18 et 19 février 2016*, http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52016XG0223(01)&from=FR.
25 Joseph Joubert, *Des gouvernements,* XXXVI (1866)
26 J.L. Borges, *La Course perpétuelle d'Achille et de la tortue*, in *Discussion, Œuvres,* t. 1, Gallimard, p. 248.

The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings

Genesis and Descriptive Comments Relating to Selected Articles

Steven Cras*

I. Introduction

On 11 May 2016, the European Parliament and the Council adopted Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[1] The Directive is the fifth legislative measure that has been brought to pass since the adoption of the Council's Roadmap in 2009. This article describes the genesis of the Directive and provides descriptive comments relating to selected articles.

II. Genesis of the Directive

1. Background: Roadmap

In November 2009, the Council (Justice and Home Affairs) adopted the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[2] The Roadmap provides a step-by-step approach – one measure at a time – towards establishing a full EU catalogue of procedural rights for suspects and accused persons in criminal proceedings. The Roadmap invites the Commission to submit proposals for legislative measures on five rights (A–E), which the Council pledged to deal with as matters of priority.

Subsequently to its adoption, the Roadmap has been gradually rolled-out. Until the beginning of May 2016, four measures had been adopted: Directive 2010/64/EU on the right to interpretation and translation,[3] Directive 2012/13/EU on the right to information,[4] Directive 2013/48/EU on the right of access to a lawyer,[5] and Directive (EU) 2016/343 on the presumption of innocence.[6]

2. The Commission proposal

In November 2013, the Commission submitted its proposal for a Directive on procedural safeguards for children who are suspected or accused in criminal proceedings. The proposal clearly related to measure E of the Roadmap, concerning "special safeguards for suspected or accused persons who are vulnerable". However, since it appeared difficult to find a common definition of "vulnerable persons", and in view of considerations linked to the principles of subsidiarity and proportionality, the Commission decided to restrict its proposal to one category of vulnerable persons that could easily be defined, namely suspected or accused children.[7]

The proposal defines children as persons below the age of 18 years. Drawing inspiration from the case law of the European Court of Human Rights (ECtHR), the Commission in its proposal stated that, due to their age and lack of maturity, special measures need to be taken to ensure that children can effectively participate in criminal proceedings and benefit from their fair trial rights to the same extent as other suspects or accused persons.[8] Because of its restricted scope, the (proposal for a) Directive was regularly referred to as "measure E-" (E-minus); in the corridors, one also used to refer to "the children Directive".

The nature of the proposal was different from the nature of the other measures of the Roadmap. Whereas the other measures set rules regarding one or more specific procedural rights that apply to all suspects and accused persons, including suspected or accused children, this proposal aimed at setting (more protective) rules regarding various procedural rights benefitting the specific category of suspected or accused children. For this reason, the proposal also formed part of the EU Agenda for the rights of the child, which had been presented by the Commission in 2011.[9]

As regards adult vulnerable persons, on the same day it presented the proposal on "children", the Commission presented a Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings and vulnerable persons subject to European Arrest Warrant proceedings.[10] This Recommendation is a non-binding act, which aims at encouraging Member States to strengthen the procedural rights of all vulnerable suspects or accused persons. It was adopted unilaterally by the Commission and hence constitutes solely the point of view of this institution. The future will tell what the influence of this "soft law" measure will be.

3. Discussions in the Council

The proposal for "the children Directive" was generally welcomed by the major stakeholders. In the Council, almost all Member States expressed positive reactions, subject to certain modifications being made to the text.[11] This was one of the reasons why the Greek Presidency, which was in charge during the first semester of 2014, decided to start discussions on this proposal (and leave the discussions on the proposals on the presumption of innocence[12] and on legal aid,[13] which had been simultaneously presented by the Commission, to subsequent Presidencies).

The proposal was discussed in several meetings of the Working Party on Substantive Criminal Law (Droipen). In the margins of one such meeting, representatives of the EU Fundamental Rights Agency (FRA) presented the results of research demonstrating why children should receive special protection in criminal proceedings. Several Member States pointed out, however, that the research carried out by the FRA related to the situation of children who are *victims*, and that this situation should be distinguished from the situation in which children are *suspects or accused persons* in criminal proceedings.[14]

The Council reached a general approach on the text in June 2014.[15] Criticism was expressed from various sides on this general approach, as the standards of protection it set seemed low.[16] However, as has been observed in respect of other Roadmap measures, in the context of the co-decision procedure the Council has become used to establishing modest

standards of protection in its general approach, so as to leave some margin for the negotiations with the European Parliament concerning the final text.

Ireland and the United Kingdom decided not to participate in the adoption of the Directive, in application of Protocol N°21 to the Lisbon Treaty. In addition, Denmark did not participate, in accordance with Protocol N°22 to the Lisbon Treaty.

4. Negotiations with the European Parliament

In the European Parliament, the discussions on the proposal began only after the parliamentary elections had taken place in May 2014. The file was attributed to the Committee on Civil Liberties, Justice and Home Affairs (LIBE), and Ms *Caterina Chinnici* (Italy, Socialists) was appointed first responsible member ("rapporteur"). Having worked for decades in Italy in the field of juvenile justice, Ms *Chinnici* was particularly well qualified to carry out this task.

In February 2015, the LIBE Committee adopted its orientation vote on the proposal for a Directive. Subsequently, negotiations started between the European Parliament and the Council,[17] with the assistance of the Commission as "honest broker". In the initial months, the Council was represented by the Latvian Presidency and, as from 1 July 2015, by the Luxembourg Presidency.

The negotiations took place partially in trilogues (in the presence of i.a. rapporteur Chinnici and the shadow rapporteurs or their assistants) and partially in technical meetings (with experts on desk/working level representing the three involved institutions). The technical meetings, which were particularly intense, had the aim of preparing the trilogues, by mutually exchanging points of view and their underlying reasons, and by drafting possible compromise texts for discussion/confirmation in the trilogues.

The negotiations first concentrated on the less controversial issues, such as the right to information, the individual assessment, and the medical examination. The most difficult issue, concerning the right of access to a lawyer, was left to the end, since it was felt that this would be the hardest nut to crack. Some feared, understandably, that this might entail some risks: one wanted to be sure that the provisions on the right of access to a lawyer would be fully agreeable before showing flexibility on the other issues. In order to make progress, however, it was necessary to negotiate and agree, at least provisionally, one article after the other. And it was understood, in any event, that "*nothing is agreed until everything is agreed*".

During the last weeks, the negotiations were particularly hectic. The aim was to complete the file before Christmas, but there was still a lot of work to be done. In the end, provisional agreement was reached at the 9th trilogue, which took place on 15 December 2015 in Strasbourg. The next day in Brussels, COREPER confirmed the agreement and the habitual letter was sent to the European Parliament.[18]

After the usual legal-linguistic examination of the text, the Directive was finally adopted on 11 May 2016. It was published in the Official Journal of 21 May 2016. The Member States have to transpose the Directive into their legal orders by 11 June 2019.

III. Comments Relating to Some Specific Elements of the Directive

1. General observations

The Directive sets minimum rules on several procedural rights for children. In respect of some issues, similar rights exist in other procedural rights directives that are applicable to all suspects and accused persons. Where this is the case, the rights of this Directive, which aims at setting higher standards of protection, take precedence: the Directive is a *lex specialis*.

The higher standards of this Directive are justified because children are considered to be vulnerable. In the course of the discussions in the Council, however, several Member States pointed out that one should not have a too idealistic view of "children" in the context of criminal proceedings. While these may concern children who are accidentally confronted with the police, they may also concern juveniles aged 16 or 17 years who commit criminal offences on a regular basis.

It would probably be appropriate to call the instrument "the Directive on the child's best interests". In fact, many times in the text it is said that action of Member States should be compatible with the child's best interests, or that Member States should take these interests into account. These references could probably be considered superfluous, since Art. 24(2) of the Charter already provides that "*In all actions relating to children (...) the child's best interests must always be a primary consideration.*" On many points, however, explicit references to the child's best interests proved to be an adequate solution to reach a compromise between the two co-legislators.

Ultimately, it should be noted that the Directive has drawn substantive inspiration from international standards, such as the UN Convention on the Rights of the Child (1989) and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).

Descriptive comments relating to some selected articles of the Directive are set out below. It is by no means an exhaustive overview of the Directive.

2. Scope (Arts. 2 and 3)

a) Personal scope

The Directive applies to children, which, as indicated above, means persons below the age of 18 years. This is in line with instruments of international law.[19] Upon request of the European Parliament, it has been clarified that the age of the child should be determined on the basis of the child's own statements, civil status checks, documentary research, other evidence, and – only if evidence is unavailable or inconclusive – on the basis of a medical examination. Medical examination is only a measure of last resort and has to be carried out in strict compliance with the child's rights, physical integrity, and human dignity. In case of doubt, there is a presumption of childhood.[20]

In its proposal, the Commission had inserted a provision according to which the personal scope of the Directive would be extended to suspects or accused persons who have become of age but who were children when the criminal proceedings started. In the Council, several Member States fiercely opposed this provision. According to these Member States, one either is a child or one is not: hence, the Directive should not apply to children that become adults. The Member States concerned indicated that ex-children themselves might not want the Directive to still apply to them after they have become of age. Reference was made in this respect to the provisions according to which a holder of parental responsibility should be involved in the criminal proceedings. In view of this, the Council in its general approach transformed the obligatory provision of the Commission proposal into an optional "may"-provision.

During the negotiations with the European Parliament, a compromise was reached on an *obligatory* provision to extend the application of the Directive to persons who have become of age but who were children when they became subject to the proceedings. However, the following important precisions were introduced:

- The extension does not apply to provisions[21] that refer to the involvement of the holder of parental responsibility;
- The application of the Directive should be extended only when this is "appropriate", based on a case-by-case assessment in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned;
- Continued application may also concern certain provisions of the Directive only; and
- The Member States may put a final "cap" on the application of the Directive by deciding that the Directive should in any event no longer apply in respect of persons who have reached the age of 21.

b) Temporal Scope

As regards the starting point of the application of the Directive, it is recalled that the first three directives that were adopted in the field of procedural rights[22], all provide that these instruments apply from the moment that the persons concerned have been made aware – by official notification or otherwise – of the fact that they are suspected or accused of having committed a criminal offence.

The Commission had proposed, however, that this Directive should apply earlier, namely when children "become suspected or accused of having committed an offence". According to the Commission, certain elements of the Directive, notably the right to the protection of privacy, should apply even before children have been made aware that they are suspects or accused persons.

While the Council was initially reluctant to accept such an earlier kick-off point, it was later willing to do so. This was due to the fact that a lot of articles of the Directive were linked to a later point in time in the proceedings anyway (e.g. deprivation of liberty, detention) and, perhaps more importantly, because a precedent had been created in the meantime: in the Directive on the presumption of innocence, which was agreed upon in October 2015, the Council had also accepted an earlier kick-off moment.

In the final text of the Directive on children, the same formula as that used in the Directive on the presumption of innocence was chosen. The Directive hence applies "to children who are suspects or accused persons in criminal proceedings". It is to be noted, however, that because of this modified kick-off, point, the text of Art. 4 on the provision of information was revised, since information on procedural rights can obviously only be given once a child has been made aware that he is a suspect or accused person.

As regards the end point of the application, the question was raised as to whether the Directive could and should apply to the execution phase (after a final sentence has been handed down). This would notably be relevant with regard to the provisions concerning the detention of a child. Various Member States considered the reference in Art. 82(2)(b) TFEU to "the rights of individuals in criminal *procedure*" to mean that there would be no power to adopt legislation that would be applicable to the execution phase, since the criminal proceedings would

already have been completed.[23] The Commission strongly contested this. These discussions were important, also in the light of possible future legislation (e.g. regarding detention conditions).

Although legal advice was sought, it was generally considered that the question raised was of a political nature. In the final compromise, the European Parliament accepted the position of the Council. It was therefore agreed that the Directive, staying in line with the previous directives on procedural rights, would apply until the decision on the final determination of the question whether the suspect or accused person has committed a criminal offence has become "definitive". The Directive thus does not apply to the execution phase.

3. Right to information (Arts. 4 and 5)

It is important to award procedural rights to children, but it is equally important to inform children that they have these rights, so that they can exercise them.

The Commission proposed that children should be informed "promptly" of their rights under this Directive.[24] The Council, however, maintained that providing children with all the information on their rights at the beginning of the proceedings would be disproportionate, partially irrelevant (e.g. if it relates to rights that would probably never become relevant for the child concerned, such as rights when in pre-trial detention), and not in the interest of the child. The Council therefore suggested that information should be provided to children "where and when these rights apply".

The European Parliament went along the line of the Commission, but it had some additional requests: referring to case law of the ECtHR,[25] it demanded i.a. that the child should also be informed "about general aspects of the conduct of the proceedings". The Council objected to this request, observing i.a. that providing such information is the responsibility of the lawyer, that it might prejudice the proceedings, and that it would constitute a substantial extra burden for the competent authorities.

The text as finally agreed makes a distinction between the different stages of the proceedings[26] and sets out which information children should receive during each stage. This is accompanied by a recording obligation,[27] which had been suggested by the Commission in order to ensure that the information is actually provided to children. This solution seems to make sense and provides added value. The text also foresees that the children be informed about the general aspects of the conduct of the proceedings but, in the light of the objections presented by the Council, it is explained in the recitals that this should include, in particular, "a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case."[28]

The Directive further sets rules on the information that should be provided to the holder of parental responsibility or, where applicable, "another appropriate adult". That person is then in a position to assist the child concerned, e.g. by appointing a lawyer. It is to be noted that the holder of parental responsibility must also be informed because he/she is legally responsible for the child and can be held civilly liable. A definition of the holder of parental responsibility (based on family law[29]) was included in the Directive.[30]

4. Assistance by a lawyer and legal aid (Arts. 6 and 18)

Art. 6 of the Commission proposal on "mandatory assistance" by a lawyer was probably the most controversial article of the entire Directive. This is understandable, since the Commission had proposed that *all* children in criminal proceedings who have the right of access to a lawyer in accordance with Directive 2013/48/EU ("A2L Directive") should be assisted by a lawyer. Legal aid should be provided by the Member States to fund the costs of such a lawyer. The Commission proposal could therefore have substantial financial consequences for the Member States.[31]

The Council in its general approach presented a counter-proposal. It made a clear distinction between the "right of access to a lawyer" and "assistance by a lawyer". In Art. 6 it recalled that children have the *right of access to a lawyer* in accordance with the A2L Directive. As observed earlier, this right provides the *opportunity* for suspects and accused persons, including children, to benefit from legal support and representation by a lawyer.[32] To this effect, the State should not prevent the lawyer from being present at specific moments during the criminal proceedings. However, this opportunity does not mean that a lawyer will indeed be present, since the person may not have the means to pay a lawyer himself and there may be no legal aid available under the system of the Member State concerned.

The Council suggested inserting provisions regarding *assistance* by a lawyer in a new Art. 6a. Such assistance means that the presence of a lawyer is, in principle,[33] *guaranteed*: if the child, or the holder of parental responsibility, has not arranged a lawyer himself, the State should arrange a lawyer. Moreover, the State should provide legal aid if the child, or the holder of parental responsibility, does not have the means to pay the lawyer himself.

The Council in its general approach suggested that assistance should be available for children *who have the right of access to a lawyer in accordance with the A2L Directive* and who *either* are questioned by the police or another law authority (unless providing assistance by a lawyer would not be proportionate) *or* are deprived of liberty (unless the deprivation of liberty is only to last for a short period of time).

Both the European Parliament and the Commission had misgivings on the Council's text. The Commission observed i.a. that a "short period of time" was a vague notion, which could easily be applied in an undesired manner. The European Parliament had fundamental objections to the link with the A2L Directive, considering it to be a "black hole" full of exceptions and derogations.[34] The European Parliament therefore requested drafting Art. 6 of the children Directive as a "stand alone" provision, without making reference to the A2L Directive.

In view of this latter request of Parliament, Art. 6 was considerably revised. Large parts of the A2L Directive were copied and transferred to that article, modifying "access to a lawyer" by "assistance by a lawyer". In the light of the objections of the European Parliament to the derogations of the A2L Directive, the Council accepted that the derogation of Art. 3(5) of said Directive concerning "geographical remoteness" would not be transferred. The Council insisted, however, on transferring the derogation of Art. 3(6) of the A2L Directive regarding life and limb and substantial jeopardy to criminal proceedings (although the text was made more stringent with a reference to "serious criminal offence").

The most difficult part in reaching a compromise on the text as thus revised was finding a proper balance regarding the situations in which assistance should be provided. In this context, the European Parliament presented a "wish list",[35] and the point was discussed at various (multi-lateral) meetings in the Council, sometimes in the presence of the Commission. During these meetings, a substantial group of Member States insisted that, for various minor and less serious offences (e.g. driving a bike without helmet, shoplifting, causing relatively minor damage to the property of a third person, and various public order offences), it would not be necessary or even useful to provide the child with assistance by a lawyer.

The attempt was made to find a solution by distinguishing between situations in which children are not deprived of liberty ("at large"), and situations in which children are deprived of liberty.[36] However, legal advice was provided to the negotiators that the criterion of "deprivation of liberty" should not be used, since it did not figure in the ECHR and in the case law of the ECtHR.

In the end, with a view to reaching a compromise, it was agreed to insert a horizontal proportionality clause in the text and to install some safety nets. According to the proportionality clause, Member States may derogate from the obligation to provide assistance by a lawyer where this would not be proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case, and the measures that could be taken in respect of such an offence.[37] In order to counter-balance the flexibility that this provision provides to Member States, two additions were made:

- The right to a fair trial should be complied with, implying that the application of this provision should be in conformity with the ECHR and the case law of the ECtHR;
- The child's best interests should always be a primary consideration.

As regards the safety nets, the European Parliament preferred to state that no entry in criminal records would be made unless the child had been assisted by a lawyer. This appeared very difficult, however, in view of the substantial differences between the criminal records of the Member States. Therefore, two other safety-nets were installed:

- The first one is that children should be assisted by a lawyer, in any event, when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings, and during detention. In the light of the temporal scope of the Directive, such detention means pre-trial detention (including detention during the trial, but excluding detention that is the result of the execution of a final sentence).
- The second safety net is that deprivation of liberty should not be imposed as a criminal sentence unless the child has been assisted by a lawyer in such a way as to allow the child to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court.

In accordance with Art. 6 as thus agreed, Member States should ensure that children are assisted by a lawyer.[38] In our view, children cannot waive being assisted by a lawyer: no provision on waiver is foreseen, and the assistance by a lawyer is an obligation for Member States, not a right for children. Member States should arrange for the child to be assisted by a lawyer where the child or the holder of parental responsibility has not arranged such assistance. Member States should also provide legal aid where this is necessary to ensure that the child is effectively assisted by a lawyer.[39] Indeed, following Art. 18, Member States should ensure that national law in relation to legal aid *guarantees* the effective exercise of the right to be assisted by a lawyer pursuant to Art. 6. Art. 6 may be summarized using the figure on page 115, which also explains the interplay of "the children Directive" with the "access to a lawyer Directive" (A2L Directive).

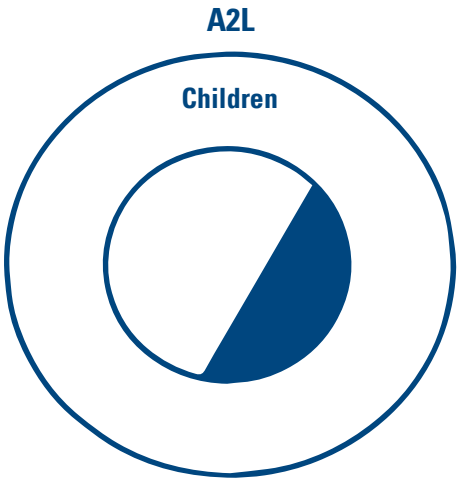

Figure: Children have the right of access to a lawyer in accordance with the A2L Directive: as explained in the text, it provides the *opportunity* for children to have a lawyer. Children should be assisted by a lawyer in accordance with the children Directive: it provides a guarantee to children that they will have a lawyer. Assistance by a lawyer under the children Directive presupposes that the child has the right of access to a lawyer under the A2L Directive;[40] therefore, the circle of the children Directive falls within that of the A2L Directive. In the circle of the children Directive, the black part represents the safety nets: in these situations, assistance should be provided in any event. The white part depends on the application of the proportionality test by the Member States.

5. Individual assessment (Art. 7)

Children are individuals who may have specific needs. Art. 7 therefore provides that children who are suspects or accused persons in criminal proceedings should be individually assessed in order to identify their specific needs in terms of protection, education, training, and social integration.

The negotiations regarding this particular article went relatively smoothly. The biggest problem concerned the moment at which the individual assessment should take place. While the Council agreed with the other two institutions that the individual assessment should take place as early as possible, it remarked that it could take some time to make a sound and meaningful individual assessment.

It was agreed, therefore, that the individual assessment should take place at the earliest appropriate stage of the proceedings and in due time so that the information deriving therefrom can be taken into account by the prosecutor, judge, or another competent authority before presentation of the indictment for the purpose of the trial. It is possible, however, to present an indictment in the absence of an individual assessment, provided that this is in the child's best interest. This could be the case, for example, when a child is in pre-trial detention and waiting for the individual assessment to become available would unnecessarily risk prolonging such detention.[41] In any event, the individual assessment should be available at the beginning of the trial hearings before a court.

As a result of requests by the European Parliament, Art. 7 was made more detailed, e.g. as regards the elements that should be taken into account in the individual assessment[42] and as regards the purposes for which the information deriving from an individual assessment should be taken into account.[43] As a result of another request by the European Parliament and in view of international standards,[44] it was also provided that the individual assessment should be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach.[45]

Art. 7 concerning the right to an individual assessment may prove to be one of the most important articles of the Directive, as it will allow for detecting when children need particular help and support – which is then hopefully addressed. As Fair Trials and CRAE have rightly observed, individual assessments are a crucial step in determining which adaptations to the proceedings are required in order to ensure that the child in question can participate effectively and to identify other specific needs of the child that must be met in order to keep the child safe and protect the child from harm. When a child is in conflict with the law, this is a strong indicator that the child is likely to be in need of support and protection from the authorities, e.g. because the child has experienced neglect, abuse, and/or bereavement in the past.[46]

6. Medical examination (Art. 8)

Art. 8 provides the right to a medical examination for children who are deprived of liberty. Such examination aims at assessing, in particular, the general mental and physical condition of the child. The results of the medical examination must be taken into account when determining the capacity of the child to be subjected to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against the child.

The text that the co-legislators finally agreed upon is very close to the text that was proposed by the Commission. During the negotiations, however, the European Parliament requested substantially enlarging the scope of the article, by providing the right to a medical examination not only for children who are deprived of liberty but also "where the proceedings so require, or where it is in the best interests of the child". Moreover, the European Parliament requested extending the right so that it would encompass "medical care", i.a. "to improve the health and well-being of the child".

The Council could understand the concerns of the European Parliament for the health and well-being of children, but it could not accept the requests concerned. Providing the right to a medical examination to basically all children in criminal proceedings was considered to be disproportionate. Only when the State has deprived a child of his liberty would it be reasonable to require the State to take special care by carrying out a medical examination.

As regards the request to extend the right to medical care, the Council observed that this would *de facto* turn the Directive into a medical insurance: therefore this request was also not considered to be proportionate. Moreover, the Council felt that accepting the request would be in conflict with the legal base of Art. 82(2) TFEU. Of course, in case of urgency, medical assistance should be provided to a child. The Council was willing, therefore, to add a reference to that effect, also in view of Art. 4(2)(c) of Directive 2012/13/EU on the right to information. After negotiations, it was agreed to add the following: "Where required, medical assistance shall be provided."[47]

7. Audio-visual recording (Art. 9)

Children are vulnerable and they may therefore be less able than adults to face questioning by the police or other law enforcement authorities. According to the Commission, there is also a risk that the procedural rights and dignity of children may not be respected during questioning.[48]

In this light, the Commission proposed that the questioning of children be audio-visually recorded. Such recording could provide protection to children, e.g. because they could then demonstrate that they have been ill-treated by the questioning authority or that their procedural rights have been infringed upon. The recording could also afford protection to the police and other law enforcement authorities in that they could demonstrate that they treated the children fairly during questioning and that they respected their procedural rights.

In the Council, Member States observed that audio-visual recording of the questioning of children did not always have positive effects. It was observed that children could consider the audio-visual recording to be intimidating and that, as a consequence, they would not dare to speak anymore.[49] This being, most Member States nevertheless assumed that audio-visual recording of the questioning of children could be positive. In this light, two main issues were raised: in which situations should there be an obligation to make an audio-visual recording and how does it tie in to the presence of a lawyer?

The Council fiercely opposed a categorical obligation to make audio-visual recordings. According to the Council, when children are not deprived of liberty (at large), there should be a *possibility* to make an audio-visual recording of questioning, whereas when children are deprived of liberty, there should only be an *obligation* to make such a recording if it is proportionate to do so. The example was given of a child who is brought to a police station after having been apprehended for a less serious offence, e.g. shoplifting of goods of minor value. If the police would like to pose some questions to the child in this situation, an audio-visual recording should not always be required.

The Council noted that the European Parliament sometimes seemed to have a certain mistrust in the handling of criminal proceedings by the competent authorities of the Member States. It considered that making an audio-visual recording during questioning of children by a judicial authority, e.g. during the trial, would be excessive in any event, since one should be able to assume that such questioning be handled correctly. The Council also suggested making a link to the presence of a lawyer. Member States should be able not to proceed with an audio-visual recording if the questioning takes place in the presence of a lawyer, since that already affords protection to the child.

The Commission and the European Parliament contested this latter argument, since the function of audio-visual recording and of assistance by a lawyer are different: while the audio-visual recording allows for checking whether the police or other law enforcement authorities handle the questioning in a correct manner, assistance by a lawyer aims at providing the child with the necessary legal support.

In the end, a compromise was found by way of an open formulation: questioning of children by police or other law enforcement authorities during the criminal proceedings should be audio-visually recorded when it is proportionate in the circumstances of the case, "taking into account, *inter alia*, whether a lawyer is present or not and whether the child is deprived of liberty or not". It was further added, as in other text passages, that the child's best interests should always be a primary consideration. As an extra safety measure, it was agreed that when an audio-visual recording is not made, questioning should be recorded in another appropriate manner, e.g. by written minutes that are duly verified.

8. Deprivation of liberty (Arts. 10–12)

When children are deprived of liberty, they are in a particularly vulnerable position. Deprivation of liberty, in particular longer periods of deprivation of liberty when in pre-trial detention,

can prejudice the physical, mental, and social development of children, and lead to difficulties as regards their reintegration into society.

The Directive therefore provides special safeguards for children when they are deprived of liberty. The problem in the negotiations was that the concept of deprivation of liberty is very broad. Efforts were made to provide a definition of this concept, but this appeared to be very difficult. Deprivation of liberty includes, in any event, situations in which children are apprehended/arrested, put in police custody, and kept in pre-trial detention.

During the negotiations, the Council insisted on making the rights foreseen in this article "tailor-made" to the various situations of deprivation of liberty. For example, the Council stressed that the obligation, which was set out in the Commission proposal, according to which Member States should take appropriate measures concerning education and training of the child during deprivation of liberty, was formulated too broadly. Only when longer periods of deprivation of liberty are involved, such as when the child is in pre-trial detention, would it be necessary to take care of this.

Art. 10 as agreed, states that deprivation of liberty of children should be limited to the shortest appropriate period of time and that deprivation of liberty, in particular detention, should only be imposed on children as a measure of last resort. This is in line with international standards.[50] To avoid doubt, it is pointed out that this requirement is without prejudice to the possibility for police officers or other law enforcement authorities to apprehend a child in situations if it seems, *prima facie*, necessary to do so, such as *in flagrante delicto* or immediately after a criminal offence has been committed.[51]

Most of the remaining provisons of Arts. 10-12 apply in particular to detention, which again, in line with the scope of the Directive, means pre-trial detention. A decision to this effect is normally taken by a judge or a court. In the Directive it is provided that

- Any detention should be based on a reasoned decision;
- Detention of children should be subject to periodic review;
- Recourse should be had, where possible, to measures alternative to detention;[52] and
- Appropriate measures should be taken relating i.a. to health, education, family life, access to programmes, and respect for freedom of religion or belief.[53]

Provisions were also agreed upon regarding the separation of children and adults when in *detention*. In line with international standards,[54] detained children should be held separately from adults, unless it is considered to be in the child's best interests not to do so. Special rules apply when a detained child turns 18 and regarding the detention of children together with young adults (it is recommended that they be persons up to and including 24 years[55]).

Following a request from the European Parliament, a provision on separation of children and adults when in *police custody* was also agreed upon: here, the Member States insisted on allowing a derogation when, in exceptional circumstances, it is not possible in practice to ensure such separation. This could be the case, e.g. when, in connection with a football match, a large number of hooligans are arrested and there is not enough space in the local police cells to organise the separation of children and adults. In such a situation, however, particular vigilance should be required on the part of the competent authorities in order to protect the physical integrity and well-being of the children.[56]

Lastly, it is provided that the Member States should *endeavour* to ensure that children who are deprived of liberty meet with the holder of parental responsibility as soon as possible, if such a meeting is compatible with investigative and operational requirements. The provision has been formulated in a rather soft way, because the Member States had substantial concerns that a firm obligation to organise meetings between the holder of parental responsibility and the child who is deprived of liberty could, in certain cases, substantially complicate the criminal proceedings, in particular when these proceedings have just started (when a child is in pre-trial detention, it is much less of a problem).

9. Protection of privacy (Art. 14)

The protection of the privacy of children who are suspects or accused persons in criminal proceedings is very important. The necessity of such protection is also recognised in international standards.[57] Involvement in criminal proceedings risks stigmatising children and may have – even more than for adult suspects and accused persons – a detrimental impact on their chances for (re-)integration into society and on their future professional and social life. The protection of the privacy of children involved in criminal proceedings is a critical component of youth rehabilitation.[58]

During the negotiations on the Directive, two main issues emerged regarding the protection of the privacy of children. The first issue concerned the question of whether such protection requires that criminal proceedings involving children should, as a general rule, be conducted in the absence of the public ("in camera"). The Commission and the European Parliament felt that this should be the case.

The Council, however, objected. While recognising the need to protect the privacy of children, it was observed that transparent and open justice is also a fundamental element of the rule of law. It referred in this context to Art. 6(1) ECHR, according to which everyone against whom a criminal charge is brought is entitled to a fair and *public* hearing. In its general approach, the Council therefore stated that the Member States should attempt to strike a balance by taking account of the best interests of children, on the one hand (which could e.g. be achieved by setting as a principle that trials against children be organised in the absence of the public) and of the general principle of a public hearing, on the other hand.[59]

As a compromise, it was agreed to provide in Art. 14 that the privacy of children during criminal proceedings should be protected and that, to this end, Member States should *either* provide that court hearings involving children are usually held in the absence of the public *or* allow courts or judges to decide whether to hold such hearings in the absence of the public. Hence, it should at least be *possible* in all the 25 Member States to conduct criminal proceedings involving children in the absence of the public.

The second issue related to the proposed obligation for Member States not to publicly disseminate information that could lead to the identification of a child. According to the Commission proposal, the authorities should, in particular, refrain from divulging the names and images of suspected or accused children and their family members.

The Council agreed, in principle, but stated that such an obligation should not prevent the competent authorities from publicly disseminating information that could lead to the identification of a child if this is strictly necessary in the interest of the criminal proceedings. One could think of criminal activity, such as robbery or sexual assault, which has been committed by persons that are apparently under 18. By publicising a photo or a video showing the (alleged) perpetrators, the police could ask the public for help in obtaining the identity of these persons.

During the negotiations, therefore, the Council suggested inserting two derogations, one for life and limb and one for the interest of the criminal proceedings.[60] Upon the request of the Nordic countries, which have strict rules regarding transparency, the Council also suggested adding that Member States could provide a right for the general public to have access to the materials and the judgment of a case in criminal proceedings.[61]

The European Parliament considered these derogations to be very broad. It therefore preferred deleting the entire obligation altogether. The Presidency regretted this decision, since it felt that, despite the derogations, the obligation provided added value. It accepted the point of view of the European Parliament, however, with a view to reaching a compromise on the draft Directive.[62]

10. Presence at court hearings (Arts. 15 and 16)

Arts. 15 and 16 provide for the right of a child to be accompanied by the holder of parental responsibility during the criminal proceedings, the right to be present at the trial, and the right to a new trial.

The title of Art. 15 as initially proposed, namely "Right of access to court hearings of the holder of parental responsibility", was replaced by "Right of the child to be accompanied by the holder of parental responsibility." This makes sense, since the Directive is meant to give rights to children, not to their parents (or similar persons).

In line with Art. 5, Art. 15 provides certain derogations allowing Member States to decide that not the holder of parental responsibility, but another appropriate adult may accompany the child during court hearings.[63] However, it is made clear that, when the circumstances justifying a derogation have ceased to exist, the child again has the right to be accompanied by the holder of parental responsibility during any remaining court hearings.[64]

The European Parliament requested adding a right for children to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings, e.g. during questioning at the police station. The Council fiercely objected this request on the grounds that this could substantially jeopardize the criminal proceedings. In order to reach a compromise, however, the Council agreed to the insertion of the new provision on condition that, during such other stage, children may only be accompanied by the holder of parental responsibility if the competent authority considers that it is in the child's best interests to be accompanied by that person and if the presence of that person will not prejudice the criminal proceedings. This enables the competent authorities to maintain control.

As regards the right of children to appear in person at the trial, the basic idea of the Commission's proposal did not cause any particular problems. Upon suggestion by the European Parliament, it was agreed that children should be able to "participate effectively" in the trial, which notably should mean that they should be given the opportunity to be heard and express their views. This is a useful amelioration.

11. Other Articles (Arts. 20 and 22)

Art. 20 on training has been modelled on a corresponding provision in Directive 2012/29/EU on the protection of victims.[65] Art. 22 provides that the costs resulting from the application of the provisions on the individual assessment, the medical examination,[66] and the audio-visual recording should be met by the Member States, irrespective of the outcome of the proceedings.[67]

IV. Concluding Remarks

Procedural rights for children are already contained in various instruments of international law. These instruments, however, often have no (real) binding nature, and the enforcement instruments are weak. It is therefore very positive that Directive (EU) 2016/800 introduces minimum standards on procedural safeguards for children in Union law. The application and interpretation of these standards will now come under the control of the Commission and the Court of Justice of the European Union.

The negotiations leading to the Directive were very intense and complicated. This can i.a. be explained by the fact that, on several points, similar rights applicable to all suspects and accused persons already exist in other measures. As a result, there was a constant search to determine the available margins to do something "extra" for children. On some points, the final text of this Directive may fall short of expectations. In respect of several important issues, however, the Directive provides added value, including:

- The right to information;
- The individual assessment;
- Assistance by a lawyer (combined with legal aid);
- The treatment of children when deprived of liberty; and
- The right to participate at the trial.

During the trilogue negotiations, the Member States in the Council had diverging positions: while some felt that the standards as set out in the general approach should be maintained, others aligned with the European Parliament and the Commission, which wanted to provide higher standards of protection for children. In the end, however, all Member States voted in favour of the final compromise text of the Directive.[68]

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* This article reflects solely the opinion of the author and not that of the institution for which he works. The author would like to thank Ingrid Breit for her valuable comments on the article. Any mistakes, however, should be attributed to the author only.

1 O.J. L 132, 21.5.2016, p. 1; see also the news section „Procedural Safeguards", in this issue.

2 O.J. C 295, 4.12.2009, p. 1.

3 O.J. L 280, 26.10.2010, p. 1. See, on this measure, S. Cras and L. De Matteis, "The Directive on the right to interpretation and translation in criminal proceedings", *eucrim* 4/2010, p. 153.

4 O.J. L 142, 1.6.2012, p. 1. See, on this measure, S. Cras, and L. De Matteis, "The Directive on the right to information", *eucrim* 1/2013, p. 22.

5 O.J. L 294, 6.11.2013, p. 1. See, on this measure, S. Cras, "The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings", *eucrim* 1/2014, p. 32.

6 O.J. L 65, 11.3.2016, p. 1. See, on this measure, S. Cras and Anže Erbežnik, "The Directive on the presumption of innocence and the right to be present at trial", *eucrim* 1/2016, p. 25.

7 The Commission considered whether the term "minors" should be used instead of "children". The latter term was finally employed since this is also the one used in international standards, e.g., the UN Convention on the Rights of the Child (1989) and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).

8 Explanatory memorandum, point 9.

9 COM(2011) 60 final (action 2).

10 O.J. C 378, 24.12.2013, p. 8.

11 The Netherlands issued a reasoned opinion on the basis of Protocol N°2 to the Lisbon Treaty, stating that the proposal of the Commission did not comply with the principle of subsidiarity. This was a bit curious, since this measure (at least a measure on special safeguards for vulnerable persons) was already foreseen by the Roadmap, which had been adopted unanimously by the Council.

12 COM (2013)821.

13 COM (2013)824.

14 Council doc. 7047/14, p. 1.

15 Council doc. 10065/14.

16 See, e.g., "Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings", presented by Fair Trials and the Children's Rights Alliance for England (CRAE) in September 2014 (from point 14).

17 In application of Art. 294 TFEU.

18 The letter by the President of COREPER to the European Parliament contains the following standard text:
"*Following the informal meeting between the representatives of the three institutions, the final compromise package was agreed today by the Permanent Representatives' Committee.*
I am therefore now in a position to confirm that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise package contained in the Annex to this letter (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position."

19 See, e.g., the UN Convention of the Rights of the Child, Art. 1.

20 Recital 13.

21 Art. 5, point (b) of Art. 8(3), and Art. 15.

22 Directive 2010/64/EU on the right to interpretation and translation, Art. 2(2); Directive 2012/13/EU on the right to information, Art. 2(1); and Directive 2013/48/EU on the right of access to a lawyer, Art. 2(1).

23 It was also observed that, after a final sentence, the persons concerned would no longer be suspects or accused persons but sentenced persons, which would not correspond with the title and subject matter of the Directive.
24 Art. 4 complements the obligation to provide information on rights under Arts. 3 to 7 of Directive 2012/13/EU.
25 ECtHR, *Panovits v. Cyprus*, 11 December 2008 (Appl. no. 4268/04), para. 67.
26 The stages of the proceedings are as follows: (1) promptly when children are made aware that they are suspected or accused; (2) at the earliest appropriate stage in the proceedings; and (3) upon deprivation of liberty.
27 Art. 4(2).
28 Recital 19.
29 Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (O.J. L 338, 23.12.2003, p. 1), Art. 2 (7 and 8).
30 Art. 3(2) and (3).
31 While the intention of the Commission was clear, doubts were expressed as to whether the drafting of Art. 6 of the Commission proposal would effectively lead to mandatory assistance by a lawyer. The Commission had proposed the following: "Member States shall ensure that children are assisted by a lawyer throughout the criminal proceedings in accordance with Directive 2013/48/EU. The right to [read: of] access to a lawyer cannot be waived." The A2L Directive provides an *opportunity* for suspects or accused persons to have access to a lawyer. Not being able to waive that opportunity does not seem to result in the child being effectively assisted by a lawyer.
32 See S. Cras, eucrim 1/2014 *op. cit.*, p. 36.
33 "In principle" because it seems fair to make an exception for the situation in which a lawyer has been arranged/appointed but the lawyer does not turn up during the proceedings. See also in this regard Art. 6(7) of the Directive as finally agreed.
34 Council doc. 13199/15, p. 4.
35 Council doc. 13901/15, p. 3.
36 See, e.g., Council doc. 14470/15, p. 4 and p. 5.
37 Art. 6(6). The criteria are clearly inspired by Strasbourg case law, see, e.g. ECtHR *Quaranta v. Switzerland,* 24 May 1991 (Appl. no. 12744/87), para. 32-38.
38 Art. 6(2).
39 Recital 25.
40 Recital 26. This recital also states that where the application of a provision of the A2L Directive would make it impossible for a child to be assisted by a lawyer under the children Directive, such provision should not apply to the right of children to have access to a lawyer under the A2L Directive. An example in this regard is the derogation for geographical remoteness as set out in Art. 3(5) of the A2L Directive.
41 See recital 39.
42 Art. 7(2).
43 Art. 7(4).
44 CoE Guidelines on child-friendly justice, *op. cit.*, point IV.A.16.
45 Art. 7(7).
46 Joint position paper presented by Fair Trials and CRAE, *op. cit.*, point 33.
47 Art. 8(4).
48 Explanatory memorandum, point 40.
49 Audio-visual recording can also have other negative effects. A representative of one Member State accounted that, under the law of his Member State, it is not only obligatory to make audio-visual recordings of questioning of children but it is also obligatory to provide the child with a copy of the recording upon request. This provokes the following situation: once in a while teenagers who often commit crimes come together to watch recordings of themselves being questioned by the police. The person who shows off as having been the "toughest" with the police during the recorded questioning is awarded a prize. Obviously, in such situations, the obligation of audio-visual recording has unwanted consequences.
50 For example, the CoE Guidelines on child-friendly justice, *op. cit.*, point IV.A.19, and the UN Convention on the rights of the child, Art. 37 b).
51 Recital 45.
52 Alternative measures could e.g. be a prohibition for the child to be in certain places, restrictions concerning contact with specific persons, reporting obligations to competent authorities, participation in educational programmes, etc. See recital 46.
53 The measures should, where appropriate and proportionate, also apply to situations of deprivation of liberty other than detention, see Art. 12(5), last sub-paragraphs.
54 CoE Guidelines on child-friendly justice, *op. cit.*, point IV.A.20.
55 Recital 50.
56 Recital 49.
57 See e.g. the CoE Guidelines on child-friendly justice, *op. cit.*, point IV.A.6.
58 Explanatory memorandum, point 51.
59 General Approach (Council doc. 10065/14), recital 28.
60 Compare Art. 5(3) of the Directive 2013/48/EU.
61 Council doc. 13199/15, p. 26.
62 Council doc. 13901/15, p. 4.
63 Art. 15(2).
64 Art. 15(3).
65 Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (O.J. L 15/57, 14.11.2012), Art. 25.
66 Unless covered by a medical insurance.
67 The request from certain Member States to allow for the recovery of such costs in case of conviction of the child (Council doc. 10065/14, Art. 21.2) was, fortunately, not accepted in the final text. It would have been contrary to the aim of enhancing the procedural safeguards for children, it could have entailed "fair justice" risks, and it would not have been in line with other instruments, in particular Directive 2010/64/EU, which equally foresees in its Art. 4 that the Member States should meet the costs.
68 It should be noted, however, that Italy made a declaration upon the adoption of the Directive, stating that it maintained concerns about the level of protection accorded by the Directive and that, when implementing the Directive, it would continue to be inspired by the high levels of protection its legal system already provides for children in criminal proceedings.

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