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Editorial

Dear Readers,

The Lisbon Treaty, which entered into force at the end of 2009 mandates the Union to establish a true European area of justice reinforcing mutual trust and enabling mutual recognition of Member States judicial decisions. This will require, among others, elements as diverse as the strengthening of Eurojust, the establishment of a European Public Prosecutor's Office (EPPO), the reform of the European Anti Fraud Office (Office Européen de la Lutte Anti-Fraude – OLAF) and common minimum standards in the justice process (such as fair trial rights, prison conditions and rights of victims of crime).

At the April Justice and Home Affairs Council the Commission gave an initial outline of its ideas for the future of a European judicial area. We will pursue our reflection in the coming months. As the EU commissioners for Justice on the one hand and Taxation and Customs Union, and Audit and Anti-Fraud on the other hand, we are committed to promoting a combined approach mixing legislative and institutional means to reinforce the Union's capabilities to prevent and fight fraud affecting its financial interests.

The Stockholm Programme, adopted in 2009, gives the outline of many of the changes which have to take place in the years to come. The Commission has defined an ambitious action plan for 2010-2014 to implement the Stockholm programme. The implementation of the programme will help to further the mutual acceptance of the different judicial systems within the Member States by building up trust: trust in each others judicial decisions, trust in each others law enforcement and judicial authorities. The citizens must be confident that the judicial proceedings throughout the Union are fair and that their rights are respected - no matter where in the EU.

Also in line with this action plan, the Commission will prepare the establishment of a European Public Prosecutor's Office (EPPO) from Eurojust to investigate, prosecute and bring to judgement offences against the Union's financial interests. Its aim is clear: to protect the European tax-payer and pursue cases where EU funds are being ripped off by fraudsters and when local law enforcement does not have the means to take the necessary action to protect the EU's budget.

Viviane Reding

Algirdas Šemeta

The Commission has since 2001 conducted a reflection on the feasibility and the value added of an EPPO based on its Green paper which ultimately led to the insertion of the concept of the EPPO as a possibility in the Lisbon Treaty.

Under the provisions of Article 86 TFEU, an EPPO may now be established from EUROJUST in order to combat crimes affecting the financial interests of the Union. This will include the strengthening of EUROJUST. We will continue to work closely together on this necessary project.

OLAF's experience shows that criminal prosecution could benefit from having a function at EU level to supplement OLAF administrative investigations. Also Eurojust already plays a useful role of coordination and its powers may be further strengthened under Article 85 TFEU in this regard. There is a need to centralise information and enforce the law, keeping in mind that, in the national legal systems, prosecutions are not always launched or completed in an effective way to protect the EU's financial interests.

The setting-up of an EPPO ultimately requires the adoption of legislation on its functions, tasks and rules of procedure.

Rules on the admissibility of evidence and on judicial review are also indispensable. A thorough reflection involving all professionals with relevant experience is needed. We are aware that "Eucrim" is a forum which can contribute to this debate. It allows views to be expressed and information to be exchanged between lawyers of all the Member States. By disseminating information on relevant legal and administrative developments in the European Union, it contributes to build mutual trust. And it is of crucial importance to foster the debate on how to carry out at European level an assessment of the way the system will work in the end.

In preparing the EPPO, we will further reflect on the EPPO's cooperation with other actors, including and in particular with OLAF. The reform of OLAF is well under way. The Commission submitted a reflection paper in July 2010. It is our intention that the legislative process concludes by the end of 2011. It is a relatively limited although important reform, as it aims to improve OLAF's efficiency and effectiveness and prepare it for future challenges, including OLAF's relationship with Eurojust and with the future EPPO.

The ultimate aim of all these actions and projects underway is to build upon mutual confidence and trust. Trust that the taxpayers' money is not wasted or misused by fraudsters. The goal is to ensure mutual trust in the judicial systems of all Member States and confidence by the citizens that their rights and interests are being safeguarded.

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

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

European Union*

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Foundations

The Stockholm Programme

Conclusions on the Action Plan Implementing the Stockholm Programme

During the Justice and Home Affairs Council from 3-4 June 2010, the Council adopted conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens − Action Plan Implementing the Stockholm Programme". The Action Plan (see also eucrim 1/2010, p. 2) of the Commission sets out the concrete measures and timetables for implementing the objectives laid down in the Stockholm Programme (see also eucrim 4/2009, pp. 122-123 and eucrim 3/2009, pp. 62-63).

In its conclusions, the Council pointed out that a number of actions that are proposed by the Commission are not in line with the Stockholm Programme, whereas other measures that were included Programme are not reflected by the Commission's Communication. Thus, the Council requested the Commission to only take initiatives regarding measures which are in conformity with the Stockholm Programme. By June 2012, the Commission is asked to present a mid-term review of the implementation of the Programme. (EDB)

➤eucrim ID=1002001

Reform of the European Union

Negotiating Mandate for Accession of EU to ECHR Adopted

The Council adopted the negotiation mandate for the accession of the EU to the European Convention of Human Rights (ECHR) on the JHA meeting from 3-4 June 2010. In April 2010, the Commission had sent out its Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement to the Council (see eucrim 1/2010, pp. 2-3), where several working groups discussed the matter.

On 10 May 2010, the European Parliament (EP) adopted a report drafted by the Committee on Constitutional Affairs on the institutional aspects of the accession of the European Union to the ECHR. In this report, the EP points out a number of institutional issues regarding the EU's accession to the ECHR such as the appointment of a judge to the European Court of Human Rights (see also eucrim 1/2010, p. 3). Article 218 of the Treaty on European Union laid down that the EP should be informed of all stages of the negotiations.

By adopting the mandate, the Commission has been given clear guidelines for the negotiations with the Council of Europe. (EDB)

➤eucrim ID=1002002

Schengen

Amendments to Regulations on SIS II

After the EP's consent to amending the legal instruments governing the transition of the SIS 1+ database to the SIS II, the Council adopted two new Regulations at its meeting on 3-4 June 2010 (see also eucrim 1/2010, p. 3). The existing instruments were to expire on 30 June 2010, and delays in making the SIS II operational have made it necessary to amend these instruments.

The two new Regulations amending Decision 2008/839/JHA and Regulation 1104/2008 extend the deadline for setting the preconditions for the transition to the new system to March 2013.

The amendments to the existing instruments also established the Global Programme Management Board. This Board was launched in 2009 as an infor-

* If not stated otherwise, the news reported in the following sections cover the period May 2010–June 2010.

mal advisory body consisting of experts of the Member States. It is the Board's task to ensure consistency between the national projects and the central project.

The two new Regulations have been published in the Official Journal of 22 June 2010. (EDB)

➤eucrim ID=1002003

Institutions

Council

Council Holds General Debate on Internal Security

The Council held a debate on internal security during the meetings from 3-4 June 2010. Discussions were mainly based on two reports: the so-called M.A.D.R.I.D. report and the EU Internal Security Strategy. The M.A.D.R.I.D. report is a confidential document from the former, current and following Presidencies that describes the current threats and challenges to internal security based on three other reports: Europol's Organised Crime Threat Assessment (OCTA), the Terrorism Situation and Trend Report (TE-SAT) and Frontex' Annual Risk Analysis.

The EU Internal Security Strategy acknowledges the framework of the Stockholm Programme and sets out a European security model, which integrates action on law enforcement and judicial cooperation, border management and civil protection, taking into account shared European values such as fundamental rights. It identifies the main threats and challenges that the EU is currently facing and therefore was one of the core elements of the debate.

The debate resulted in the Council emphasising the policy areas on which operational cooperation among Member States should be focusing: organised crime and its financial resources, money laundering, cybercrime and cyber-security, terrorism, trafficking in human beings, arms trafficking, illegal migration and cooperation with third states.

Finally, the COSI (the Council's Standing Committee on Internal Security, see also eucrim 4/2009, p. 123) has been given the task of reporting annually on the state of internal security in the EU. (EDB)

➤eucrim ID=1002004

Commission

Directorate-General Justice, Freedom and Security Split

As of 1 July 2010, the Commission has two new Directorates-General. The DG Justice, Freedom and Security has become two directorates – Directorate-General for Justice and Directorate-General for Home Affairs. Ms Francoise Le Bail is now the new Justice Director General and Mr Stefano Manservisi will serve as the new Home Affairs Director General. The two new Directorates-General will continue to share a common Resource Directorate. (ST)

➤eucrim ID=1002005

Relations Between the Commission and the National Parliaments

On 2 June 2010, the Commission released its annual report on relations between the Commission and the national parliaments (COM (2010) 291 final).

The report points out a greater extent of participation of the national parliaments with the Commission's work, shown by an increased number of opinions sent to the Commission in the context of the political dialogue. Most opinions related to the area of freedom, security and justice focused on the Stockholm Programme (see also eucrim 4/2009, pp. 122-123 and eucrim 3/2009, pp. 62-63), overall expressing support for it. On the other hand, concerns were raised, inter alia, as to the efficiency of instruments of internal resettlement, the Common European Schengen Visa, and the proposal that legal migrants should obtain similar rights to EU citizens. The Commission sees its main future priorities with respect to the relations to the Member States' parliaments in strengthening the political dialogue and assuring smooth and effective implementation of the provisions of the Lisbon Treaty, especially regarding the subsidiarity control mechanism (See also the article written by Dr. Herlin-Karnell, pp. 59-64). (ST)

➤eucrim ID=1002006

OLAF

OLAF 2009 Activity Report

On 14 July 2010, OLAF published its annual activity report.

The report focuses on OLAF's independent operational work, and presents a number of concrete case studies, e.g. a case of systemic weakness found in a new agency, internal investigations related to misuse of expenses by an ex-MEP, or investigations into systemic fraud in an agricultural development programme. According to the report, OLAF's workload has overall increased, as shown by 220 cases opened in 2009 compared to 204 cases in 2008.

With respect to future challenges, the report emphasises the need for a reform of OLAF, in particular with a view to benefitting from the opportunities created by the Lisbon Treaty. (ST)

➤eucrim ID=1002007

Agency for Fundamental Rights (FRA)

Fundamental Rights Bodies in Need of Additional Support

According to 4 reports released by the European Union Agency for Fundamental Rights (FRA) on 7 May 2010, European fundamental rights protection bodies need more support as to resources, authority and independence to function effectively. The four reports concern national human rights institutions across the EU, national data protection

authorities, national equality bodies and the impact of the Racial Equality Directive. Key findings of the reports are that these Member States' bodies lack both financial and human resources, which in the end leads to insufficient citizens' awareness of fundamental rights and ways to protect these rights. Also, the reports find that the inconvenience, bureaucracy and time involved in making a complaint were among the main reasons given for not reporting violations of fundamental rights. The FRA therefore calls upon Member States to better resource and authorise their fundamental rights protection bodies in order to not put the European fundamental rights architecture at risk. (ST)

➤eucrim ID=1002008

Europol

Cooperation Agreement with FYROM

Striving for the conclusion of a cooperation agreement with another state set out on the list of third states with which Europol shall conclude agreements (see eucrim 3/2009, pp. 66-67), the JHA Council authorised the conclusion of an Agreement on Operational and Strategic Co-operation between the Former Yugoslav Republic of Macedonia (FYROM) and Europol during its meeting of 3-4 June 2010. Such conclusion would also allow for the exchange of personal data as opposed to mere technical and strategic information which Europol and the FYROM already exchange under a strategic cooperation agreement concluded in January 2007.

The purpose of this operational agreement is to regulate and extend the co-operation between the parties in order to support the EU Member States and the FYROM in their fight against serious forms of international crime. The areas of cooperation covered by the agreement involve all of Europol's tasks such as, for instance, the exchange of specialist knowledge as well as of information on criminal investigation procedures and crime prevention methods, participation in training activities, and advice and support in individual criminal investigations.

The main novelty of the agreement, however, will be the possibility to exchange personal data. The agreement contains detailed rules on the provision of collected personal data by both parties, on the assessment of the source of information, on potential correction and deletion, and on confidentiality obligations. It also encloses a detailed annex regulating the exchange of classified information. Moreover, the FYROM may be invited by Europol to be associated with the activities of analysis groups in charge of Europol's Analysis Work Files.

Within the FYROM Ministry of Interior, a Europol Unit will be set up to act as a contact point which shall also be in charge of the exchange of information with Europol. Finally, one or more liaison officers of the FYROM shall be stationed at Europol and Europol will be able to send liaison officers to the Europol Unit within the Ministry of Interior. (CR)

➤eucrim ID=1002009

Enhanced Cooperation with Serbia

During his visit to Europol on 28 May 2010, Serbia's First Deputy Prime Minister and Minister of the Interior, Ivica Dacic, and Europol's Director, Rob Wainwright, signed three cooperation measures: a roadmap for cooperation between Serbia and Europol, a memorandum of under-standing on the establishment of a secure communication line between Serbia and the Europol headquarters as well as a bi-lateral agreement for the interconnection of computer networks.

In September 2008, Europol and Serbia concluded a strategic cooperation agreement. Serbia is also included on the Council's list of third states with which Europol shall strive for the conclusion of an operational cooperation agreement (see eucrim 3/2009, pp. 66-67). (CR)

➤eucrim ID=1002010

Eurojust

Eighth Annual Report 2009

On 15 June 2010, Eurojust published its eighth annual report reviewing its activities in 2009. Besides some general information on its activities and management, the report mainly focused on Eurojust's operational work in the light of the EU's priorities regarding the fight against serious and organised crime. A new feature of the report is the incorporation of concrete case studies deriving from Eurojust's operational work. The remaining chapters outline Eurojust's relations with EU partners and the implementation of the Eurojust Decision. The final chapter provides a follow-up on the implementation of the key guidelines and recommendations given by the Council in its conclusions on the seventh Eurojust report.

As in previous years, the caseload at Eurojust increased, this time by 15% with 1372 newly registered cases and 131 coordination meetings conducted. At the end of 2009, an evaluation of 255 closed cases showed that the majority of cases carried out by Eurojust deal with EAWs and requests for judicial cooperation with respect to suspects, witnesses, or victims.

Eurojust's operational priorities for 2009 focused on the fight against terrorism, drug trafficking, trafficking in human beings, fraud, corruption, cybercrime, money laundering, and on other activities related to organised crime. As to terrorism and trafficking in human beings, the report concludes that the number of cases where Eurojust's assistance has been sought decreased in 2009. With regard to drug trafficking, 230 cases were registered at Eurojust in 2009 and 40 coordination meetings have been held. As in previous years, Eurojust's caseload concerning cases of fraud and fraud-related crime has increased again. Cases of money-laundering have even increased by 25%. For the first time, the Eurojust annual report lists corruption as a separate category of crime which

underlines its increasing importance in Eurojust's work. The report also highlights the importance of Eurojust in cybercrime cases committed via the Internet which are generally multi-national cases. Eurojust's operational budget increased by 10% and the total budget execution for 2009 was € 25,2 million. For the first time, Eurojust applied for and administered funding from the Commission for Joint Investigation Teams (see eucrim 3/2009, p. 81).

Important changes were brought about by the new Eurojust Decision which vests Eurojust with new authorities. In 2009, Eurojust conducted several seminars and meetings to support a coordinated implementation of the Decision by the Member States and published a non-binding implementation plan as well as an internal Implementation Programme. Furthermore, in order to improve Eurojust's effectiveness, it introduced an Organisational Structure Review (OSR) in 2009 whose task is to review Eurojust's management structure, coordination mechanism, human resources management and control systems.

Another important change in Eurojust's field of activity is introduced by the Lisbon Treaty which, amongst others, allows for the development of a European Public Prosecutor's office emerging from Eurojust.

Regarding Eurojust's cooperation with states and bodies in and outside of the EU, the year 2009 was characterised by the signature of a new Cooperation Agreement with Europol (see also eucrim 1-2/2009, p. 6), a Memorandum of Understanding with CEPOL (see eucrim 4/2009, p. 127), and first contacts with Frontex. Beyond the EU, Eurojust signed a Memorandum of Understanding with the Ibero-American Network of International Legal Cooperation (IberRed) and the United Nations Office on Drugs and Crime (UNODC). Eurojust also became an observer of the Financial Action Task Force (FATF). A liaison prosecutor from Croatia was appointed to Eurojust and a Eurojust contact point has been added to its third state network in the Republic of Korea.

Finally, a new Administrative Director of Eurojust, Hans Jahreiss, and a new President of the College, Aled Williams (see eucrim 1/2010, pp. 7-8) have been appointed in 2009. (CR)

➤eucrim ID=1002011

Eurojust News – Second Issue

On 16 April 2010, Eurojust published the second issue of its quarterly news. The issue is dedicated to the fight against trafficking in human beings (THB). The articles deal with the phenomenon of trafficking in human beings and Eurojust's role in combating it, particularly the agency's efforts related to the fight against trafficking in children..

The newsletter includes an interview with the Swedish MEP Anna Hedh who had introduced a motion for a resolution on preventing THB in early 2010 and Mrs Patsy Sörensen, Founder and Director of Payoke, a Belgian organisation set up to defend the interests of prostitutes and their families.

Eurojust's caseload regarding cases of trafficking in human beings has increased considerably in comparison to previous years. In 2009 74 THB cases were registered. The Eurojust Trafficking and Related-Crimes Team works on cases of THB, collecting and managing expertise to ensure that the information is made available to practitioners through strategic and tactical meetings and by other means.

Moreover, Eurojust hosts a Contact Point for Child Protection which is tasked to collect, identify, and coordinate information and share relevant best practice and practical experience. The Contact Point also cooperates with competent European and international bodies active in the field of child protection, such as Europol, Interpol and the UNODC, and provides advice to Eurojust National Members on casework involving children. (CR)

➤eucrim ID=1002012

European Judicial Network (EJN)

Memorandum of Understanding with IberRed

During its 34th plenary meeting on 21 June 2010, the European Judicial Network (EJN) signed a Memorandum of Under-standing (MoU) with the Ibero-American Network of International Legal Cooperation (Red Iberoamericana de Cooperación Jurídica Internacional, IberRed). IberRed is a network of contact points between the different ministries and central authorities consisting of currently 23 Ibero-American states. The network aims at improving mutual legal assistance in civil and penal matters.

Recognising the need for a global response to transnational criminality, the MoU aims to strengthen the cooperation at the operational level between the contact points of the two networks and to establish a bridge between EJN and IberRed in order to jointly combat crime from different regions of the world. As both networks mainly work on an operationally-oriented, informal and decentralised basis, the objective of the MoU is not to formalise the cooperation, but rather to set out its general framework in writing. (CR)

➤eucrim ID=1002013

Project with EPJUST

On 8 October 2009, the EJN signed a project agreement with the EU-Philippine Justice Support Programme (EPJUST) which was publicly announced by the launch of a new website in June 2010. The programme assists Philippine government agencies, constitutional bodies as well as the civil society in bringing an end to extralegal killings and enforced disappearances. Through an EU expert team, it contributes to the effective investigation, prosecution and bringing to justice of individuals involved in the commitment of these crimes by the competent Philippine authorities. The project will last 30 months and a EJN webmaster, involved as a short-term expert, will provide the expert team of the

project with technical assistance on the development and management of networking systems. (CR)
➤eucrim ID=1002014

Frontex

Extract from the Annual Risk Analysis 2010

Frontex has published an extract from the Annual Risk Analysis Report for 2010. The Annual Risk Analysis (ARA) was developed to plan the coordination of operational activities at the EU's external borders in 2011. The analysis assesses the threats and vulnerabilities at the EU's external borders and their impacts and consequences in order to effectively allocate Frontex' resources. The public ARA does not contain certain parts of the full report, namely the parts on environmental scan, the outlook for 2011, recommendations for operational response as well as operationally sensitive details.

With regard to the situation at the external borders of the EU, the report finds a strong decrease regarding the detection of illegal border crossings of -23% at sea borders and of -43%, at land borders, with illegally border-crossing Albanian nationals representing the largest share of the total detections (38%). The analysis confirms a general decrease in the total number of detections for most nationalities with the exception of Palestinian nationals whose detection rate increased by 77%.

39% of all detections of illegal border crossing entering the EU in 2009 were reported on the Eastern Mediterranean route. Joint patrols by Libya and Italy, made possible by the signature of a bilateral agreement, are seen as a strong deterrent and as a reason for the decrease in detections along the Central Mediterranean route. The same applies to the Western African route, presumably due to the improved collaboration between Spain, Senegal and Mauritania. Along the Western Balkan route, the most commonly detected nationals illegally crossing the border were from Kosovo. This route is also used for smuggling high taxed goods and drugs, small arms, ammunition and explosives as well as stolen vehicles. Detections of cases of illegal border crossing at Eastern European land borders in 2009 were very low, representing only 1% of the total.

The top three most commonly falsely claimed countries of origin found in the report are Somalia, the Palestinian territories and Afghanistan.

According to the report, the number of facilitator remained nearly the same with a total of 9,200 compared to 9,900 in the previous year, most facilitator being EU nationals.

Looking at the refusals of entry in 2009, the report found that the number remained fairly stable with 113,000 cases; however, it also showed a decrease in refusals of entry at air borders and a sharp increase at land borders.

Finally, the number of applications for international protection remained similar to 2008 with 219,800 cases, while the number of persons staying illegally in the EU dropped by 21%.

With regard to the victims of trafficking in human beings, the report finds that almost half of the numbers of victims identified in 2009 were EU nationals; most of them have been abducted from Member States that joined the EU after 2004 and have been trafficked for the purpose of sexual exploitation. Corresponding to these results, the majority of suspected traffickers is from Member States that joined the EU after 2004 (37%). (CR)
➤eucrim ID=1002015

Situation at the External Border Map

Frontex recently published a map picturing the current irregular migration situation at the external borders of the EU, showing the main entry routes into the European Union, namely the West African route, via the Canary Islands, the Central Mediterranean route, including Italy and Malta, the South Eastern European route (including Greek land and sea borders) as well as the Eastern land borders of the EU. (CR)
➤eucrim ID=1002016

Cooperation with CEPOL

Following up on the Working Agreement signed between Frontex and CEPOL in June 2009 (see eucrim 3/2009, p. 68), on 21 June 2010, Frontex Executive Director Ilkka Laitinen and CEPOL Director Ferenc Bánfi met at CEPOL Secretariat in Hampshire, United Kingdom, to discuss their strategy for closer future cooperation between the two agencies, starting with co-operation on specific areas of training and a projected Exchange Programme.

The Directors underlined that the future cooperation should be built on the concluded Working Agreement as well as on the joint report written by CEPOL, Eurojust, Europol and Frontex on the improvement of interagency cooperation among the EU law enforcement agencies. (CR)
➤eucrim ID=1002017

European Day for Border Guards

On 25 May 2010, the first European Day for Border Guards took place in Warsaw. The event aimed at strengthening the European community of border guards by providing a forum for discussion and exchange of best practices.

The agenda of the event featured a conference on "The future of the border management in Europe including the role of Frontex" as well as specialised panel discussions on fundamental rights in border management, the profiles of the future border guards, the future of technology for border control and interagency cooperation. The event further offered a border related photo contest, film screenings, and an industry exposition. It will take place annually and each time in a different Member State. The focus will always be on aspects of the management of the EU's borders. (CR)
➤eucrim ID=1002018

Specific Areas of Crime / Substantive Criminal Law

VAT / Tax Fraud

Agreement on VAT Cooperation Regulation Reached

On 8 June 2010, the Council reached a political agreement on the draft regulation on administrative cooperation and combating fraud in the field of VAT. One of the most interesting innovations is the creation of Eurofisc, a common operational structure of national officials to detect and combat new cases of VAT fraud. The Eurofisc network will establish a multilateral early warning mechanism and facilitate the coordination of information exchange in cross-border VAT fraud investigations (see eucrim 1/2010, p. 5 for the EDPS' opinion on the new regulation). The regulation is to be adopted at the next Council meeting. (ST)

➤eucrim ID=1002019

Pan-European Swoop on EU Emissions Traders

As reported by newspapers and online journals, traders involved in the emissions trading system were the focus of a series of raids and arrests by British and German prosecutors as part of investigations regarding CO2-credit VAT fraud. On 28 April 2010, over 1000 investigators in Germany simultaneously raided more than 230 premises, including the headquarters of the Deutsche Bank in Frankfurt. At the same time, British tax authorities raided 81 different offices and homes. The operation was targeted at a total of 50 companies and about 150 suspects from all over Europe. (ST)

➤eucrim ID=1002020

Fraud

Member States Allowed to Restrict Online Gambling

On 3 June 2010, the ECJ delivered its judgment in two cases regarding the prohibition of the operation of games of chance on the Internet. In these cases regarding online gambling (Case C-203/08 and Case C-258/08), the Court found that governments are within their rights to restrict online gambling in order to combat fraud.

The Netherlands had blocked websites from British firms Ladbrokes and Betfair, companies which are engaged in the organisation of sports-related prize competitions and online betting on sporting events and horse races. The websites have been blocked on the basis of Dutch legislation which only allows administratively licensed companies to organise or promote games of chance. Furthermore, there is no permission at all to offer games of chance interactively via the Internet in the Netherlands. Therefore, the Ladbrokes and Betfair gambling websites have been made inaccessible to Dutch residents.

In its ruling, the ECJ said that blocking access to certain websites may be justified in order to combat fraud and crime as well as the need to preserve public order. (ST)

➤eucrim ID=1002021

Raising Awareness of Mass-Marketing Fraud

On 1 June 2010, the International Mass-Marketing Fraud Working Group (IMMFWG), an international working group established in 2007 which includes representatives from various international enforcement agencies who use cross-border intelligence sharing and strategy development to combat fraud (e.g. Canada, the Netherlands, Nigeria, the UK, and the US), has published a report on the nature, scope and impact of mass-marketing fraud. Mass-marketing fraud is primarily conducted over the Internet or telephone and typically consists of persuading victims to transfer money or funds to the criminals based on promises of valuable goods, services, or benefits, which are not delivered. The IMMFWG report contains detailed information on methods and techniques of the phenomenon in order to raise awareness with the public of the threat that mass-marketing fraud imposes. (ST)

➤eucrim ID=1002022

Money Laundering

France Warned for Not Complying with EU Anti Money Laundering Legislation

On 3 June 2010, the Commission formally requested France to comply with a judgment from 2009 (C-170/09) concerning European laws on anti-money laundering. In this case, the ECJ decided that France had failed to fulfil its obligations under the third anti-money laundering Directive by not fully transposing the Directive into national law before the implementation deadline.

The Commission now formally asked France to comply with the Court's judgment and complete the implementation of the Directive. If French laws remain to diverge from the European anti-money laundering legislation, the Commission may refer the case to the Court and France would again have to face proceedings for failure to fulfil its obligation under EU law. (ST)

➤eucrim ID=1002023

Organised Crime

Fight against International Drug Trafficking

At the JHA Council meeting from 3-4 June 2010, the Council adopted a European pact to combat international drug trafficking. The pact contains three main commitments, for which both specific and target actions are foreseen:

- *Disrupting cocaine routes*: e.g. by giving more importance to regional information exchange centres set up in West Africa and by intensifying technical assistance to source countries (Latin America and the Caribbean) and to transit countries (West Africa);

■ *Disrupting heroin routes*: e.g. by adopting a common approach which takes into account the variety of routes and partners involved, as well as by intensifying operational cooperation with the third countries (especially the Balkans, countries along the Black Sea routes, Eastern European neighbouring countries);
■ *Countering the proceeds of crime*: e.g. by providing technical assistance to third countries willing to develop instruments for identification and seizure / confiscation.

The pact is part of the law enforcement aspect of the EU's anti-drug strategy and the EU dugs action plan (2009-2012). (ST)
➤eucrim ID=1002024

Trafficking in Human Beings Directive – State of Play

At the JHA Council meeting from 3-4 June 2010, the Council agreed on a general approach regarding a Directive aimed at strengthening the fight against trafficking in human beings and the protection of victims. The Commission had adopted its proposal in March (see eucrim 1/2010, p. 10). The proposed Directive builds upon the 2000 United Nations Protocol on trafficking in persons, especially women and children, and the 2005 Council of Europe Convention on action against trafficking in human beings. Once adopted, the Directive will replace Framework Decision 2002/629/JHA on combating trafficking in human beings. The provisions of the future Directive include, inter alia, a definition of the crime, extraterritorial jurisdiction making it possible to prosecute EU nationals for crimes committed abroad, as well as preventive measures aimed at discouraging the demand side of trafficking in human beings. (ST)
➤eucrim ID=1002025

Commission Proposal on Stricter Rules to Combat Illegal Arms Trafficking

On 31 May 2010, the Commission presented a proposal for a Council Regulation implementing Article 10 of the United Nations' Firearms Protocol (UNFP) and establishing export authorisation, import and transit measures for firearms, their parts, components and ammunition. The UNFP is the only international binding instrument on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition. Article 10 UNFP is based on the principle that firearms and related items should not be transferred between states without the awareness and consent of all states involved. Therefore, the proposed Regulation foresees that exports of firearms will be subject to export authorisations, containing the necessary information for tracing them, including the country of origin, the country of export, the consignee, the final recipient and a description of the quantity of the firearms, their parts, components and ammunition. Simplified procedures will apply for the temporary export of firearms for verifiable lawful purposes which include hunting, sport shooting, evaluation, exhibitions and repair. The proposed Regulation applies only to firearms, their parts, essential components and ammunition for civilian use, so firearms intended for military purposes are not included. Furthermore, it only addresses trade and transfers with countries outside the EU since transfers of firearms within the Union are regulated by other EU law (Council Direc-

Seizure, Confiscation and Asset Recovery to Protect Financial Interests of the European Union – EU legislation and its enforcement in the Member States

Report from the Conference in Milan/Italy, 4 – 6 February 2010

This important conference was organised by the European Lawyers' Union (UAE), financed by the European Commission under the Hercule II Programme (managed by OLAF), in collaboration with the Bar Association of Milan and the Institute for Research into European Criminal Law (CSDPE). It was attended by more than 300 lawyers, including representatives of the European institutions, judges, and delegations of the Member States.
The first session was devoted to confiscation in legislation and the activities of EU institutions. In this session, the focus was on analysing the instruments of seizure and confiscation with a view to harmonising existing legislation in the Member States, while taking into account the differences among their legal systems, so as to obtain more effective results in the fight against economic crime.
In the second session, the speakers discussed seizure and confiscation from an interesting and comparative angle, pointing out the peculiarities of their respective countries (Belgium, the Netherlands, Austria, Germany, Spain, UK, Italy, Switzerland, and Liechtenstein).
The third session was dedicated to the in-depth changes that have recently affected the matter of confiscation in Italy, especially under the auspices of transnational legislation. Confiscation is a multifaceted and versatile legal measure, which cannot be systematised: it is often used as a preventive and as a security measure with respect to corporate liability and at the administrative level.
The last part of the conference dealt with the enforcement of seizure and confiscation measures. The representatives of all the players involved (legal practitioners, lawyers, EU institutions) presented their experiences with the help of some case studies.
The conference was followed by an interesting session on the subject of seizures in the computer age, ranging from the mouse pad to cloud computing. The speakers noted that, while the implementation of the Budapest Convention on Cybercrime had been welcomed by most as a milestone in the history of the legislation on computer crime, many interpretative problems remain to be solved.
For further information please visit www.dirittopenaleeuropeo.it or contact Mr. Lucio Camaldo, Member of Scientific and Coordination Committee UAE/OLAF 2010 Conference, E-mail: lc@studiobana.it

Cybercrime: Developing the Legal Framework in Europe

Seminar 1: National experiences with regard to the implementation of cybercrime instruments

London, 11 – 12 November 2010

This project, mainly sponsored by the European Commission, consists of three major seminars. Each seminar will have a specific focus:

- Seminar 1 (London, Queen Mary University of London, 11-12 November 2010): "National experiences with regard to the implementation of cybercrime instruments";
- Seminar 2 (Lisbon, Centre of Judicial Studies, March 2011): "Child pornography on the internet and cooperation with internet service providers";
- Seminar 3 (Trier, Academy of European Law, October 2011): "Cooperation of law enforcement agencies and internet service providers: the roles of Interpol, Europol and the G8 24/7 Network".

The first seminar is intended as a platform to debate and assess how European legislation in the field of cybercrime is applied in the different Member States and candidate countries as well as what the perspectives are for an effective Europe-wide campaign against illegal use of the Internet. The most recent European legal acts and complementary measures, such as the Council of Europe Convention on Cybercrime (2001), Council Framework Decision 2005/222/JHA on attacks against information systems, and Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, will be debated. Ongoing cooperation with service providers and IT firms such as Google, Microsoft, and Vodafone will also be discussed.

After the introductory lectures by national, EU, and Council of Europe experts, panels will discuss the concrete implementation of these measures at the domestic level and the differences in national legislative acts that can impede the efficient fight against cybercrime.

The seminar will be held in English.

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

tive 91/477/EEC on control of the acquisition and possession of weapons, as amended by Directive 2008/51/EC). (ST)

➤eucrim ID=1002026

2010 EU-US Declaration on Counter-Terrorism

At the JHA meeting in Luxembourg from 3-4 June 2010, the EU and the US approved a joint Declaration on the fight against terrorism in which they declare their resolve to cooperate in combating terrorism. The 2010 Declaration emphasises the importance of the rule of law and human rights protection in counter-terrorism efforts. The parties also declared to generally enhance cooperation in diplomacy, law enforcement, judicial cooperation, exchange of information and efforts to control suspect cash flows. (ST)

➤eucrim ID=1002027

Commission Communication on Use of Body Scanners

On 15 June 2010, the Commission has adopted a Communication on the use of security scanners at European airports (see eucrim 1/2010, p. 11). The Communication assesses the use of security scanning technology in terms of existing technologies, detection capacity, and compliance with fundamental rights and health protection. The report states that the use of body scanners would offer a possibility to reinforce passenger security. The Commission is in favour of an EU approach to ensure standardised use throughout the Member States to guarantee a harmonised level of compliance with European fundamental rights and health provisions. (ST)

➤eucrim ID=1002028

Cybercrime

EU Cybercrime Task Force

During a meeting of heads of EU Cybercrime Units and representatives from Eurojust and the Commission held at Europol Headquarters on 14-15 June 2010, a new EU Cybercrime Task Force was created. The meeting mainly focused on operational and strategic issues of cybercrime investigations, prosecutions and cross-border cooperation in the fight against cybercrime. Discussions have been held on cross-border operational information exchange, criminal modus operandi, international legal constraints, relationship with private industries, negotiations with non-European Union law enforcement organisations and training of law enforcement officials.

The meeting was conducted under the 2010-2014 Europol strategy, which particularly emphasises the need for strengthening cybercrime capacities in order to ensure an effective fight against cybercrime at the European level. (ST)

➤eucrim ID=1002029

Environmental Crime

Fighting International Illegal Trafficking of Waste

At the JHA Council meeting from 3-4 June 2010, the Council adopted conclusions regarding the prevention and combating of the illegal trafficking of waste. The Council herein, inter alia, requests Member States to create a network of contact points to improve information exchange and to make more use of existing instruments such as Europol, Eurojust or Interpol. Furthermore, the Council suggests to establish Joint Investigation Teams on the subject of illegal trafficking of waste.

The Council particularly calls on Europol to ensure information exchange on environmental crime between Member States and competent international organisations and to explore procedures to enhance cooperation and effectiveness in the fight against illegal trafficking of waste. (ST)

➤eucrim ID=1002030

EU – Republic of Congo Agreement on Fighting Illegal Timber Exports

On 17 May 2010, the EU and the Republic of Congo signed the Forest Law Enforcement Governance and Trade Voluntary Partnership Agreement. From July 2011 on, all wood products entering the EU from the Republic of Congo will be required to carry a license showing that they contain wood and wood products from a legal origin. The Republic of Congo exports more than 250 million euro annually in timber and timber products, about half of which are purchased by EU Member States. (ST)

➤eucrim ID=1002031

Waste Water Treatment – Italy and Spain will be Taken to Court

Italy and Spain face proceedings before the ECJ for breaches of EU legislation on urban waste water treatment.

Despite two warnings from the Commission, a considerable number of large towns and cities (178 in Italy and 38 in Spain) do not have waste water treatment congruent with EU standards. Environment Commissioner Janez Potočnik said that "it is unacceptable that more than eight years after the deadline, Italy and Spain have failed to comply with this important legislation. The Commission has no other choice than to refer these cases to the European Court of Justice." An action will be brought before the Court soon. (ST)

➤eucrim ID=1002032

Another Round of Warnings Sent Out

On 5 May 2010, the Commission sent out warnings over breach of environmental legislation to several Member States.

Ireland has been given a final warning regarding its failure to comply with an ECJ ruling on the Environmental Impact Assessment (EIA) Directive. In November 2008, the Court had ruled that Ireland's legislation did not comply with some of the EIA Directive's environmental assessment procedures.

➤eucrim ID=1002033

Hungary, Portugal and Romania have received warnings by the Commission over nature protection shortcomings. Hungary has been asked to assure protection of the Sajólád Wood in the east of the country, Portugal has received its warning over an inadequate impact assessment for a tourist resort development in the south of the country, and Romania has been warned over deficiencies in an environmental impact study related to the development of tourism facilities on the Black Sea coast.

➤eucrim ID=1002034

The Commission has also sent out a warning to Greece over inadequate protection and conservation measures for Lake Koroneia, an internationally important wetland. The lake is a Natura 2000 site protected under the EU Birds and Habitats Directives and is currently affected by heavy water abstraction for irrigation purposes and serious pollution.

➤eucrim ID=1002035

Another final warning has been sent out to Italy over failing to comply with EU air quality standards for dangerous airborne particles. The EU Air Quality Directive allows Member States to request, under certain conditions and for specific parts of the country, limited extra time to meet the fine particle standards. Italy submitted two notifications covering about 80 air zones in 17 different regions and autonomous provinces, but failed to demonstrate that the actions taken will ensure that EU limit values will be respected by the extended deadline. Although obligated to, Italy did not submit new notifications and has therefore received the warnings from the Commission. (ST)

➤eucrim ID=1002036

Member States Fail to Implement EU Environmental Laws

According to a press release published on 3 June 2010, the Commission is taking actions against several Member States for not/insufficiently transposing EU environmental legislation into their national law.

Cyprus, Finland, France, Greece, and Luxembourg face proceedings before the ECJ for failing to complete the implementation of laws necessary to comply with the 2007 Directive establishing an Infrastructure for Spatial Information in the European Community (INSPIRE). This Directive aims to facilitate the access and use of spatial data related to the environment and the national laws necessary to implement this aim had to be in force before 15 May 2009.

Furthermore, the Commission is referring Belgium to the ECJ for failing to implement laws relating to Directive 2006/118/EC on the protection of groundwater against pollution and deterioration. The "Groundwater Directive" sets underground water quality standards and introduces measures to prevent or limit inputs of pollutants into groundwater. Belgium was obligated to implement the necessary legislation and notify the Commission no later than 16 January 2009. (ST)

➤eucrim ID=1002037

On 24 June 2010, the Commission sent out requests to comply with EU environmental legislation to 10 Member States (Belgium, Bulgaria, Estonia, France, Portugal, Latvia, Finland, Poland, Malta and Slovakia).

The requests concern the prevention of floods, electrical and electronic equipment waste, water policy, management of environmental noise and landfill waste sites. The deadline for 9 of the Member States is 2 months since the requests have been sent out, whereas Malta had to respond to the request within one month. (ST)

➤eucrim ID=1002038

Illegal Immigration

2010–2014 Action Plan on Unaccompanied Minors

On 6 May 2010, the Commission adopted an action plan on unaccompanied minors coming to the EU regardless of

whether they are asylum seekers, illegal migrants or victims of trafficking in human beings, which aims at enhancing the protection of these minors by creating common standards for guardianship and legal representation, quicker decision procedures, and closer cooperation with third countries. The Action Plan proposes a common EU approach based on:

- Prevention of unsafe migration and trafficking;
- Increase of reception and procedural guarantees in the EU;
- Identification of durable solutions based on the best interests of the individual child, e.g. return and reintegration in the country of origin, granting of international protection status, or resettlement.

As to concrete measures, the Action Plan foresees that the Member States collect data on unaccompanied minors by using existing agencies and networks, such as the European Migration Network, Frontex, Europol and the European Asylum Office. Reception measures and access to relevant procedural guarantees shall apply from the moment an unaccompanied minor is found at external borders or on EU territory until a durable solution is found. The Commission plans to give priority to funding of activities concerning unaccompanied minors, such as projects providing for post-return monitoring and follow-up, supporting families and communities for reintegration, and creating study and training opportunities for children in their countries of origin.

The Commission is to report on the implementation of these measures by mid-2012 and by 2015. (ST)

➤eucrim ID=1002039

Council Conclusions on Unaccompanied Minors Action Plan

At the JHA Council meeting from 3-4 June 2010, the Council adopted conclusions on the subject of unaccompanied minors entering the EU. The conclusions mainly concern amendments to the Commission's action plan, such as proposing ways to improve the collection of necessary data, the request to assess whether the current EU legislation offers unaccompanied minors sufficient protection to guarantee that minors are treated as such or on how to improve cooperation with third countries. (ST)

➤eucrim ID=1002040

Homophobia

Top-Level EU Leaders Address Homophobia

On 17 May 2010, the international day against homophobia, leaders from the European Council, the European Parliament and the European Commission have issued unequivocal messages condemning homophobia.

Herman Van Rompuy, the President of the European Council, released a written statement on the EU's commitment to ensuring equal rights and to fight any form of discrimination related to gender or sexual orientation.

Jerzy Buzek, President of the European Parliament, published a video statement in which he declared homophobia to be a "clear branch of human dignity that questions fundamental rights" and therefore has to be condemned.

Viviane Reding, Vice-President of the European Commission and European Commissioner for Justice, Fundamental Rights and Citizenship, also issued a video statement, saying that "homophobia is incompatible with the principles on which the EU has been founded."

High Representative Catherine Ashton contributed a written statement, in which she "reaffirms the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation and gender identity."

It is the first time that top-level EU leaders jointly address homophobia. (ST)

➤eucrim ID=1002041

Sexual Violence

EDPS Opinion on Directive against Child Abuse

On 10 May 2010, the EDPS published his opinion on the proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography. The EDPS sees data protection issues in two aspects of the proposal, namely the role of service providers with regard to the blocking of websites and the setting-up of a network of hotlines. With respect to the blocking of websites, the EDPS criticises that the criteria and conditions leading to a blocking decision are defined by private parties. He also calls for more appropriate safeguards to ensure that monitoring or blocking will only be done in a restricted way and under judicial control. As to the proposed network of hotlines, the EDPS emphasises that there is a need for a more precise description of what should be considered as illegal or harmful content as well as who is enabled to collect and keep information. Since the information collected by the proposed hotlines will more than likely be used for prosecution, the EDPS asks for additional safeguards in order to guarantee that the information considered as digital evidence was properly collected and preserved. (ST)

➤eucrim ID=1002042

Procedural Criminal Law

Data Protection

New EU-US Agreement on Data Transfers Adopted

As reported before in eucrim (see eucrim 1/2010, p. 13 and eucrim 4/2009, pp. 135-136), a new agreement between the EU and the US on the transfer of bank data in the fight against terrorism was planned to be concluded in June 2010. Before a negotiation mandate was

adopted, both members of the EU and members of the US administration were very active in convincing the other party of their points of view.

In an unprecedented initiative to explain their views that triggered the rejection of the first agreement in February, a delegation of the EP visited their US counterparts in April 2010.

On 6 May 2010, US Vice-president Joe Biden made a visit to the EP. The visit was aimed at convincing the members of the EP of the fact that the agreement was necessary to prevent new terrorist attacks that remain imminent.

On 5 May 2010, the EP had adopted a Resolution on a Recommendation from the Commission to the Council to authorise the opening of negotiations for the SWIFT Agreement, calling upon the Council and the Commission to comply with the EU's data protection principles such as purpose limitation and proportionality avoiding bulk transfers of data and to designate a judicial public authority supervising the data requests. Alternatively, the EP calls for a "twin-track approach" which differentiates between, on the one hand, the strict safeguards to be included in the envisaged agreement, and, on the other, the fundamental longer-term policy decisions that the EU must address.

After the formal adoption by the Council of the negotiation mandate on 11 May 2010, agreement followed quickly as talks focused on the issues that made the EP reject the first text. These included the amount and type of data demanded by the US Treasury, the data retention period and the rights of redress.

A particularly thorny issue was whether the exchange would involve bulk transfers of personal data as SWIFT would be unable to select the requested data before sending them to the US authorities.

On 15 June 2010, the adopted agreement was presented by Commissioner for Home Affairs Cecilia Malmström, stating that the content of the agreement is a substantial improvement compared to the agreement that had been rejected before. According to Commissioner Malmström, the agreement guarantees that protection of EU citizens' data is ensured, while enabling US and EU law enforcement authorities to make use of a paramount tool in the fight against terrorism.

The text contains rights of administrative redress and ensures that any person whose data are processed under the agreement will have rights to seek judicial redress in the US from any adverse administrative action.

A new feature is also that Europol is assigned as the public authority that is responsible for checking the necessity of requests for data. Europol also will be competent to verify that each request is tailored as narrowly as possible in order to minimise the amount of data requested.

The data retention period of transferred data is kept to 5 years. This rule is subject to an assessment within 3 years of the entry into force of the agreement. Regular reviews of the implementation of the whole agreement are also projected.

The European Data Protection Supervisor has published his opinion on 22 June 2010, pointing out a number of positive features in the agreement, but also expressing his concerns regarding other elements. These include the length of the retention period for data that have not been extracted; the choice for Europol instead of a judicial authority to check data requests; the organisation of independent oversight and supervision mechanisms.

Annexed to the agreement are three declarations. The first declaration ensures that once an EU-US Agreement on Data Protection is in place, the SWIFT Agreement (which is now known as the Terrorist Financing Tracking Programme Agreement or the TFTP Agreement) will be assessed in the light thereof. The second declaration refers to the aforementioned EP Resolution of 5 May 2010. In this declaration, the Council and the Commission acknowledge the suggested "twin-track approach" and plan to start a study on the development of an EU TFTP in the second half of 2010. If this system, which could allow

Guaranteeing Procedural Safeguards in the EU: A first step taken?

Trier, 18–19 November 2010

The idea of introducing common criminal procedural standards in the EU has been subject to several proposals since 2003 – without success.
In 2009, under the Swedish Presidency, EU justice ministers finally agreed on a roadmap to foster protection of suspects and accused persons in criminal proceedings. The roadmap outlines six measures to be introduced step-by-step in the years to come.
To implement the first step, a group of EU Member States and the European Commission tabled proposals for a Directive on the right to interpretation and translation in criminal proceedings. Questions arising from the proposals include:

- The scope of the right to interpretation and of the right to translation;
- The need for joint mechanisms on how to determine the need for interpretation and translation;
- How best to ensure adequate quality of interpretation and translation;

Practical consequences of the possibility to review/challenge a refusal to interpret or translate;

- The impact on the execution of a European Arrest Warrant;
- The relationship between the proposal(s) and the ECHR; Costs.

Experts from the European institutions, EU justice ministers, defence lawyers, and academics will discuss the legal consequences of the measure, especially with a view to national differences in the legal systems.
The conference will also conduct an initial analysis of the discussions concerning the second measure envisaged by the roadmap, the so-called "EU letter of rights".
The seminar will be held in English.

For further information, please contact Ms. Cornelia Riehle, Deputy Head of Section – Public and Criminal Law, ERA, E-mail: criehle@era.int

for the extraction of the data in the EU instead of in the US, has not been established 5 years after the entry into force of the agreement, the Council and the Commission will consider the termination of the agreement.

On 8 July 2010, the EP followed the recommendation of its Committee on Civil Liberties, Justice and Home Affairs to approve the agreement. 484 members voted in favour of the agreement to 109 against and 12 abstentions. The agreement will enter into force on 1 August 2010. (EDB)

➤eucrim ID=1002043

General EU-US Data Protection Agreement Being Negotiated

Three weeks after the negotiation mandate for the new TFTP-Agreement, on 26 May 2010, the Commission adopted a mandate to negotiate a general agreement with the US on the protection of personal data while cooperating in criminal matters. The EU and the US have different approaches on the protection of personal data but the need for exchange of data in the fight against international crime have made it necessary to address and overcome these differences. The Commission aims to develop legally binding standards of personal data protection that will ensure that the fundamental rights and freedoms of the data subjects are protected and will be enforced. Independent public authorities in both the EU and the US should be supervising the compliance with these standards. The envisaged agreement will not provide a legal basis for any transfers of data but will lay down the data protection standards to be complied with when transferring data on the basis of other agreements, such as the abovementioned TFTP-Agreement.

Vice-President of the Commission Viviane Reding urged the Council to approve the mandate quickly and expressed her ambition to include sufficient safeguards on data protection in the agreement. (EDB)

➤eucrim ID=1002044

Data Retention Directive Challenge before ECJ Imminent

On 5 May 2010, the Irish High Court ruled in favour of having the Data Retention Directive (see also eucrim 4/2009, pp. 136-137; eucrim 1-2/2009, pp. 2-3 and eucrim 1-2/2008, p. 2) challenged before the ECJ in a preliminary ruling. An Irish Company, Digital Rights Ireland Ltd (DRI), was the plaintiff in the case against the Minister for Communication, Marine and Natural Resource; the Minister for Justice, Equality and Law Reform; the Commissioner of *An Garda Siochana*, Ireland, and the Attorney General. The Human Rights Commission intervened in the proceedings as *amicus curiae*.

Three issues were raised in the case before the High Court. The first issue, which was granted in favour of DRI, related to the question whether DRI had standing before the Court as a company and could bring an *actio popularis* in respect of whether citizens' rights to privacy and communications are infringed. The second issue was brought forward by the defendants and aimed at making the plaintiff pay an amount that would cover the costs of the proceedings in case of losing the action. This motion was rejected due to the fact that the matter was of public importance, legitimising the special circumstances that are required for refusing such motions. The third issue aimed at referring the question regarding the validity of the Data Retention Directive to the ECJ in the form of a preliminary ruling. The High Court ruled that sufficient information is available to make a referral to the ECJ based on Article 267 TFEU. The Court is expected to lodge its reference for a preliminary ruling to the ECJ soon. (EDB)

➤eucrim ID=1002045

Privacy Concerns over New Data Compilation Instrument

The standardised, multidimensional, semi-structured instrument for data collection and information on the processes of radicalisation that was agreed upon in the Council conclusions adopted by the General Affairs Council of 26 April 2010 (see also eucrim 1/2010, p. 14) has raised great concerns amongst human rights NGOs and MEPs in terms of personal data protection and the right to privacy.

With the objective of developing strategic analyses of the reasons for radicalisation and involvement in terrorist activities amongst individuals and thus determining adequate policies and strategies to address these phenomena, the instrument comprises 70 questions grouped along the following four topics:

- Ideologies and radical messages supporting violent radicalisation (focusing mainly on the ideological content to which individuals are exposed)
- Violent radicalisation dissemination channels (regarding the actual agents spreading and receiving these contents)
- Factors affecting violent radicalisation (concerning the specific setting and environment of the radicalisation processes)
- Impact and changes (targeting the changes experienced by individuals after undergoing violent radicalisation).

The Council acknowledged this data collecting instrument for its high level of flexibility and adaptability to the needs of the users and invited Member States, European Union institutions and agencies to make best use of it as they see fit. The applicability of the instrument is further expanded to include its use by police forces, secret services and intelligence agencies.

In the light of the fact that the ideologies which will fall under the surveillance of the data compilation instrument include "extreme right/left, Islamist, nationalist or anti-globalisation", it is precisely the "flexibility" – the ambiguity and broadness of the provisions – which are criticised most by human rights watchdogs and MEPs.

By referring to processes of "radicalisation" instead of terrorism, this new mechanism could blur the distinction

between mere political activists, dissenters, and terrorists.

Consequently, it is feared that in spite of their non-binding character, these guidelines could legitimise police cooperation and new practices in Member States. They could also result in data collection and sharing between EU institutions on persons, free of any conviction, solely on the grounds of their opinion.

The decision to adopt the Council conclusions regarding this instrument was not submitted to the EP. British Liberal MEP Sarah Ludford has formally asked the Council to give an explanation for its decision. (NK)

➤eucrim ID=1002046

Best Practices for Data Protection in the Schengen Acquis

On 10 May 2010, the Council presented the "Catalogue of recommendations for the correct application of the Schengen acquis and best practices: data protection."

In 2002-2003, four catalogues were produced with regard to the application of the Schengen acquis: on external borders, removal and readmission, on the Schengen Information System/Sirene, on the issuing of visas, and on police cooperation. In 2008, the Schengen Working Party decided to produce an additional catalogue on data protection issues related to the Schengen acquis.

The catalogue, which was developed by a group of experts, covers the relevant rules governing personal data protection with regard to the SIS as laid down by the Schengen acquis, including the non-legislative and implementing measures which affect the use of the SIS by the authorised authorities (such as security measures, confidentiality, rights of data subjects and public awareness). (EDB)

➤eucrim ID=1002047

EDPS Opinion on the Proposal for a New Frontex Regulation

On 17 May 2010, the European Data Protection Supervisor (EDPS) issued an opinion on the proposed Regulation in order to strengthen the operational capabilities of Frontex (see also eucrim 1/2010, pp. 9-10).

The most significant concern of the EDPS goes out to the lack of clear data protection rules in this new instrument. It is not clear to what extent Frontex will be able to process personal data and which rules would apply in that case. Thus, the scope of Frontex' activities that may cause data to be processed should be clearly defined. A specific legal basis for processing personal data by Frontex is necessary as well as compliance with data protection standards.

The fact that basic provisions on data processing and data protection have not been included in the proposal is of great concern according to the EDPS and the inclusion thereof should not be postponed.

Furthermore, clarification is needed, for example with regard to Frontex' cooperation with Europol and the potential exchange of information. (EDB)

➤eucrim ID=1002048

NGOs Oppose Data Retention Directive

106 NGOs have written and signed a letter on 22 June 2010 to the European Commissioner for Home Affairs, Cecilia Malmström, to express their concerns regarding the Data Retention Directive.

Their concerns mainly relate to the collection of sensitive information about social contacts (including business contacts), movements and other details concerning the private lives of many citizens who are not suspected of any offence. The protection of journalists' sources and the freedom of the press is thus at risk, as well as the open and democratic society. The blanket retention of data is considered as a superfluous measure that has been ruled as unconstitutional in several Member States such as Romania and Germany (see eucrim 4/2009, pp. 136-137).

The NGOs, who call themselves the "representatives of the citizens, the media, professionals and industry," collectively reject the controversial Directive (see also eucrim 4/2009, pp. 136-137; eucrim 1-2/2009, pp. 2-3 and eucrim 1-2/2008, p. 2). They call upon the Commissioner to repeal the Directive in favour of a system of expedited preservation and targeted collection of traffic data. The Council of Europe's Convention on Cybercrime is hereby mentioned as an example. (EDB)

➤eucrim ID=1002049

Jurisdiction

Reference to ECJ for a Preliminary Ruling on Online Criminal Offences

On 6 April 2010, the Tribunal de grande instance de Paris in France, lodged a reference for a preliminary ruling (case C-161/10) regarding the interpretation of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The case concerns the infringement of personal rights allegedly committed by placing information and/or photographs on an Internet site. The plaintiffs being French and the defendant being a company based in the United Kingdom, the question is whether the French courts have jurisdiction to try the case. Thus, the key issues relate to the jurisdiction of the courts of a Member State (France), when the Internet site has been published in another Member State by a company based in the other Member State (UK), and to the conditions for having jurisdiction to prosecute these offences.

Articles 2 and 5, §3 of the mentioned Regulation cover jurisdiction and include the possibility for a person to be sued in a Member State other than the Member State where he is domiciled. Based on Article 5, §3, this could be the Member State where the offence was committed or may be committed in matters relating to tort, delict or quasi-delict. The place where the offence is committed is inevitably a difficult question in the case of online offences.

Because the jurisdiction of the Tribunal de grande instance de Paris is not clear from the combination of Articles 2 and 5, §3 of Regulation No 44/2001, the Court decided to refer the case to the ECJ. Therefore, the Court requests the ECJ to rule on which criteria should be used for deciding upon the question of jurisdiction: the fact that the website can be accessed from France or the fact that there is a sufficient, substantial or significant link between the offence and the French territory. The referring Court also asks how this link can be created, for example by the number of hits originating from a particular state or the language in which the information is broadcasted. (EDB)

➤eucrim ID=1002050

Victim Protection

Troublesome Discussions on European Protection Order

During the JHA Council from 3-4 June 2010, the Council held a public debate on the Member States' initiative to introduce a European Protection Order (see also eucrim 4/2009, p. 138). The proposed directive is aimed at facilitating and enhancing the protection granted to victims of crime or possible victims of crime, by the recognition of the proposed protection measures by all Member States.

The Spanish presidency concluded that the discussion should continue with the EP in order to reach agreement on the text. At the next Council in October 2010, the progress made on the proposed Directive will be assessed. However, the Commission had announced in April that it would present its own proposal for a protection order in the first half of 2011, following an impact assessment and stakeholder consultations on the matter. Vice President of the European Commission, Viviane Reding, said at a press conference after the meeting that the Spanish presidency did not receive a mandate to bring forward and discuss the proposal. She indicated that negotiations would take longer due to the action taken by the Spanish presidency. (EDB)

➤eucrim ID=1002051

Freezing of Assets

Conclusions Adopted on Confiscation and Asset Recovery

The Council adopted conclusions on confiscation and asset recovery during its meetings of 3-4 June 2010. In view of the emphasis in the Stockholm Programme on increased cooperation between asset recovery offices and other relevant authorities and in view of fully implementing Council Decision 2007/845/JHA of 6 December 2007 on Asset Recovery Offices, the conclusions include a number of recommendations for the Member States to take into account.

The Member States are invited to inter alia ensure that their asset recovery offices are equipped with the necessary resources, powers and training facilities (such as CEPOL courses) to effectively carry out their tasks, to ensure the preservation of assets for confiscation and to establish asset management offices as well as to further financial investigations by making full use of existing cooperation tools within the framework of Europol, Eurojust and OLAF.
Furthermore, the Member States should promote the application of financial investigations and asset-related meaures, for example freezing, seizure and confiscation.

The Commission and the Member States should consider inter alia how to acknowledge non-conviction-based confiscation for those Member States who do not have this system yet and possible legislative amendments in order to achieve more effective regimes for third-party confiscation and extended confiscation. (EDB)

➤eucrim ID=1002052

Cooperation

Police Cooperation

Update of the Handbook for International Police Cooperation in Connection with Football Matches

In May 2010, the Police Cooperation Working Party agreed on a Draft Council Resolution concerning the update of the "Handbook providing for recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension in which at least one Member State is involved."

The first such handbook was published in 1999 and updated by the Council Resolutions of 6 December 2001 and of 4 December 2006, of which the latter is going to be replaced by this Resolution. The new amendments to the handbook are proposed in the light of recent experience, especially with the World Cup 2006, the European Championship in 2008, and their experts' assessments, as well as with the general extensive police cooperation in respect of international matches, club matches and other sport events with an international dimension.

The handbook includes nine chapters dealing with the following issues: information management by the police, especially regarding the tasks of the National Football Information Points (NFIP) established under Council Decision 2002/348/JHA; event-related preparations by the police such as the organisation, composition, and tasks of visiting police delegations; cooperation between (i) police forces during the event, (ii) the police and the organiser; (iii) the police, justice, and prosecuting agencies involved, and (iv) the police and supporters; communication and media strategy; EU football expert meetings; lists of relevant documents on safety and security at football matches. In its appendixes, the handbook provides for

advice on dynamic risk assessment and crowd management; a timeframe for requesting Europol products and services; specifications for and samples of police identification vests as well as a categorisation of football supporters and a risk supporter check list. (CR)
➤eucrim ID=1002053

Judicial Cooperation

Belgian Discussion Paper Follow-up of the Mutual Recognition Instruments

Shortly before the start of its presidency on 1 July 2010, Belgium issued a discussion paper addressing the matter of effective implementation and improved practical application of mutual recognition (MR) instruments in criminal matters. Among the instruments concerned are, inter alia, Framework Decision 2003/577/JHA on the freezing of assets, Framework Decision 2005/214/JHA on the mutual recognition of decisions imposing financial penalties, and Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.

The paper acknowledges the past problems with insufficient and delayed implementation of these instruments and anticipates similar problems with forthcoming instruments. The list of instruments to be implemented by the end of 2012 comprises, for example, the Framework Decisions on the application of the principle of mutual recognition to (i) judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; (ii) judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU, (iii) decisions on supervision measures as an alternative to provisional detention.

The discussion paper aims to serve as a basis for the development of a methodology targeted at ensuring a systematic exchange of information on the follow-up of the implementation of MR instruments and on practical measures to facilitate the application of these instruments.

According to the Belgian Presidency, such a methodology should provide for potential ways to monitor legislative implementation of the aforementioned instruments at the national level. In addition practical measures taken at the EU level should follow a more proactive and systematic approach in order to ensure efficiency and consistency in the process of implementation.. In this context, the paper suggests five measures that should be taken for each MR instrument at the EU level:

- Information on official notifications should be made available from the EJN website.
- Fact-sheets containing practical information on national systems should be prepared and made available on the EJN website.
- 'Atlases' (such as the EJN Atlas on mutual legal assistance) including data from each Member State on the competent receiving authorities should be developed for each instrument.
- Standardised certificates and forms should be made available in electronic format and in all languages from the EJN website.
- A handbook similar to the EAW Handbook should be developed for each MR instrument.

The Belgian Presidency argues that many problems with the application of mutual recognition instruments could already be avoided during the phase of implementation. It therefore suggests a four-step standard methodology/procedure to be applied to all MR instruments. These steps would require the following:

- The notifications on implementation transmitted to the General Secretariat should be forwarded to the EJN Secretariat for upload on its website.
- At regular intervals, a document indicating the state of play of each instrument should be circulated by the General Secretariat (and in the future the Commission). This document shall also be available on the EJN website.
- Once during each Presidency, the state of play should be discussed at the CATS level. When necessary and on the basis of a proposal from the Presidency, the Council should adopt conclusions on the current state of play.
- Discussions on the state of play regarding existing MR instruments should

Annual Forum on Mutual Recognition of Judicial Decisions in Criminal Matters

Trier, 20–22 October 2010

This three-day forum is the fifth annual event for national judges and prosecutors on the subject of mutual recognition. This Europe-wide platform should enable judges and prosecutors to exchange experiences, discuss common problems, and promote cooperation and best practice in the field of judicial cooperation in criminal matters.
The main topics will be:
- EU mutual recognition instruments in light of the Lisbon Treaty;
- The European Public Prosecutor's Office (EPPO): state of play and initiatives taken so far;
- Implementation of mutual recognition instruments in Member States' criminal law;
- Mutual recognition in practice (experiences to date with the European Arrest Warrant);
- Role of EU criminal justice institutions in promoting mutual recognition;
- Relationship between national criminal law and EU criminal law.

Proposals to improve the legal and/or practical functioning of EU mutual recognition instruments will be debated in light of the entry into force of the Lisbon Treaty and the endorsement of the Stockholm Programme. The contribution of EU institutions will be outlined and concrete EAW cases presented and discussed in working groups.
The seminar will be held in English, French, and German. Simultaneous interpretation will be provided.

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

also include the mentioned five measures to be taken at the EU level. (CR)
➤eucrim ID=1002054

Follow-up on the Mutual Recognition Instruments – Non-Paper from the Czech Delegation

In reply to the above mentioned Belgian discussion paper on the follow-up of the mutual recognition (MR) instruments, the Czech Delegation issued a non-paper suggesting to also include information regarding the application of certain EU instruments in criminal matters in overseas territories and regions of the Member States, i.e. the outermost regions (OMR), the overseas countries and territories (OCT), and other special Member State territories. Based on the difficulties that Czech judicial authorities encountered when trying to find out the applicability of EU penal instruments such as the EAW or the Convention on Mutual Legal Assistance in these territories, the Czech Delegation suggested to also centralise this information, for example on the EJN webpage. (CR)
➤eucrim ID=1002055

Further Developments Regarding the European Investigation Order (EIO)

In April 2010, a group of seven Member States put forward a proposal for a Directive regarding the so-called European Investigation Order in criminal matters (EIO), which would cover, as far as applicable, all types of evidence and replace the existing legal framework related to the gathering and transfer of evidence between the Member States, including Framework Decision 2008/978/JHA on the European Evidence Warrant (for more details see eucrim 1/2010, pp. 15-17).

Since the launch of the initiative for a Directive in April 2010, an explanatory memorandum on this matter was published in June 2010. The document is divided into five chapters which elaborate on the April initiative. The first chapter offers a definition, information on the scope and content of an EIO, and the types of procedure for which the EIO can be issued. The second chapter describes the procedures and safeguards for the issuing state, giving advice on the transmission and form of an EIO. The third chapter deals with the procedures and safeguards for the executing state, explaining the proposed provisions for recognition and execution of an EIO, for instance, on the possibility of temporarily transferring persons held in custody to the executing state for purpose of investigation, on video and telephone conference hearings, and on information related to bank accounts and transactions. The fifth chapter contains some final provisions, e.g. on the EIO's provisions in relation to other instruments.

Furthermore, a detailed statement on the EIO, which accompanies the aforementioned proposal, was published on 23 June 2010. The general objective of this statement is to assess the possibilities to improve the mechanisms of obtaining evidence across the internal borders of the EU. The document proposes four policy options and assesses and analyses them on the basis of their economic and social impact as well as on their impact on the fundamental rights of the citizens. These options are: A) no new action to be taken in the EU; B) adoption of non-legislative measures; C) abrogation of the FD on the EEW; and D) new legislative action taken in the EU. After measuring what impact each of these policy options would have within the context of the economy, social concerns, and fundamental rights, the preferred option according to the statement would be option D, which in particular means the replacement of all existing instruments by an extensive EIO. However, it is also noted that the adoption of this new instrument would not be entirely without negative impact as the negotiation process would likely be long and difficult, as it was in the case of the Framework Decision on the EEW. It is also feared that some Member States might request to keep certain arrangements and exceptions already adopted in previous instruments related to the principle of mutual recognition, which would reduce the efficiency of the new instrument.

Lastly, there has also been a financial statement for the proposal for a Directive regarding the EIO from 23 June 2010. In this document, it is stated that the pro-posed Directive is expected to place no additional burden on the budget of the EU or the Member States. Indeed, it is pointed out that the replacement of the current le-gal framework by the proposal will entail substantive savings for the Member States, although the amount of these savings is difficult to evaluate. It is also stated that the switchover to a single regime of mutual recognition instruments in this field will further a simplification of the procedure of gathering evidence and will thus accelerate the criminal proceedings in general. This could be achieved through (i) simplification of most procedures due to the use of a standardised form; (ii) simplification of the translation procedures; and (iii) acceleration of the procedures. (CR)
➤eucrim ID=1002056

European Arrest Warrant

Conclusions on the Final Report of the Fourth Round of Mutual Evaluations

In its meeting on 3-4 June 2010, the JHA Council adopted the following conclusions following-up the recommendations made in the final report of the fourth round of mutual evaluations concerning the European Arrest Warrant and surrender procedures among EU Member States (see eucrim 4/2009, p. 143):

- Time limits for the provision of language-compliant EAWs: Following-up its recommendation to ad-dress the need for common time limits at the EU level, the Council suggested that such a time limit could be set around 6 working days.
- Proportionality check: In order to establish a proportionality requirement

on the European level for the issuance (not executing) of any EAW, the Council suggested to modify point 3 of the European Handbook on how to issue an EAW.

- Accessory surrender: With regard to the absence of a rule in the Framework Decision concerning the issue of surrender in respect of accessory of-fences, Member States are asked to take action at the national level and, if needed, to solve any difficulties in this regard.
- Speciality rule: The report of the fourth round of evaluations found that for various reasons, the implementation of the speciality rule is problematic in practice. Therefore, the Council asked to continue reflections as to the advisability of no longer applying that rule, and, with respect to the national level, on the possibility to do the same by making use of the declaration provided for under Article 27.1 of the Framework Decision.
- Article 111 of the Convention implementing the Schengen Agreement (CISA): The report revealed that so far no clear answer has been found on how to implement Article 111 CISA in practice. In its conclusions, the Council asked the Commission to take into account the need to ensure the efficiency of the EAW when evaluating Council Decision 2007/533/JHA on the establishment, operation and use of SIS II and to pave the way for a common interpretation of the relevant provisions in the Member States.
- "Provisional arrest" under the EAW: As the Framework Decision does not envisage a mechanism for "provisional arrest" under the EAW, the Council asked the Member States to take the necessary legislative actions at the national level insofar as this matter creates particular difficulties in practice.
- Information deficits: As many of the authorities stressed the lack of timely and accurate information on the progress of the EAW procedure and on the final decision on surrender, the Council encouraged executing authorities to use the standard form on EAW decisions, annexed to the conclusions (see also eucrim 1/2010, p. 17).
- Seizure and handover of property: To avoid differing practices regarding Article 29 of the EAW Framework Decision that provides for rules on the seizure and transfer of property deriving from an EAW, the Council recommended distributing a questionnaire to the Member States assessing the need for a uniform approach on this issue. (CR)

➤eucrim ID=1002057

Law Enforcement Cooperation

Implementation of the "Prüm Decisions"

According to the Prüm Decision and its implementing Decisions (Council Decision 2008/615/JHA and 2008/616/JHA), Member States had to comply with the provisions covering the supply of information relating to major events and in order to prevent terrorist offences as well as with the provisions regarding data protection by 26 August 2009. Regarding the provisions for automated searching of DNA profiles, dactyloscopic data and vehicle registration data (VRD), Member States will have to comply with them by 26 August 2011 at the latest.

In order to assist Member States with the implementation, the Spanish Presidency has provided for a brief overview on (i) the formalities to be complied with, (ii) the related documents and procedures; (iii) the declarations made by Member States pursuant to the relevant provisions of the Prüm Decisions; and (iv) the state of play of implementation regarding the automated data exchange of DNA, finger-print, and VRD.

The first overview includes instructions on the declarations/notification procedure regarding the list of national DNA analysis files, information on maximum search capacities for dactyloscopic data, and the readiness to apply data protection requirements. Furthermore, the paper ex-plains the procedure regarding the implementation of automated data exchanges and the requirements of the evaluation procedure. The document also points out steps Member States need to take as soon as they have become operational. In its annex, the document includes an update on declarations and notifications made by the Member States on the replies to the data protection questionnaire and the state of play regarding the legal and technical implementation and evaluation of DNA, dactyloscopic and VRD data. (CR)

➤eucrim ID=1002058

Prüm – Vehicle Registration Data (VRD): Evaluation of Finland

Prior to any actual exchange of vehicle registration data under the Prüm Decisions, the Council Sub Group on VRD, which reports to the Working Party on Information Exchange and Data Protection, is tasked to evaluate the level of protection of personal data in the Member States' national law. Personal data can only be provided if the Council unanimously decides that the conditions for data protection have been met. The evaluation report of Finland is the joint result of three evaluation visits on Finnish territory, the answers received to two questionnaires, and a checklist completed by the evaluation team.

Apart from some minor functional issues subject to adjustment, problems with the protection of log files against internal threats, and the adoption of some provisions currently pending in Parliament, the report concludes that the implementation of the EUCARIS/Prüm-application and the related Prüm/VRD-information flow has reached an important level, both on the legislative and on the technical side. Other than the three mentioned, no items were identified that may cause reason to postpone the further roll-out of the system in Finland

The Finnish delegation is invited to give additional feedback on the observations laid down in this report. (CR)

➤eucrim ID=1002059

Council of Europe*

Reported by Dr. András Csúri

Foundations

European Court of Human Rights

Human Rights Commissioner on Orders to Halt Deportations

In his human rights comment of 25 June 2010, the Human Rights (HR) Commissioner expressed his concerns about the fact that some European states have deported persons to countries where they are at risk of treatment in violation of the European Convention on Human Rights (ECHR), despite clear decisions by the European Court of Human Rights (ECtHR) not to do so. The Commissioner found that this is not only disrespectful towards the ECtHR and the rule of law, but also puts human lives in serious danger. The Commissioner highlighted cases of Italy, which failed at least four times to comply with the interim measures ordered by the ECtHR by expelling applicants to Tunisia. He also criticised the expulsion of an Algerian national from Slovakia. Furthermore, the Commissioner pointed out that reports show that in other cases applicants who were expelled have been later imprisoned and tortured, while the whereabouts of other deported are unknown. The Commissioner stated that Rule 39 of the Rules of Court is crucial for individual applicants who might face a risk of violation of their human rights. Therefore, the ECtHR is often their ultimate hope to stop a forced return to a country where they could be exposed to torture or other ill-treatment.

The Commissioner stressed that interim measures ordered by the ECtHR are legally binding and should always be strictly respected by the Member States, as failure to comply with them seriously jeopardises the effectiveness of the European system of human rights protection.

➤eucrim ID=1002060

Other Human Rights Issues

HR Commissioner on the Proper Investigation of Torture Allegations

In his human rights comment from 9 June 2010, the Commissioner recalled that during the 'war on terror', core principles of human rights had been violated in Europe as well. Thousands of individuals were victimised, many of whom are completely innocent. The Commissioner stressed the urgent need to repair the damages made in the past in order to improve in the future.

In his comment, he welcomed the decision of the new UK government to order a judge-led enquiry into allegations claiming that British officials were complicit in the mistreatment of suspects held by the United States, Pakistan and other countries. The Commissioner showcased this action as an important step and as a possible example for other countries to prevent torture, provided that the investigation will be thorough, comprehensive and as transparent as possible.

The Commissioner also highlighted cases in Poland, Romania, Sweden and the Former Yugoslav Republic of Macedonia which still need further clarifications.

The comment stressed that a thorough and fair investigation is possible without endangering a person's intelligence nerve system and cited the case of Maher Arar as an example. Arar, a Canadian citizen, was mistaken for another person and stopped at a US airport in 2002. Later he was handed over to the Syrian security police, severely tortured and held in prison for several months. After his return to Canada the Government of Canada announced a Commission of Inquiry into the Actions of Canadian Officials in relation with Arar. The Commissioner presented the Canadian authorities' inquiry as a model for how such investigations could be designed.

The Commissioner also explicitly stressed that effective action is needed to prevent and punish terrorist acts and emphasised that the tragic mistake after 9/11 was not the determination to respond, but the choice of methods: "terrorism must not be fought with terrorist means."

➤eucrim ID=1002061

Specific Areas of Crime

Corruption

GRECO: Horizontal Study on Political Financing

On 29 June 2010, the Group of States against Corruption (GRECO) published a study, titled "Political Financing: GRECO's first 22 evaluations", which focuses on the three key topics, examined in the legislation of 22 of GRECOs Member States. The evaluations (see all former eucrim issues from 2006 onward) looked at all aspects of the funding of political activities, including the transparency of the parties' and candidates' resources, the enforcement of regulations, and the penalties imposed.

* If not stated otherwise, the news reported in the following sections cover the period May 2010–June 2010.

The report aims to identify weaknesses and problems that are common to several of the Member States. The introduction points out that there are not just young democracies which only recently enacted legislation on political funding (at the same time as their new institutions were established), but also mature democracies who have only just introduced relevant rules.

The study points out that the principles set out in the CoE Recommendation (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns (hereafter "the Recommendation") are common and of great importance to all the reviewed states due to the same democratic values they share and regardless of their differing political systems. Sometimes national rules even exceed the Recommendation's requirements, but there can also be a considerable gap between the letter of the law and its implementation in practice.

The study stated that there has been considerable progress in several areas, such as defining the frames of the parties' sphere of activity, the presentation and publication of their accounts, the independence of the relevant supervisory bodies and the flexibility of available sanctions. However, the following issues were also identified. Giving priority to comprehensive central party accounts may offer only a partial view ignoring local branches. Granting the respective authority the right to independently apply the legislation without providing for real investigative powers may not be effective. Severe criminal penalties could in certain cases be disproportionate. The report states that the anticipated improvements are the common responsibility of the individual governments and of all those involved in political activities, and require more than simply ensuring the compliance of national legislations.

One of the study's main conclusions is that the full disclosure of accounts is the precondition for an effective application of the law by any supervisory body. Even a full range of legal sanctions serves no purpose if the monitoring body is not empowered to impose them. In order to further develop these approaches, the Council of Europe's Recommendation – which is the only international text elaborating on these key elements of a properly functioning democracy – provides an excellent basis.

➤eucrim ID=1002062

GRECO: Tenth General Activity Report, an Overview of 2009

On 24 June 2010, GRECO published its tenth General Activity Report providing an overview on all its activities in 2009. The report highlighted GRECO's 10th Anniversary, celebrated on 5 October 2009, emphasising that since its establishment, GRECO has set benchmarks in many areas, especially regarding common standards on the transparency of political financing for policy makers to bear in mind. During the celebration, it was underlined that taking joint actions helps to preclude inefficient repeated actions from actors of the international anti-corruption movement. The report contains GRECO's 2009 activities, such as the evaluation and compliance procedures carried out, the co-operation with other bodies of the CoE (e.g. Parliamentary Assembly and GRETA) as well as with other international players, in particular with the EU (see the Memorandum of Understanding between the CoE and the EU, see also eucrim 1-2/2007, pp. 41-42). In addition, the report also features an article on the criminal offence of trading with influence regarding the situation in France, presenting experiences and good practices in that field.

➤eucrim ID=1002063

Money Laundering

MONEYVAL: Publication of the Annual Activity Report for 2009

On 16 June 2010, MONEYVAL published its Annual Activity Report for 2009 with detailed information on the Committee's activities, its co-operation with other international players in the global AML/CFT network of assessment bodies as well as its current initiatives and future areas of work in 2010.

The Committee's activities in 2009 included the adoption of 5 third round mutual evaluation reports, 10 first progress reports, and 4 second progress reports. MONEYVAL also took action under the compliance-enhancing procedures in respect of two of its jurisdictions. The Committee has completed its third round of mutual evaluations, which includes a review of the overall progress made in its Members' countries until the end of this evaluation cycle, becoming the first global assessment body to commence a more detailed 4th round of evaluations on AML/CFT matters.

The report summarises the strategic initiatives as well as the key activities involving MONEYVAL (mainly on-site visits) in 2010. The report gives information on the current state of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198). This Convention entered into force on 1 May 2008 (see also eucrim 1-2/2008, pp. 60-61) and has since then been ratified by 16 states and signed by another 17 states. The report also contains additional information on evaluation visits and publications from 2009.

➤eucrim ID=1002064

Russia: MOLI-RU 2

The project MOLI-RU 2 aims at further developing Russia's AML/CTF system in view of both practice and legislation (see also eucrim 1/2010, p. 23; eucrim 4/2009, pp. 153-154; eucrim 3/2009, p. 85; eucrim 1-2/2007, p. 33 and eucrim 1-2/2007, p. 45). On 28 April 2010, an international conference took place for the Russian banking sector on the "Modernization of the AML/CFT System in the post-crisis environment" in Moscow. The conference was attended

by supervisors and compliance officers representing over 100 Russian banks and featured the participation of one UK and one Russian expert.
➤eucrim ID=1002065

On 11 May 2010, the CoE also published its 11th Progress Report on MOLI-RU 2. The report summarises the activities implemented under the project between 1 November 2009 and 30 April 2010 (see also eucrim 1/2010, p. 23; eucrim 4/2009, pp. 153-154 and eucrim 3/2009, p. 85).
➤eucrim ID=1002066

Procedural Criminal Law

CEPEJ: The European Parliament Calls upon the EU to Become a Member of the CEPEJ

As reported in eucrim 1/2010, p. 2, the European Parliament called upon the EU to accede to the European Convention on Human Rights in a Resolution adopted on 19 May 2010. The resolution called upon the EU to become a member of the CEPEJ as well. This could be elaborated to a package of measures accompanying the Union's accession to the Convention to strengthen the protection of human rights.
➤eucrim ID=1002067

CEPEJ: Process for Collecting Judicial Data

CEPEJ's network of national correspondents held its 4th meeting in Strasbourg on 5 May 2010. The objective of this network is to guarantee homogeneity in collecting and processing data and the aim of it is to improve the national data collecting process with each edition of the report. The national correspondents analysed the developments in progress related to the collection of judicial data with a view to the preparation of the new edition of the evaluation report of judicial systems.
➤eucrim ID=1002068

Legislation

GRETA: 6th Meeting

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its 6th meeting on 1-4 June 2010 at the Council of Europe headquarters in Strasbourg. GRETA devoted the major part of its meeting on finalising the structure of its first round of evaluation reports, the preparation of country visits and requests for information addressed to the public regarding the parties' implementation of the Convention on Action against Trafficking in Human Beings (hereafter: the Convention).

Also, the initial version of the Trafficking Information Management System (TIMS) has been made available to the 1st Group of 10 parties to be evaluated. In order to assess the role of NGOs in the evaluation procedure accompanying the implementation of the Convention, GRETA invited Amnesty International, Anti-Slavery International and La Strada International to a hearing.

At the meeting, GRETA noted that, since its last meeting, the Convention has been ratified by two CoE Member States (the Netherlands and Sweden), raising the total number of ratifications to 28 and the signatures not yet followed by ratification to 15.
➤eucrim ID=1002069

The Lisbon Treaty

A Critical Analysis of Its Impact on EU Criminal Law

Dr. Ester Herlin-Karnell

Introduction

The Lisbon Treaty has opened up a new chapter in the history of European criminal law. The purpose of this analysis is to guide the reader through the main changes in this area, as introduced by the Lisbon Treaty. Therefore, the present analysis is a follow-up to previous work by the author before entry into force of the Lisbon Treaty[1] – thereby seeking to provide an account of the status of EU criminal law post-Lisbon Treaty.

The paper has been structured into seven sections. Section one deals with a short introduction to the evolution of criminal law at the EU level. Section two outlines the framework of the criminal law in the Lisbon Treaty. Section three deals more specifically with the emergency brake and enhanced co-operation procedure as well as the possible establishment of a European Public Prosecutor. Thereafter, Section four looks more broadly at the Court of Justice's jurisdiction in the area of criminal law and the Area of Freedom, Security and Justice (AFSJ). Section five deals with the legally binding status of the Charter of Fundamental Rights and the possible accession to the ECHR. Section six deals with the principles of subsidiarity and proportionality with regard to criminal law. Finally, the analysis concludes by offering some thoughts about the future of European criminal law.

I. Short Recap: European Criminal Law pre- and post-Lisbon

Generally speaking, criminal law as a European issue entered the EU scene in connection with the entry into force of the Maastricht Treaty in 1993. Subsequently, the Amsterdam Treaty in 1999 clarified the Union's objectives in the Justice and Home Affairs area and created the concept of 'freedom, security and justice.'[2] However, the third pillar was accused of having a lack of transparency and, as such, has been criticised for creating a democratic deficit, with minimum involvement of the European Parliament (EP) in the legislative process. Moreover, the Court's jurisdiction within this pillar has been very limited and based on a voluntary declaration by the Member States to confer such jurisdiction (Article 35 TEU).[3] Therefore, from an EU law perspective, the third pillar framework was never considered to be an ideal counterpart to the first pillar (EC) sphere.[4] However, the Member States were concerned about retaining their competences in such an extremely sensitive area as that of justice and home affairs, which is the reason why this field – or its EU subculture – has persisted.[5] In any case, shortly after the entry into force of the Treaty of Amsterdam, the consequential Tampere Council of 1999 and the subsequent Hague Programme[6] took the notion of European criminal law one step further by introducing the adoption of the internal market formula of 'mutual recognition' into the third pillar.[7] This concept has remained the main engine of development, although there has also been extensive legislation in the area, particularly in the fields of terrorism, organised crime, and illicit drug trafficking, in accordance with the relevant provisions. Moreover, a new JHA programme was recently crafted – the Stockholm Programme – to replace the previous Hague Programme.[8]

The Stockholm programme sets out a very ambitious agenda. It is the latest development in the creation of an AFSJ sphere. It takes the Tampere agenda and the Hague Programme one step further by stipulating a number of goals to be achieved in the AFSJ field. The Commission's communication COM(2009) 262/4 and its title, *An area of freedom, security and justice serving the citizen,* regarding the Stockholm Programme is worthy of mention here. This communication points at the current success with EU involvement in the present area. Nonetheless, it is also pointed out that the desired progress has been comparatively slow in the criminal law area because of the limited jurisdiction of the Court of Justice – and since the Commission has been unable to bring about infringement proceedings – which has led to considerable delays in the transposition of EU legislation at the national level. Therefore, the aim of this communication is to make EU policies more effective in the AFSJ field.

In any case, the Lisbon Treaty provides for a specific basis for such a crime-fighting mission by listing an entire range of crime fighting activities as set out in Articles 82 and 83 TFEU, respectively.

II. Main Changes for the Criminal Law as Introduced by the Lisbon Treaty

This section briefly sketches out the picture of EU criminal law as depicted in Lisbon. Accordingly, the former justice and home affairs area will now form part of Title V of TFEU and consists of five chapters on:

- General provisions (Chapter 1);
- Policies on border checks, asylum, and immigration (Chapter 2);
- Judicial cooperation in civil matters (Chapter 3);
- Judicial cooperation in criminal matters (Chapter 4);
- Police cooperation (Chapter 5).

It is fitting to begin the present analysis by scrutinising Chapter 4 and the legal framework of the criminal law after Lisbon. The crucial provisions for the criminal law are Articles 82 TFEU (procedural criminal law) and 83 TFEU (substantive criminal law). These provisions need, however, to be read in the light of Chapter 1 of Title V of TFEU, which sets out the general goals to be achieved in this area. More specifically, Article 67 TFEU stipulates that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Moreover, it reads that the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism, and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

1. Procedural criminal law – the continuing road to mutual recognition

Article 82 TFEU stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition and should include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of the same article. This paragraph, in turn, states that the European Parliament and the Council may establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. Such rules shall take into account the differences between the legal traditions and systems of the Member States. The provision of Article 82 TFEU then sets out a list of areas within the EU's competence for legislation, such as the mutual admissibility of evidence between the Member States, the rights of individuals in criminal proceedings, and provisions regarding the rights of victims. Furthermore, the article contains a so-called 'general clause' stating that any other specific aspect of criminal procedure, which the Council has identified by decision (unanimity would apply here) in advance, would qualify for future approximation. Finally, the article states that the adoption of the minimum rules referred to in this paragraph should not prevent Member States from maintaining or introducing a higher level of protection for individuals. It remains to be seen whether this constitutes a far-reaching and consistent enough solution as regards the protection of the individual.

2. Substantive criminal law

Article 83(1) TFEU concerns the regulation of substantive criminal law and stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Then, this provision sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organised crime, and money laundering. It, accordingly, also states that the Council may identify other possible areas of crime that meet the cross-border and seriousness criteria. Moreover, and interestingly, paragraph 2 of this article reads that the possibility exists for approximation if this measure proves essential towards ensuring the effective implementation of a Union policy in an area that has already been subject to harmonisation measures.

Consequently, the question that needs to be addressed in the present context is what Articles 82(1)–(2) and 83(1)–(2) mean from the perspective of harmonisation in the more general sense. As noted, the wording in Article 83(2) TFEU is slightly different from that of Article 82 (2) TFEU. More specifically, Article 83(2) TFEU does not explicitly state that there has to be a 'cross-border dimension' or a crime of a 'serious nature' in order to qualify for legislation if, as noted, the area in question has already been subject to harmonisation and such legislation proves essential in ensuring the effective implementation of a Union policy. Furthermore, in contrast to Article 82(2), there is no unanimity requirement for Article 83(2) TFEU. Instead, decisions under this article follow the same procedure as their respective preceding harmonisation scheme, which is most likely to be the 'standard' procedure, namely qualified majority voting (QMV) in the Council. Why this difference? It certainly seems odd, given that mutual recognition is held to be the main rule as stipulated in Articles 67 TFEU and 82 TFEU and considering the apparent need for underlying rules ensuring adequate protection of the individual in an area based on mutual trust.

Moreover, the different parts of the Lisbon Treaty that deal with crimes give reason to uncertainty. An indication that the Union's criminal law competence may extend beyond the offences enumerated in Article 83 TFEU is the new Article 325 TFEU. Indeed, it should be recalled that the old Article 280 TEC stipulated that, although the EC's mission was to fight fraud, such an agenda could not concern the Member States' national criminal law or the national administration of justice. As Mitsilegas points out though, it is not clear whether the Union would have competence under Article 325 TFEU to adopt criminal laws on fraud or whether it would need to have recourse to Article 83 (2) TFEU.[9] The same arguments could probably be applied to Article 114 TFEU (ex Article 95 TEC) concerning the establishment and functioning of the European internal market (whether it would be possible to rely on this provision or whether Article 83 TFEU is 'exclusive' *lex specialis*).

Clearly, the framework as provided by the Lisbon Treaty means big constitutional changes as regards national sovereignty in these issues. One of the ways of persuading the Member States to surrender the criminal law was the emergency brake provision.

III. Emergency Brakes …

One of the most important changes introduced by the Lisbon treaty is the so-called 'emergency brake,' which resembles a mini opt-out. Indeed, the provisions of Articles 82 and 83 TFEU also provide the possibility of applying an emergency brake if the proposed legislation in question would affect fundamental aspects of a Member State's criminal justice system. More concretely, in such an emergency brake scenario, a Member State may request that the measure be referred to the European Council. In this case, the ordinary legislative procedure is suspended and, after discussion and 'in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.' There is, however, no such emergency suspension as regards the legal notion of mutual recognition, which will remain the main theme in matters of EU criminal law cooperation.

Clearly, the notion of an emergency brake appears attractive to Member States with a strong relationship between the criminal law and the state and hence remedies Member State anxiety about the loss of national sovereignty in criminal law matters. The crux is that the mere inclusion of an emergency brake does not automatically constitute a guarantee for successful European criminal law. As argued elsewhere by the author, the problem is that the very notion of the transformation of criminal law to the supranational stage prompts the question of whether the Lisbon Treaty was drafted carefully enough in the first place to live up to the freedom, security, and justice paradigm. This is particularly important as the issue is not only a question of 'taming' protectionist states but also of the adequate protection of the individual at the EU level.[10]

1. … and Accelerators

Regardless of whether a Member State pulls the emergency brake, if it would affect fundamental principles of its criminal law system, the Lisbon Treaty nonetheless provides for the possibility for the remaining Member States to engage in 'enhanced cooperation.' More specifically, Articles 82 and 83 TFEU of Lisbon state, respectively:

> In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.[11]

Briefly, this means that there is neither an obligation, as set out in Article 329 TFEU of Lisbon, to address a request to the Commission specifying the scope and objectives of the enhanced cooperation in question. Nor is there an obligation (as Article 20(2) TFEU reads) that the Council adopt the decision at issue as a last resort. This poses two questions. Firstly, it is possible to argue that the mere fact that the Member States do not need to specify the last resort requirement, as stated in Article 20(2) TFEU, can be regarded as being in disharmony with the sensitive character of criminal law as the *ultimo ratio*. Secondly, there appears to be a risk that such cooperation could result in varying degrees and notions of freedom, security and justice.[12] A further aspect of this approach is the limited participation of the European Parliament in the establishment of enhanced cooperation in criminal law.[13]

In any case, a further dimension can be added here, as the possibility of enhanced cooperation in criminal law in emergency brake situations also begs the question of what it means in practice for the Member State that pulled the brake. This may sound paradoxical as, under the previous Treaty structure, it was generally accepted that the Member States pursuing enhanced cooperation were under a loyalty obligation and not the other way round (the previous fundamental principle of safeguarding the *acquis communautaire*). The thrust of the argument presented here is therefore that there are conflicting values at stake and that these values may not necessarily point in the 'moving forward' direction.

2. The possibilities of a European Public Prosecutor

The Lisbon Treaty broadens the possibilities of enhanced co-operation by also extending it to police cooperation and to the establishment of the European Public Prosecutor (Article 86 TFEU), an innovation in comparison to the Constitutional Treaty (CT). This prosecutor will be responsible for investigating, prosecuting, and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in offences against the Union's financial interests, as determined by the regulation provided for in the paragraph. It is far beyond the scope of this analysis to discuss the pros and cons of a European Public Prosecutor in general.[14] It should be pointed out that there has been a debate as to whether such Prosecutor should have a wider criminal law mandate than that of the financial sphere alone.[15] Indeed, Article 86(4) provides for the possibility of a future European Council to adopt a decision amending the competences of such a prosecutor to include serious crime with a cross-border dimension in the broader sense.

IV. Reformation of the Court of Justice's Jurisdiction

One of the most significant changes introduced by the Lisbon Treaty is the extension of the Court's jurisdiction to also cover the former third pillar area. This is one of the most important constitutional restructurings when compared to the period before entry into force of the Lisbon Treaty. It should perhaps be recalled that this jurisdiction was based on a voluntary declaration by Member States as to whether to accept such jurisdiction in accordance with Article 35 TEU.[16] The Lisbon Treaty changes this, as it significantly extends the Court's jurisdiction within the AFSJ field.[17] The Lisbon Treaty Protocol on Transitional Provisions provides a five-year transition – or alteration – period before the existing third-pillar instruments will be treated in the same way as Community instruments. Article 10 of this Protocol stipulates that:

> 1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.
>
> 2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.
>
> 3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

Therefore, despite the entry into force of the Lisbon Treaty and, thereby, the merging of the pillars, there will remain 'echoes' of the third pillar in terms of the transitional protocol and its five-year transition period. As pointed out by Professor Peers, this means that the Commission will not have the power to bring infringement procedures against Member States as regards alleged breaches of pre-existing measures during this period.[18] It also means that the complex inter-pillar structure that has characterised European criminal law will remain for some time. Moreover, as a result of the transitional rules, there will be mixed jurisdiction over different measures concerning the same subject matter, and the most feasible regime (and favourable from the perspective of the individual) should then be preferred. The crucial question seems to concern the definition of when an act is 'amended.' It has been suggested that, in the absence of any *de minimis* rule or any indication that acts are in any way severable as regards the Court's jurisdiction, any amendment − no matter how minor − would suffice. But there will obviously be less clear cases.[19] In the light of the Court's history in promoting European integration, the Court would conceivably favour the most 'Communitised' reading of when an act is 'amended.'

Most importantly, the Lisbon Treaty introduces the possibility of expedited procedures for persons in custody. More specifically, the Lisbon Treaty stipulates in Article 267 TFEU that, if a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with a minimum of delay. This is obviously an extremely important change and reflects the debate on speedier justice in Europe.

However, despite the reformation of the Court of Justice's jurisdiction as provided by the Lisbon Treaty, the Court still will not have the power to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. This is likely to create interpretation problems as regards the notion of 'internal Member State security' as opposed to EU security.[20]

V. The Convention on Human Rights and the Legally Binding Status of the Charter of Fundamental Rights – What is a Principle/Right?

As a result of the entry into force of the Lisbon Treaty, the EU will now have one legal personality and will therefore be capable of acceding to the European Convention of Human Rights (ECHR). Thus, the new Article 6 (2) TEU will add

that such accession shall not affect the Union's competences as defined in the Treaties. It is clear that this accession has great symbolic value, particularly in the area of criminal law. Such an accession would also require unanimity in the Council and ratification by the Member States. Similarly, the Charter of Fundamental Rights has finally become legally binding, even if 'dismissed' to one of the numerous protocols annexed to the Treaty. It should perhaps be mentioned that the Court has long shown a stubborn unwillingness to refer to the Charter as a valid source of interpretation, but has more recently broken this ice.[21] Although the Charter has now become legally binding, it is stated in Article 6 TEU that the provisions of the Charter shall not extend the EU's competences. Also, Article 51 of the Charter makes it clear that it is directed at the Union's institutions and to the Member States when they are implementing Union law. Given this, it could perhaps be questioned what the point of the Charter is. This is particularly the case, since the Charter, also in Article 52, distinguishes between principles and rights. The problem is how to identify fully justiciable rights as opposed to partially justiciable principles.[22] Interestingly, the principle of legality is referred to as a principle in the Charter while Article 7 ECtHR refers to the ban on retroactive criminal law (except the international law exception drafted in the aftermath of the Second World War) as an absolute right.

However, even if the Charter is applied when it is implementing Union law, it still has an important function as a source of interpretation. As for the criminal law, Articles 47-49 of the Charter have a huge influence as they guide the Union's action in this area and set the scene. It is therefore likely that the binding status of the Charter will have a significant symbolic status and therefore have a real impact on the criminal law. Although one may well speculate whether the Court will use its traditional case law on general principles and view the Charter as part of this, such an interpretation would run counter to the express will of the Member States. Or, as pointed out by Dougan[23], it is possible that the Court would continue its old case law based on general principles and then have a separate agenda for the EU's institutions and the Member States when implementing EU law. It could therefore be argued that the Charter of Fundamental Rights, consequently, not only underlines and clarifies the legal status and freedoms of the Union's citizens facing the institutions of the Union, but also gives the Union and, in particular, the policies regarding the "area of freedom, security and justice" a new explicit normative foundation.[24]

Furthermore, 'opt-outs' by the UK and Poland are well known from the Charter. These 'opt-outs' appear, however, to contain much rhetorical home propaganda, as it seems conceivable that the general principles of fundamental rights will apply anyway (as traditionally interpreted by the Court).[25] Moreover, it seems unclear how these opt-outs will work in the possible scenarios of enhanced cooperation in criminal law.[26] Again, only the future will tell.

VI. Emphasis on Subsidiarity and Proportionality

The principles of subsidairity and proportionality as regards the AFSJ have been made more 'visible' in the Lisbon Treaty than ever before. Not only does the Protocol on Subsidairity and Proportionality reinforce this (although, admittedly, it had already been attached to the Amsterdam Treaty) as well as the monitoring process by the national parliaments but, as regards the AFSJ, there is a specific provision in Article 69 TFEU stressing the importance of respect for subsidiarity in this area. More specifically, this principle states that national parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

In short, the Lisbon Treaty increases the national parliaments' participation in the monitoring process for subsidiarity by imposing an obligation to consult widely before proposing legislative acts (Article 2 of the Protocol on subsidiarity and proportionality). In addition, the Commission must, moreover, send all legislative proposals to the national parliaments at the same time as to the Union institutions. The time limit for doing so has been increased from six to eight weeks (Article 4). Further, the Court will have, as is the current state of affairs, jurisdiction to consider infringements of subsidiarity under Article 263 TFEU brought about by the Member States or notified by them in accordance with their legal order on behalf of their national parliaments (Article 8). Without going into a discussion of how in-depth such a review by the Court ought to/could be in terms of substantive reasoning [27], as for the area of justice and home affairs, Article 69 TFEU, as noted, states that national parliaments shall ensure that proposals and legislative initiatives in this area comply with the principles of subsidiarity and proportionality. Obviously, paying attention to subsidiarity and proportionality is especially important in criminal law in order to avoid excessive criminalisation.

VII. Conclusion

This overview has attempted to point at the most important constitutional changes as introduced by the Lisbon Treaty in the criminal law area. In sum, the Lisbon Treaty is a highly welcomed development because it brings the former third pil-

lar into the jurisdiction of the Court, and it ensures that legal safeguards can be adopted. It also includes the Charter of Fundamental Rights into the *acquis,* and it makes the accession to the ECHR possible. Yet there are still aspects of the Lisbon Treaty that are far from ideal. For example, it has been far from settled as to what extent the Union will have a more far-reaching competence (than Article 83 TFEU grants) to harmonise criminal law if it would be essential for the effective implementation of a Union policy. Another concern is that of mutual recognition: does mutual recognition sufficiently respect fundamental rights in EU criminal law at present? The Court has already, in the context of the European Arrest Warrant, answered in the affirmative by stipulating that the abolishment of dual criminality and the move from extradition to surrendering did not challenge the legality principle in criminal law.[28]

Another concern is the strong focus on security within the AFSJ (as also witnessed in the Stockholm programme). There is a risk that such a security focus will relegate the freedom and justice concepts to empty promises. In spite of this, the Lisbon Treaty offers a far more attractive framework for EU criminal law compared to the previous messy pillar landscape. The five-year transitional period will still present a memory of the past and promises an interesting case law in the near future regarding the exact definition of when an act is amended. One thing seems clear: the supranationalisation and the use of traditional instruments, such as Directives, will have a significant impact on the criminal law. It is to be hoped that the new focus on subsidiarity and proportionality and the national parliament's participation in this monitoring exercise will have a strong impact on the sensitive area of criminal law and justice.

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Solutions Offered by the Lisbon Treaty

Margherita Cerizza

I. Introduction

The Lisbon Treaty aims at further developing an area of freedom, security and justice without internal frontiers, and the prevention and combating of crime is seen as one of the premises in order to strengthen the creation of such an area (Article 3 TEU). Member States are faced with crises of criminality in the era of globalisation: following economic and social trends, crime tends to assume a transnational dimension and a complex structure, and individual States cannot manage to deal with this phenomenon. Moreover, freedom of circulation within the EU can lead to further difficulties in fighting criminality. This is the reason why the Lisbon Treaty reinforces EU powers in criminal matters. It offers a great opportunity to create a response to economic globalisation and global criminality, thereby not only dealing with the problem at an adequate (i.e., supranational) level, but also attempting to offer a more 'political' and 'democratic' solution than those originating from contingent situations or single leading countries.[1] The previous regime was often lacking in effectiveness, legitimacy, and efficiency[2] and its reform offers some solutions. The most important ones will be analysed in the next sections.

II. The Ultimate Frontier: Mutual Recognition

The main innovation introduced by the Lisbon Treaty is the explicit acknowledgment of the principle of mutual recognition of judgments and other judicial decisions. This principle had not been adopted in the Maastricht Treaty (1992) and in the Amsterdam Treaty (1997), and it had previously only been recognised in the Tampere Council (1999) and in the Hague Programme (2004). On the basis of this principle, the EU had already adopted some former third pillar measures, such as the Framework Decisions on the European Arrest Warrant and on the European Evidence Warrant.

The new Treaty presents the principle of mutual recognition as being tightly connected with the principle of judicial cooperation and the principle of approximation of national laws and regulations (Articles 82.1 and 2 TFEU). The codification of these three principles results from a compromise between two different schools of thought: according to the first one, favoured by the United Kingdom, Ireland, and the Scandinavian countries, the creation of the European legal area should be based essentially on the mutual recognition principle; according to the second one, favoured by the majority of the other Member States, the harmonisation principle should be privileged.

The recourse to mutual recognition seems to be the easiest approach, because it apparently does not require any harmonisation or collaboration efforts. However, as has been pointed out,[3] no serious mutual recognition among judicial authorities can be envisaged without a previous in-depth harmonisation of criminal laws. Only mutual trust among the Member States, originating from the awareness of a substantial similarity of the national legal systems and from a strong and rooted attitude towards cooperation, can make the instrument of mutual recognition effective; otherwise, this extraneousness could easily lead to distrust and provide grounds for refusal of cooperation, as has already happened several times, for example in case of decisions rendered *in absentia*.[4] Only a satisfactory degree of mutual trust can, for instance, justify the abolition of the traditional requirement of dual criminality for an arrest warrant.[5] This is the reason why the new Treaty sees mutual recognition, approximation, and cooperation as complementary measures,[6] and, in order to encourage the approval of new mutual recognition measures, it strengthens the existing harmonisation and collaboration procedures.

III. The Approximation of the Laws and the Adoption of Minimum Rules

As mentioned above, the Treaty also reaffirms and reinforces the principle of approximation of the laws and regulations of the Member States, which is part of judicial cooperation and the basis for it. Approximation is achieved through the establishment of minimum rules in some significant areas of substantive and procedural criminal law (Articles 83 and 82.2 and 3 TFEU). Such minimum rules shall be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure (co-decision and QMV) and shall assume the form of directives.

Minimum rules of substantive law concern the definition of criminal offences and sanctions "in the areas of particularly

serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." Before the entry into force of the Reform Treaty, the areas of approximation were terrorism, illicit drug trafficking, and organised crime. Thanks to the Reform Treaty, new areas were introduced, namely trafficking in human beings and the sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, and computer crime. In addition, other areas can be subsequently identified on the basis of new developments in crime but, in this case, the Council must unanimously adopt a decision with the consent of the European Parliament.[7] The area of approximation appears to be more relevant than ever and is likely to become even more consistent. Even if minor differences in national laws should not prevent Member States from cooperating, this extension is necessary in order to lay down the basis for an authentic cooperation and to create the conditions for mutual recognition, especially for crimes such as corruption, the effective prosecution of which serves to protect the financial interests of the Union. Although the area covered by approximation was extended and the legislative procedure simplified, no radical changes of the paradigm have been registered in this field. Approximation through approval of minimum rules had also been taken into account in past Treaties − a true revolution would have been embodied by a shift from harmonisation to unification, that is, from a Euro-harmonised criminal law to a European criminal law.[8] In other words, the Union is not ready to have its own 'criminal code,' its own catalogue of crimes to be prosecuted in all jurisdictions. The idea of an EU code, which has already been proposed in some documents and projects such as the *Corpus Juris*,[9] the *EuropaDelikte,*[10] and the *Alternativentwurf*,[11] requires a degree of mutual trust and reciprocal harmonisation that EU members have not reached yet: drafting criminal code not only means identifying a catalogue of offences, but also creating a 'general part,' that is, finding an acceptable compromise on the very basic principles of a penal system, which continue to vary from one country to another. Moreover, the introduction of a criminal norm on a European level could create, in many national systems, a serious contrast to the principle of legality. In any case, a general referral to unification, perhaps as a mere possibility at the disposal of the Council would have been useful for at least two reasons. Firstly, it would have constituted a provision similar to that concerning the European Public Prosecutor's Office, which will be analysed in the next paragraph. The existence of a list of 'eurocrimes' to be prosecuted by an EU Prosecutor would facilitate the activity of this officer, who, according to present provisions, would have to face the great diversity of the various national laws. Secondly, the Reform Treaty (especially Articles 83 and 86 TFEU) could have suggested some applicable criteria in order to identify the 'eurocrimes:' all crimes against the financial interests of the Union and, perhaps subsequently and in part, serious crimes of cross-border dimensions related to some strategic areas.

Minimum rules of procedural law concern the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings, and the rights of victims. Furthermore, other areas can be subsequently identified but, in this case, the Council must unanimously adopt a decision with the consent of the European Parliament. Approximated procedural laws also serve to establish a higher degree of cooperation and facilitate mutual recognition, as the Reform Treaty explicitly maintains. In any case, the cooperation policy cannot penalise the rights of a person involved in a criminal proceeding, and this is why such minimum rules as "shall take into account the differences between the legal traditions and systems of the Member States" and "shall not prevent Member States from maintaining or introducing a higher level of protection for individuals" exist. One must nevertheless take into consideration that the EU fully recognises the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (and plans to adhere to this Convention, Article 6 TEU), and that these charters include all relevant procedural rights, such as the right to a fair trial or the right to privacy. As stated above, within this framework of common protected legal interests, the concerns of Member States regarding judicial cooperation should soon become a thing of the past.[12]

IV. Paradigm Change in the Field of Judicial and Police Cooperation: the European Public Prosecutor's Office

As mentioned above, judicial and police cooperation has been well strengthened: the Reform Treaty considers adopting, by means of a simplified legislative procedure, measures in fields not included in the previous regime. As for judicial cooperation, these measures are aimed at laying down rules and procedures for:

- Ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- Preventing and settling conflicts of jurisdiction between Member States;
- Supporting the training of the judiciary and judicial staff;
- Facilitating cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters;
- The enforcement of decisions (Article 82.1 TFEU).

As for police cooperation, these measures include:

- The collection, storage, processing, analysis, and exchange of relevant information;

- Support for the training of staff and cooperation on the exchange of staff, on equipment, and on research into crime detection;
- Common investigative techniques in relation to the detection of serious forms of organised crime. (Article 87 TFEU).

The most important and most revolutionary innovation in the field of judicial cooperation is the possibility to establish a European Public Prosecutor's Office in order to combat crimes affecting the financial interests of the Union as well as serious crime having a cross-border dimension (Article 86 TFEU). Such a possibility underscores the awareness that an effective contrast to these forms of criminality cannot result only from the promotion of communication and cooperation between Public Prosecution authorities of the Member States, but also that a direct action on the part of EU institutions is required.[13] This provision has a great symbolic value, but it would be a mistake to exaggerate its practical significance: Article 86 outlines a mere possibility to establish such a body, and it provides only for generic and indefinite guidelines, the enforcement of which will likely require long and difficult negotiations.

The establishment of a European Public Prosecutor's Office is facultative and requires regulations unanimously adopted by the Council as well as the previous consent of the European Parliament. The lack of unanimity can be overcome only through a referral to the European Council or by the establishment of an enhanced cooperation among at least nine Member States: in the first case, consensus is still required; in the second case, the involvement of a limited number of States will affect the effectiveness of the Office. These regulations can only be applied to crimes affecting the financial interests of the Union; provisions concerning crime having a cross-border dimension do not necessarily have to be adopted at the same time, but can result from a subsequent amendment, and this extension of competencies requires the additional consultation of the Commission.

According to the Treaty, the European Public Prosecutor's Office shall be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices in, the above-mentioned offences, and it shall exercise the function of prosecutor in the competent courts of the Member States in relation to such offences. The following rules have not been specified in the Treaty and shall constitute the subject of regulation:

- The general rules applicable to the European Public Prosecutor's Office;
- The conditions governing the performance of its functions;
- The rules of procedure applicable to its activities;
- The rules governing the admissibility of evidence;
- The rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Consequently, many issues are still open and still lacking a satisfactory solution.

Few indications concerning the structure of the new Prosecutor's Office have been provided. Two alternatives are offered: the creation of an autonomous body of prosecutors or the foundation of an office, which would direct and instruct national public prosecutors appointed by the Member States and acting in turn as the European Public Prosecutor's deputies. The second solution is considered the better one for several reasons: the European Prosecutor constantly faces national judicial authorities, not only during trials but also during investigations, and his/her action(s) would be considerably facilitated if he/she is already integrated in the national system; moreover, this consistent cession of sovereignty would be more easily accepted by Member States if the European Prosecutor is not perceived as a completely extraneous body.[14] Furthermore, the only textual instruction provided by the Treaty ("Prosecutor's Office" instead of "Prosecutor") suggests the idea of a bureau of support more than that of a radically new authority.

In addition, a clear definition of the relationships between the Public Prosecutor and other EU institutions already operating in the field of criminal justice or involved in the protection of the financial interests of the Union is needed.

According to Article 86 TFEU, the Prosecutor's Office shall be established from Eurojust, as part of judicial cooperation in criminal matters. According to the new Treaty (Article 85 TFEU), Eurojust's mission shall be to provide strategic support to national authorities in investigating and prosecuting "serious crime affecting two or more Member States or requiring a prosecution on common bases" and "offences against the financial interests of the Union,"[15] which is, approximately, also the operational field of the EU Prosecutor's Office. Nonetheless, it is necessary to distinguish between the two bodies: Eurojust supports and coordinates national authorities, while the EU Prosecutor's Office shall replace them in a number of specifically assigned competencies and activities,[16] that is, the latter will be directly involved in national jurisdictions and the former will have to provide assistance. Relationships between Eurojust and the EU Prosecutor will have to be regulated.
According to Article 86 TFEU, the Prosecutor's Office shall conduct its investigation in liaison with Europol, wherever appropriate. According to the new Treaty (Article 88 TFEU) Europol's mission shall be to provide for strategic support to police authorities in preventing and combating "serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy,"[17] that is, an area which goes far beyond the operational field assigned to the EU Prosecutor. In the future, Europol will have to assist both national and European prosecution servic-

es, presumably by using different tools: the closeness between Europol and the EU Prosecutor, both settled on the European level, could foster the introduction of more closely defined mechanisms of cooperation.

Finally, the European Anti-Fraud Office (OLAF) is already engaged in the fight against fraud, corruption, and other irregular activities within the European institutions in order to protect EU financial interests: at the moment, it is an administrative body and it provides support to national administrative, police, or judicial authorities as well as to Europol and Eurojust. If a European Public Prosecutor's Office were to be established, OLAF could provide it with appropriate assistance and documentation, and its efforts in administrative investigations could finally be treated more rationally and promote a direct and significant feedback in a judicial proceeding.[18] In order to reach this goal, appropriate communication and cooperation mechanisms between OLAF and the Prosecutor's Office should be implemented; otherwise OLAF's participation and expertise could be irremediably wasted.

In addition, a clear definition of the relationships between the Public Prosecutor and the national jurisdictions is needed. Representatives of the Prosecutor's Office will have to interact with national judges and national police forces in order to abide by national laws and procedures: this means, on the one hand, that EU Prosecutors will have to be adequately prepared to face these situations; on the other hand, it means that national authorities will have to be ready to accept the intervention of this 'extraneous body' within the system. This problem requires a solution because the idea of EU crimes entirely prosecuted on a European level, i.e., in front of a European criminal court, is not even mentioned in the Treaty and, at the moment, appears unrealistic, so that the EU Prosecutor will have to act on a national level for a long time to come. Any organisational deficits in this field could seriously affect the effectiveness of the prosecution of 'eurocrimes.'

In conclusion, Article 86 TFEU offers a great opportunity for Member States to consolidate the area of freedom, security and justice and to strengthen the instruments in the fight against the most serious and widespread forms of criminality. Indeed, the special legislative procedures required for the approval of the regulations, the potentially restricted field of offences to which these provisions shall be applicable, and the wide range of solutions offered to States in defining the concrete methods of operation of the new body could jeopardise the future of the European Public Prosecutor: the risk is that this Office may not even be established or, if established, could prove itself substantially ineffective and thus not constitute a sharp deviation from the model represented by existing bodies.

V. Criticism and Conclusions

It is unquestionable that the Lisbon Treaty, by acknowledging the mutual recognition principle, by extending the area of approximation, and by reinforcing judicial and police cooperation, constitutes an extraordinary improvement of EU involvement in criminal matters. There are still many concerns regarding the relinquishment of sovereignty, and mutual trust often seems to be insufficient. Moreover, there are many procedural obstacles, such as the need for approving all the implementation measures and the unanimity rule, that still remains in certain cases.[19] The Lisbon Treaty provisions are nothing more than a temporary goal and create an institutional and organisational system that is still fragmented and somehow incoherent. The importance of the liberties and rights of the players requires a gradual and cautious approach: security cannot prevail over freedom and justice, but these three principles must be reconciled. In other words, the aim of the EU is not only to combat crime, but also to protect people. The Union is not a mere repressive mechanism and, unless it denies its own nature, its criminal policy has to assume the form of a penal democracy.

1 For these considerations, see *M. Donini,* L'armonizzazione del diritto penale nel contesto globale, 2002 Rivista Trimestrale di Diritto Penale dell'Economia, pp. 477-492.

2 For a detailed analysis, see *C. Ladenburger,* Police and Criminal Law in the Treaty of Lisbon. A new Dimension for the Community Method, 2008 European Constitutional Law Review, No. 4, pp. 20-40.

3 *Inter alios*, *ibid*., at pp. 35 f.

4 See *V. Mitsilegas,* The third wave of third pillar law: Which direction for EU criminal justice?, 2009 European Law Review, Vol. 34, No. 4, pp. 523-560, at p. 546.

5 See *E. Herlin-Karnell,* The Lisbon Treaty and the Area of Criminal Law and Justice, 2008 European Policy Analysis, No. 3, pp. 1-10, at pp. 4 f.

6 On the theme of cooperation and integration as fundamental but not mutually exclusive political choices, see also *J. Monar,* What kind of EU policy regarding criminal matters? The question of the balance between cooperation and integration, in: G. Grasso and R. Sicurella (ed.), Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale, Milan: Giuffrè 2008, pp. 531-560.

7 Moreover, "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."

8 On this subject, see *C. Gómez-Jara Díez,* Models for a System of European Criminal Law: Unification vs. Harmonization?, published online: 27 March 2010, available at http://ssrn.com/abstract=1579422.

9 *M. Delmas-Marty* (ed.), Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union, Paris: Economica 1997.

10 *K. Tiedemann,* Europa-Delikte. Vorschläge zur Harmonisierung des Wirt-

schaftsstrafrechts in der EU, in: Festschrift für Dionysios Spinellis, Athen: Sakkoulas 2001, pp. 1097 ff.
11 *B. Schünemann*, Alternativentwurf Europäische Strafverfolgung, Köln: Heymanns 2004.
12 For the relationship between criminal law and fundamental rights in the EU, see also *G. Grasso,* La protezione dei diritti fondamentali nella Costituzione per l'Europa e il diritto penale: spunti di riflessione critica, in: G. Grasso and R. Sicurella (ed.), Lezioni di diritto penale europeo, Milan: Giuffrè 2007, pp. 633-672.
13 *C. Conde-Pumpido,* National prosecution authorities and European criminal justice system: the challenges ahead, published online: 11 September 2009, ERA-Forum, Vol. 10, No. 3 (1 October 2009), pp. 355-368.
14 For similar considerations, see *C. Conde-Pumpido*, note 13, at p. 365.
15 Art. 85 TFEU adds that "in this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; (b) the coordination of investigations and prosecutions referred to in point (a); (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network. These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities."
16 For these considerations, see *C. Conde-Pumpido,* note 13, at pp. 364 f.
17 Art. 88 TFEU adds that "the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include: (a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies; (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust. These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments."
18 OLAF has always supported the Commission's proposal of creating a European Prosecutor in order to protect EU financial interests, Green Paper from the Commission, on "Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", Brussels, 11.12.2001 COM(2001) 715 final, http://ec.europa.eu/anti_fraud/green_paper/document/green_paper_en.pdf, reasoning that the establishment of a European Prosecutor, instead of providing Eurojust with more competences, would be a more effective instrument in the fight against criminality, because the prosecutor could directly intervene in a criminal proceeding carried out in a national court; see also the open letter of the Director-General of OLAF and the OLAF supervisory committee to the President of the Convention for the Future of Europe, http://ec.europa.eu/anti_fraud/green_paper/document/lettrevge_en.pdf.
19 Furthermore, the so-called "emergencies brake" to be invoked if a minimum rule contrasts with a basic principle of a national system (Art. 82 and 83 TFUE), the disparities created by enhanced cooperation, and the "opt-in" and "opt-out" regimes can be considered other procedural obstacles.

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European Criminal Justice Under the Lisbon Treaty

Dr. Agnieszka Serzysko

Before the entry into force of the Treaty on European Union of 1991, the cooperation in matters of internal security took place at the level of international relations between particular Member States − in the legal sense, outside the European Communities.[1] The Treaty on European Union formed the architecture of European integration by attaching different forms of intergovernmental cooperation to Community policies. In this way, the three-pillar system was established. The cooperation between the EU Member States was described as "the cooperation in the fields of justice and home affairs." This area includes police and judicial cooperation in criminal matters (Title VI of the Treaty on European Union).[2]

The Lisbon Treaty entered into force on 1 December 2009. It introduced changes in many areas. One of them was criminal law. In this article, I will analyse the changes brought about by the Lisbon Treaty[3] in the field of criminal justice and also in connection with priorities of the Stockholm Programme, which was adopted by the European Council during its meeting of 10-11 December 2009.[4] The main goal of the Lisbon Treaty reform was the belief that it should focus on the establishment of a uniform legal and systemic-institutional framework for this area.[5] It also stressed the necessity to distinguish the legislative and operational tasks implemented in the area of freedom, security and justice.[6]

I. Disappearance of Third Pillar

One of the basic elements of the reform that requires attention is the abolishment of the pillar system[7] and the inclusion of the provisions regarding police and judicial cooperation in criminal matters in the Treaty Establishing the European Community (renamed the Treaty on the Functioning of the European Union). At the same time, some specific elements currently characteristic of these issues (e.g., the role of the European Court of Justice) were maintained. Thus, Title IV of the Treaty Establishing the European Community – "Visas, asylum, immigration and other policies related to free movement of persons" − was replaced by the new Title V[8] of the Treaty on the Functioning of the European Union – "Area of freedom, security and justice" − that will comprise five chapters: "General provisions," "Policies on border checks, asylum and immigration," "Judicial cooperation in civil matters," "Judicial cooperation in criminal matters," and "Police cooperation".

Furthermore, in my opinion, we have a different situation on the basis of the Lisbon Treaty, which we can describe as a mix of parallel worlds: a mixture of "old" & "new." What does it mean? On the basis of Article 10 (1) of the Protocol to the Lisbon Treaty, we have 5-year transitional periods. Any new measures are subject to the new Lisbon Treaty rules. The Protocol on transitional provisions to the Lisbon Treaty in Article 10 (4) & (5) states that the UK may notify the Council that it does not accept the European Court of Justice's (ECJ) new jurisdiction regarding *unamended* third pillar measures. All such acts will then cease to apply to the UK when the transitional period expires. In this situation, the question is how long this situation will last and which consequences it will have.[9]

The legal instruments of the former third EU pillar, which regulate the aspects of judicial and police cooperation in criminal matters (adopted under the Treaty on European Union before the entry into force of the Treaty of Lisbon), shall be preserved until these acts are repealed, annulled, or amended in the implementation of the Treaties.

II. Delimitation of Competences

One of the tasks of the Lisbon Treaty was to organise the delimitation of competences between the European Union and the Member States. Thus, the Treaty on the Functioning of the European Union is to constitute a basis for the functioning of the EU in order to determine the areas, frameworks, and conditions on which Member States and the European Union exercise their powers.

The provision of the new Article 4(2) of the Treaty on the Functioning of the European Union includes the area of freedom, security and justice among the shared competences of the EU and the Member States, i.e., both the EU and the Member States may legislate and adopt legally binding acts. In such a legal situation, this means that the Member States shall exercise their competences to the extent that the EU has not exercised its competence or to the extent that the EU has decided to cease exercising its competence.

The point of departure with regard to the delimitation of competence is the provision of the new Article 67 of the Treaty on the Functioning of the European Union. Pursuant to its provisions, the establishment of the area of freedom, security and justice is to be carried out with respect to the fundamental rights and different legal systems and legal traditions of specific Member States.[10] The Treaty of Lisbon then effects a delimitation of tasks between the EU and the States that is rather precise in comparison to the provisions previously in force, determining only the powers of the Member States.

III. European Court of Justice

Regarding judicial cooperation in criminal matters and police cooperation, the ECJ has a new competence to review EU and national legal instruments of judicial and police cooperation in criminal matters, on the one hand, due to the disappearance of the pillar structure. The ECJ is required to ensure the equal application of EU law across Member States, as well as being responsible for interpreting that law. On the other hand, the EJC has no jurisdiction to review the validity and proportionality of operations carried out by the police or other law enforcement services of the Member States or to review the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The trouble is that the provisions on police and judicial cooperation in criminal matters very often apply to actions that are subject to internal security and law and order issues. However, the ECJ has not had an opportunity to comment on the extent of the above-mentioned limitation. For this reason, the ECJ will soon face the need to specify more precisely the framework of this exclusion, probably referring to its previous jurisprudence by interpreting the old Article 39(3) or Article 46 of the Treaty Establishing the European Community. Professor Steve Peers explained that the extended remit of the ECJ has two key implications:

> First, that the ECJ now has jurisdiction over all Member States' national courts and tribunals. For example, a member of the judiciary in any court in any Member State, hearing a first instance criminal proceeding or an action against the police, could send a question to the ECJ. For instance, if somebody was trying to resist the execu-

tion of a European arrest warrant their defence counsel could argue that the national implementation of the *Framework decision on the European arrest warrant* is somehow defective and therefore that the arrest warrant could not be executed. Prosecutors have also sought to use the court, for example by reference to the *Framework decision on the rights of victims in criminal proceedings* to toughen up national law in favour of victims. Secondly, the Commission has now the option to sue Member States in the ECJ for infringing EU criminal law legislation adopted after the entry into force of the Treaty of Lisbon.[11]

One will also notice a change with respect to the raising of preliminary questions by the national courts. All the courts of the Member States under the Treaty of Lisbon have a chance to submit preliminary questions in accordance with the current Article 267 of the Treaty on the Functioning of the European Union. This means the abolishment of the former rule that gave this right only to courts whose rulings were final and against which there is no judicial remedy.[12]

IV. Uniform Legal Acts

One of the most significant changes set out in the Treaty of Lisbon is the introduction of uniform instruments within the whole area of EU legislation, including the area of freedom, security and justice.[13] The legal acts that have been implemented correspond to the former instruments of regulations, directives, and decisions. This change and also achievement of uniformity and the legal character of the legal acts of the EU is particularly important for judicial and police cooperation in criminal matters. It results in the granting of direct consequences for norms in this field, which had previously been excluded in accordance with the principles of the pre-Lisbon legal status on the basis of the provisions of Article 34(2) of the Treaty on European Union.[14]

It needs to be stressed that the legal acts in question, regulating the aspects of police and judicial cooperation in criminal matters, are within the jurisdiction of the Court of Justice of European Communities and under the control of the European Council with regard to the fulfillment of the obligations set out in the Treaty (current Article 258 of the Treaty on the Functioning of the European Union) by the Member States.

1. Legislative procedures

After the entry into force of the Treaty of Lisbon, acts are basically adopted by means of a common legislative procedure, which is based on the former procedure of co-decision. It is one of the most important consequences of the alteration in the pillar structure. In practice, it means increased participation on the part of the European Parliament and the European Commission in the legislative process.

2. Voting process and the issue of the emergency brake

The main change is the voting procedure – not unanimity in such cases but qualified majority voting in the Council (more substantive areas are included in the common legislative procedure that, at the voting stage in the Council, makes it possible to adopt a decision by a qualified majority) and, consequently, limitation of the application of the procedure of unanimity with regard to securing national law systems against the interference of the EU law. An emergency brake mechanism was established by the Member States in the Treaty of Lisbon.[15]

In accordance with the rules set out in the new Article 82 (3) of the Treaty on the Functioning of the European Union, the emergency brake mechanism should be understood as follows: in cases involving judicial cooperation in criminal matters and police cooperation, when a member of the Council is of the view that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft legislation be referred to the European Council. This mechanism is also applicable to situations where the approximation of criminal laws and regulations of the Member States proves to be essential in ensuring the effective implementation of EU policies in an area that has been subject to harmonisation measures. Referral of the decision to a higher level of the European Council is also possible in the case of lack of agreement (required unanimity) by adopting legal measures on the establishment of the European Public Prosecutor's Office[16] or operational cooperation between the police.[17] In these cases, the legislative procedure is suspended. After discussion and in the case of a consensus, the European Council shall refer the draft instrument back to the Council within four months of this suspension, which means that suspension of the normal legislative procedure ends.

V. Enhanced Cooperation

In the pre-Lisbon legal status, the Council's decisions regarding the legislative procedure within the area of freedom, security and justice, as defined by the Treaty of Amsterdam, are made unanimously. The establishment of the emergency brake and enhanced cooperation in the Treaty of Lisbon is of great importance – including political importance – to some of the Member States. After entry into force of the Treaty of Lisbon provisions, where there is no consent in the Council, enhanced cooperation may be established if at least nine Member States, which inform the European Parliament, Council, and Commission, agree. Under the new Article 86 of the Treaty on the Functioning of the European Union, enhanced cooperation may also be established in case of a disagreement in the European Council regarding the establishment of the European

Public Prosecutor's Office. In these cases, one recognises that the authorization to undertake enhanced cooperation, which is required pursuant to the provisions of new Article 20 (2) in relation to new Article 329 of the Treaty on the Functioning of the European Union, was granted, and the rules on enhanced cooperation can be applied without any formal-legal obstacles.

VI. Actors in the European Union

1. European Parliament

The role of the European Parliament changed and was strengthened. This allows room for further development of this institution of the EU. What is more, the European institutions must foster international dialogue. In this context, the role of the national parliaments has changed. They should participate in the actions taken by the EU by applying the rule regarding information for national parliaments (Protocol on the role of national parliaments in the EU) and by supervising institutions like Eurojust or Europol and respecting the rule of subsidiarity.

The provisions of the Treaty of Lisbon also concern the strengthening of the European Parliament in the area of freedom, security and justice, e.g., by extension of the number of fields in which the acts will be adopted in the normal legislative procedure, that is with the participation of the Council and the European Parliament.

2. National parliaments

Democratic control over the area of freedom, security and justice was widened through the strengthening of the role of national parliaments. The European Parliament will have the right to supervise the activity of the EU in this field. In accordance with the new Article 69 of the Treaty on the Functioning of the European Union, the national parliaments will have the competence to issue opinions on the compliance of the proposals and legislative initiatives submitted under the framework of the area of judicial and police cooperation in criminal matters with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality. Under Article 6 of the Protocol, this power means that any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the President of the European Parliament, the Council, and the Commission a reasoned opinion stating why it considers the draft in question not to be compliant with the principle of subsidiarity. Each national parliament shall consult the regional parliaments having legislative powers. Article 7 of the Protocol stresses the fact that each national parliament shall have two votes (in the case of a bicameral parliamentary system each chamber receives one vote) in the process of preparing a reasoned opinion regarding draft legislative acts as defined by Article 3 of the Protocol. When the reasoned opinions on a draft legislative act representing at least 1/4 of all the votes allocated to the national parliaments, demonstrate non-compliance with the principle of subsidiarity, the draft should be reviewed. This procedure is applicable to that for draft legislative acts in the area of freedom, security and justice. In the case of other subject areas, the number of votes necessary to initiate a procedure of consultation with the author (the Commission, the European Parliament, a group of Member States, etc.) of a given initiative or act shall be 1/3 of all votes. This procedure is laid down in Article 7 of the Protocol, which ideally leads to full compliance of the draft act with the principle of subsidiarity.

In addition, in the area of freedom, security and justice, national parliaments shall have the following competences:

- The right of national parliaments to be informed of the content and results of the evaluation of the implementation (by the authorities of the Member States) of the policies of the EU with regard to Title IV of the Treaty on the Functioning of the European Union (new Article 70 of the Treaty on the Functioning of the European Union);
- The right to be informed of the proceedings of a standing committee set up to ensure that operational cooperation with regard to internal security is promoted and strengthened (new Article 71 of the Treaty on the Functioning of the European Union);
- The right to evaluate the operations of Eurojust (new Article 85 (1) of the Treaty on the Functioning of the European Union);
- The right to evaluate the operations of Europol (new Article 88 (2) of the Treaty on the Functioning of the European Union).

3. European Council

In the area of freedom, security and justice, the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice – the new Article 58 of the Treaty on the Functioning of the European Union. These acts may, however, take the form of programs or strategies and be of great political importance.

4. Eurojust and Europol

The Treaty of Lisbon changed the mission of Eurojust and Europol. The provisions of the Treaty of Lisbon strengthen the position of Eurojust and Europol through the incorporation

of legislative regulations that explicitly determine their status and the range of their operations in the new Article 85 (Eurojust) and the new Article 88 (Europol) of the Treaty on the Functioning of the European Union.

On the basis of the Treaty of Lisbon, the role of Eurojust was reinforced for the coordination and cooperation between judicial authorities in Member States. This means that Eurojust has more operational capacity to act and to resolve conflicts of jurisdiction. Eurojust shall have the competence to initiate criminal investigations as well as propose the initiation of prosecutions conducted by competent national authorities, particularly those regarding offences against the financial interests of the European Union, as well as the right to coordinate those investigations.

Eurojust will become a central player in the European judicial area.[18] To do this, Eurojust needs to be properly equipped. Its rules underwent a first change last year.[19] In 2009, the Council Decision No. 2002/187/JHA of 28 February 2002 was changed by Council Decision No. 2009/426/JHA. The amendments open new possibilities for the EU Member States as regards their regulating of relationships with Eurojust. On the basis of Council Decision No. 2009/426/JHA, national members have reinforced powers. The 2009 Decision on Eurojust provides for the possibility to claim the powers of the College, a national member in Eurojust, participation in Eurojust operations through an On-Call Coordination and Eurojust National Coordination System.[20] The 2009 Decision on Eurojust creates new possibilities, but the manner of their use remains with the EU Member States that have the powers to implement them according to their own legal regimes. In this context, the role of the Commission is also important to improve efforts to get these new rules in place. The Commission should supervise the implementation of the new rules in certain Member States.[21] The important thing is to make sure that criminal investigators can do their job. Further new rules giving Eurojust new powers to directly initiate investigations as well as new rules to regulate its internal structure shall be considered.

The Treaty of Lisbon confirms the mission of Europol, which is the agency of the EU that handles criminal intelligence in preventing and combating organised crime and terrorism. Europol has the prerogative to coordinate the cooperation between national law enforcement authorities regarding the investigations and operational actions against organised crime and terrorism. Europol's mission concerns not only the collection, storage, processing, and analysis of information forwarded by the authorities of the Member States or third countries, but also the coordination, organization, and implementation of investigative and operational action carried out in liaison and in agreement with the competent authorities of the Member States or third States, depending on the number of territories on which the actions are carried out. The application of coercive measures shall then be the exclusive responsibility of the competent national authorities (new Article 88 of the Treaty on the Functioning of the European Union).

5. Standing Committee for Internal Security (COSI)

The former cross-border operational cooperation between the authorities of certain Member States as well as the specialised authorities of the EU in the context of police cooperation or border security is sometimes considered ineffective, intransparent, or even not legitimate. For this reason, in order to strengthen uniform coordination and control, a separate coordinating structure in the Council, in the form of a standing Committee for Internal Security (COSI), has been set up under the new Article 71 of the Treaty on the Functioning of the European Union. Its mission is to strengthen and promote operational cooperation in the area of internal security. In accordance with the preliminary provisions, the Standing Committee is to strengthen and help the coordination of concrete actions in this area. The main emphasis is on the promotion of legislative operations in the area of freedom, security and justice, the coordination of anti-terrorist actions of the EU, the exchange of information, personal data protection, or the external aspects of actions in this field. The implementation of the regulations determining the status of the COSI requires an appropriate decision concerning the aspects of the range of competence of the Committee, its composition, and functioning.

6. European Public Prosecutor's Office

The European Public Prosecutor's Office,[22] in accordance with the provisions of the Treaty of Lisbon, could be established after a unanimous decision of the Council and after the consent of the European Parliament. It would be responsible mainly for investigating, prosecuting, and bringing to judgment the perpetrators of offences against the EU's financial interests (new Article 86 (2) of the Treaty on the Functioning of the European Union). The European Council was also granted the legal possibility to adopt a decision on the extension of the powers of the European Public Prosecutor's Office. In accordance with the provision of Article 86 (4) of the Treaty on the Functioning of the European Union, it may extend the powers of this authority to include serious crime having a cross-border dimension.[23]

The European Public Prosecutor's Office could be set up "on the basis of" Eurojust, and, as one of the strongest and most powerful institutions within the area of freedom, security and

justice, it may boost the integration actions in this field. The latter depends on how the European Public Prosecutor Office would be created on the European level and on the level of particular Member States.[24] We can list a few possibilities. Firstly, the European Public Prosecutor's Office could be created *from* Eurojust. This means that we could have an old institution under a new name. Eurojust could disappear. Secondly, the European Public Prosecutor Office could be created *on the basis of* Eurojust. This means that we could have two separate institutions – Eurojust and the European Public Prosecutor's Office. In this context, the question is how they could share the competences to fight against criminals? We will see in the future what it will look like.[25]

These steps could lay the foundation for the creation of the European Public Prosecutor's Office, as foreseen in the Lisbon Treaty. It would be necessary to lay the groundwork carefully but solidly, building on strong mutual trust and fully involving all potential stakeholders.

VII. Anti-Terrorism Measures

The Treaty of Lisbon also laid down a provision regarding the strengthening of measures combating terrorism and related activities. In accordance with Article 75 of the Treaty on the Functioning of the European Union − where necessary to achieve the objectives of the area of freedom, security and justice as regards terrorism − the European Parliament and the Council shall define the framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets, or economic gains belonging to or owned or held by natural or legal persons, groups, or non-state entities.

The adoption of these arrangements establishes a legal basis for more effective combating of terrorism, e.g., through financial restrictions. The entry into force of this provision on the level of the primary law will also end the controversies surrounding this instrument in the ECJ.[26]

VIII. Conclusions

The changes prepared in order to establish a uniform area of freedom, security and justice at the level of the EU should be considered positive. Another positive result of the planned changes is the introduction of greater flexibility to this area as far as the implementation of particular measures designed to implement the Treaty provisions is concerned. The rules of enhanced cooperation in certain fields make it possible for a greater number of Member States interested in specific aspects of the area of freedom, security and justice to meet similar objectives. This does not rule out that, in the future, cooperation will be extended and other interested States will join. On the basis of the Treaty of Lisbon, new opportunities like strengthening Eurojust, Europol, as well as the possibility to create European Prosecutor have been created.

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1 *A. Gruszczak,* Historia współpracy w dziedzinie wymiaru sprawiedliwości i spraw wewnętrznych: od TREVI do Tampere, in: Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy rozwoju, Office of the Committee for European Integration, Warsaw 2005, p. 7.

2 It should be stressed that, since the entry into force of the Treaty of Amsterdam, the notion of the EU third pillar was understood as the rules of police and judicial cooperation in criminal matters. Other issues, such as the conditions of entry, movement, and residence of persons on the territory of the EU (i.e., immigration, asylum, and visa policy, as well as customs cooperation) were transferred to the first EU pillar (Community) under Title IV and Title X of the Treaty Establishing European Communities. Moreover, the Protocol integrating the Schengen acquis into the framework of the EU was annexed to the Treaty of Amsterdam.

3 A guide to the Treaty of Lisbon, European Union insight, January 2008, The Law Society, http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf.

4 The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda, Fundamental Rights Agency.

5 The European Convention. Final report of Working Group X, "Freedom, Security and Justice," 2.12.2002, CONV 426/02, pp. 1-25; *L. Paprzycki*, Prokurator Europejski – organ europejskiego postępowania karnego, Palestra, 2009, no. 3-4, p. 63.

6 *J.J. Węc*, Reforma obszaru wolności, bezpieczeństwa i sprawiedliwości w Traktacie Konstytucyjnym, Studia Europejskie 2006, no. 2, p. 111.

7 *S. Griller/J. Ziller,* The Lisbon treaty: EU constitutionalism without a constitutional treaty?, pp. 88 f.

8 In the Lisbon Treaty, it said Title IV but in the final consolidated version it is Title V.

9 The Future of European Criminal Justice under the Lisbon Treaty, conference material in the author's collection, Conference "The Future of European Criminal Justice under the Lisbon Treaty" Stockholm, 4-5 May 2010, organised by European Research Academy.

10 *J. Barcz*, Przewodnik po Traktacie z Lizbony – Traktaty stanowiące Unię Europejską, Warsaw 2008, p. 51.

11 House of Commons, Justice Committee, Justice issues in Europe, Seventh Report of Session 2009-10, Report, together with formal minutes, Ordered by the House of Commons.

12 *J. Engstrom*, Recent and potential future developments in judicial protection in the European Area of Freedom, Security and Justice, ERA Forum, 5.3.2009, p. 489.
13 The previous legal system is described in *C. Herma*, Reforma systemu aktów prawa pochodnego UE w Traktacie z Lizbony, Europejski Przegląd Sądowy, 2008, no. 5, pp. 22-34.
14 *J. Barcz*, Poznaj Traktat z Lizbony, Piaseczno, grudzień 2007, p. 33.
15 *D. Kietz*/*R. Parkers*, Justiz- und Innenpolitik nach dem Lissabonner Vertrag, Diskussionspapier – Forschungsgruppe EU-Integration 2008/13.Mai 2008, Stiftung Wissenschaft und Politik (SWP), http://www.sewpberlin. org/common/get_document.php?asset_id=5000.
16 Article 69e (1) – new Article 86 TFEU.
17 Article 69f (3) – new Article 87 (3) TFEU.
18 *Ch. van den Wyngaert*, Eurojust and European Public Prosecutor in the Corpus Iris Model: Water and Fire?, in: N. Walker (ed.), Europe's Area of Feedom, Security and Justice, Oxford 2004, p. 5.
19 The status of the national members of Eurojust was one change in the process of strengthening the power of Eurojust. It was the result of the experiences gained by Eurojust over the years, opinions collected during seminars held since 2006 (Revision of the 2002 Decision on Eurojust during following seminars: Vienna Seminar September 2006, EJN "Vision paper" December 2006, Eurojust Contribution March 2007, Eurojust Questionnaire June 2007, Commission Communication October 2007, Lisbon Seminar October 2007, Council Conclusions 6 December 2007, initiative taken by representatives of 14 Member States of the European Union January 2008), in particular practitioners like Olivier de Baynast – General Prosecutor from Amiens (The Council of the European Union, Report of the seminar: "A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network", Vienna, 25-26 September 2006, 14123/06, LIMITE, EUROJUST 48, EJN 24, COPEN 108).
20 President of Eurojust from 2008 to 2009 – *Jose Luis Lopes de Mota*, "The future of Europa criminal justice under the Treaty of Lizbon, Innovations for Eurojust", seminar in Trier, 11-12.2.2008, www.era.int/web/en/html/nodes_main/4_1649_459/4_2153_462/events_2008/5_1625_6358.htm.
21 *A. Linnet,* The powers of the National members of Eurojust – the implementation of the Eurojust decision, in: Public Prosecutor's Office of the Court of First Instance of Athens. The role of Eurojust against crime. European conference 2003, p. 197.
22 More information regarding the idea of the creation the European Public Prosecutor's Office are available in: Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, European Commission COM(2001) 715 fin, 15.6.2002, University of Utrecht, Faculty of Law; *J. Łacny*, European Prosecutor's Office in Draft Treaty establishing a Constitution for Europe, www.revel.unicef.fv/pie/document.html?id=282; Eurojust, the European Public Prosecutor, and the draft Reform treaty, 14.8.2007; *B. Donoghue*, European Public Prosecutor: will it happen?, Law Society Annual Conference, Budapest, 28.3.2008; *G. Vermeulen*, A European Public Prosecutor's Office, Established from Eurojust: Pro's and Con's, Lubljana, 30.5.2008, Conference "Protection of the EC Financial Interests and the Developments of European Criminal Law; *D. Flore*, La perspective d'un procureur europeen. The prospect of a European Prosecutor, ERA Forum, 2008, 10.6.2008, pp. 229-243; Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, European Commission COM(2001) 715 final, Opinion delivered by Prof. *John A.E. Vervaele*, 15.6.2002; *H. Radtke*, The proposal to establish a European Prosecutor, in: E.J. Husabo/A. Strandbakken (ed.), Harmonization of Criminal Law in Europe, 2005, pp. 104-118; *H. Kuczyńska*, Wspólny obszar postępowania karnego w prawie Unii Europejskiej, Warszawa, 2008, pp. 98-119; eucrim 1-2/2006, p. 9.
23 It could also be pointed out that there has been a debate as to whether the European Public Prosecutor should have a wider criminal law mandate than the financial sphere only, *J. Monar*, Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the "Area of Freedom, Security and Justice"? European Constitutional Law Review 1, 2005, p. 226.
24 Differences on the position of the prosecutor in Member States of the European Union are shown in the report citing research which was conducted from 2004 to 2005 by the research team lead by P. Tak – P. Tak (ed.), Tasks and Powers of the Prosecution Services in the EU Member States, 2004; *L. Paprzycki*, Prokurator Europejski – organ europejskiego postępowania karnego, Palestra, number 3-4, 2009, pp. 65 f.
25 In short, however, it could be noted that it has been observed that the relationship between this prosecutor and the existing prosecution network of Eurojust is somewhat blurred. See, in general, e.g., *H.G. Nilsson*, Eurojust – the beginning or the end of the European Public Prosecutor?, Europarättslig Tidskrift (2000), 601, and *C. Van den Wyngaert*, Eurojust and the European Public Prosecutor, in: N. Walker (ed.), Europe's Area of Freedom, Security and Justice, 224 (2004), and *S. Peers*, EU Justice and Home Affairs, Ch 9 (2006). *G. Persson*, Gränslös straffätt, available at http://www.sieps.se/publ/rapporter/2007/2007_4_en.html; *A. Suominen*, The past, present and future of Eurojust, Maastricht Journal of European and Comparative Law, 2008, Volume 15, number 2, p. 230.
26 For example: "*Kadi* case, Joined Cases C-402/05 P and C415/05 P, 3 September 2008, in which the European Court of Justice decided that the Court of First Instance (Case T-306/01 *Yusuf and Al Barakaat international Foundation* v *Council* and Case T-315/01 *Kadi* v *Council and Commission*, 21 September 2005) erred in law, and moreover annulled the Council Regulation 881/2002 freezing the assets of Yassin Abdullah Kadi, and the Al Barakaat International Foundation. This sets a precedent that led to the potential dismissal of every subsequent challenge in the European Union Courts bought by individuals or groups designated as associates of the Taliban or Al Qaida (Statewatch 2008). It could furthermore trigger more challenges to the listing by the European Union of other terrorists. The main complaints of Kadi and the Al Barakaat Foundation, after the Court of First Instance had rejected all their complaints, were the lack of competence of the Council to adopt these regulations and the infringements by the sanction regimes of their fundamental rights. Whereas the Court of First Instance had ruled that the Court did not have the competence to review Security Council decisions, the Court of Justice concludes that Community Courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council (C-402/05 and C-415/05, par. 326). Indeed, the Court ruled that the rights of the defense, in particular the right to be heard, and the right to judicial review were not respected. Especially the failure of the European Council Regulation to include procedures to communicate the evidence justifying the inclusion of names of persons or entities infringed fundamental rights. Although, the Court ruled that the Council was competent to adopt the freezing measures, the lack of guarantee enabling Mr. Kadi to put his case to the competent authorities, led to the unnecessary infringement of his right to property. Because of the serious and irreversible effect of the annulment, the Court orders that the effects of the regulation are to be maintained for a period of three months, in order to allow the Council to remedy the infringements found." Summary from the original judgement made by the Court of Justice, http://eur-lex.europa.eu/Result.do?arg0=Kadi&arg1=&arg2=&titre=titre&chlang=pl&RechType=RECH_mot&Submit=Szukaj
Similar statements in the following cases: case T-318/01, *Omar Mohamed Othman* v *Council* in which Council Regulation No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban was annulled, and repealing Regulation No. 467/2001, in so far as it concerned Mr. Omar Mohammed Othman; (para. 85) "the Council neither communicated to the applicant the evidence used against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, the applicant was not in a position to make his point of view in that respect known to advantage. Therefore, the applicant's rights of defence, in particular the right to be heard, were not respected."; case T-341/07, *Sison and others* v. *Council*; case *European Parliament* v *Council* (Blacklists), C-130/10, in which the European Parliament brings an action for annulment of Council Reg. No. 1286/2009 (amending Regulation No. 881/2002) imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network, and the Taliban. The European Parliament claims the invalidity of the contested regulation because it does not have Article 75 TFEU as a legal basis. In the alternative, the European Parliament considers that the conditions to adopt the contested regulation under the procedure laid down in Article 215 TFEU were not fulfilled.

The Cooperation and Verification Mechanism in Bulgaria

Its Role for the Successful Implementation of the Mutual Recognition Principle in Criminal Matters

Gergana Marinova / Iskra Uzunova

The Cooperation and Verification Mechanism was established in December 2006, by the European Commission to help propel judicial reform and the fight against corruption and organised crime in Bulgaria.[1] The mechanism provided for sanctions that could be applied against Bulgaria during the three years after accession – including the suspension of mutual recognition of judicial decisions – if Bulgaria did not show sufficient progress. Sanctions were not applied, however, and were arguably never even seriously considered, despite repeated meager findings and, at times, a "shocking" lack of progress. This paper reviews the findings of the Commission on Bulgaria from 2007 to 2009 and analyses whether Bulgaria's problems in tackling corruption and organised crime domestically affect its ability to comply with EU instruments in the field of criminal justice based on mutual recognition principles and within the Framework Decision on the European Arrest Warrant in particular. This is especially important now that the Treaty of Lisbon has entered into force, as Article 82 (1) TFEU explicitly declares the principle of mutual recognition to be the cornerstone of judicial cooperation in criminal matters.

I. The Cooperation and Verification Mechanism (CVM)

Commission Decision 2006/929/EC of 13 December 2006 established "a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime."[2] The mechanism required Bulgaria to submit annual reports to the Commission and that the Commission communicate its own findings to the Parliament and Council every six months.[3] The main underlying concern behind CVM was for Bulgaria to fulfill its obligations as a Member State by guaranteeing a justice system based on the rule of law and, specifically, a justice system able to deal with corruption and organised crime. CVM was "a new model … designed to ensure that improvements in the rule of law that were observed and promoted throughout the accession process would continue" after Bulgaria became a full member.[4]

During the pre-accession process, it was assumed that the necessary standard of the rule of law in a candidate Member State would be achieved by the formation of institutions similar to those in existing Member States, because such institutions already had proven records of independent, reliable, and efficient judicial systems. In the case of Bulgaria, it was clear that, even after such basic necessary structural systems were put in place and accession was granted, serious problems would remain. CVM was adopted as a method of dealing with the need for continuing post-accession reform. Commission monitoring of the "integrity and reliability" of the judicial process followed indicators such as the number of arrests, charges and convictions, and forfeiture of criminal assets, measured against estimated levels of organised crime and corruption. Commission reports were to identify key problem areas in the Bulgarian judicial reform process by following six specific benchmarks addressing the problematic areas of the Bulgarian law enforcement system. These benchmarks were to:

- Adopt constitutional amendments to remove any ambiguity regarding the independence and accountability of the judicial system;
- Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and the penal and administrative procedure codes, notably on the pre-trial phase;
- Continue the reform of the judiciary in order to enhance professionalism, accountability, and efficiency. Evaluate the impact of this reform and publish the results annually;
- Conduct and report on professional, nonpartisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials;
- Take further measures to prevent and fight corruption, in particular at borders and within local government;
- Implement a strategy to fight organised crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments, and convictions in these areas.[5]

II. The Safeguard Clause

The following provisions were specified in case Bulgaria failed to show sufficient progress or failed "to address the benchmarks [enumerated by the Commission] adequately:"[6]

> If Bulgaria should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian judgments and judicial decisions, such as European arrest warrants." Additionally, and more broadly, the 2006 Decision specifies that Article 37 of the Act of Accession allows for "appropriate measures in case of imminent risk" that Bulgaria's shortcomings would threaten the functioning of the internal market. Additionally, Article 38 of the Act of Accession similarly allows "appropriate measures in case of imminent risk" in the transposition, state of implementation, or application of the framework decisions or any other relevant legal obligations, instruments of cooperation, etc. relating to mutual recognition. The measures "may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria … and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation.

Thus, the suspension of mutual judicial recognition and the EAW for Bulgaria were conceived as possible sanctions. However, it is unclear what level of unsatisfactory or less than adequate implementation of the benchmarks would have been sufficient to qualify as an "imminent risk" or as "serious shortcomings," as required per Articles 37 and 38, so as to trigger sanctions. The safeguard clause was arguably to be employed as a "last resort." Sanctions per Article 38 are no longer available, as they could only have been applied within three years after accession − until the end of 2009. Questions remain, however, regarding why the measures provided for in Articles 37 and 38 were not applied and whether Bulgaria fell and still falls significantly short of properly implementing its legal obligations, especially in its implementation of mutual recognition instruments.

Requiring that a Member State guarantee the rule of law is undertaken not only for the benefit of that Member State's own citizens. As cooperation in the area of criminal justice between Member States continues to evolve and grow, any Member State's judicial quality has potential repercussions for other Member States' citizens. Cooperation among Member States in the criminal sphere, such as judicial cooperation and the EAW, is in itself a recent and ongoing development. Under Article 82 (1) TFEU, judicial cooperation in criminal matters is based on the principle of mutual recognition and includes the approximation of criminal laws in specific areas. Mutual recognition instruments are clearly based not only on necessity and administrative facility, but on the understanding that there are common basic standards and substantive procedural fairness guarantees applied throughout the Member States and on the ensuing shared trust in the high quality of justice everywhere within EU borders. However, the contours of those assumed "verifiable common standards,"[7] despite their centrality to the justification of mutual recognition instruments, are not entirely clear. These standards, assumed to justify the adoption and proper functioning of mutual recognition instruments, are the same ones used to evaluate Bulgaria's progress under CVM: namely, the independence, accountability, transparency, professionalism, and efficiency of the judicial process.

III. Progress and Evaluations

" 'Other countries have the mafia,' said Atanas Atanasov, a member of Parliament and a former counterintelligence chief [in 2008]. 'In Bulgaria, the mafia has the country.' "[8] This quote is undoubtedly an extreme statement of a politician trying to draw public attention through the use of hyperbole; nevertheless, it is clear that Bulgaria has encountered and still experiences serious problems with corruption and organised crime.

There was some indication that, despite CVM reports and domestic efforts, corruption had increased in the three years following accession. Tracking the dynamics of the "hidden economy" and the main channels of corrupt interactions between business and politics, namely public procurement, concessions, and land/forest swaps, the 2009 Corruption Report of the Center for the Study of Democracy (CSD)[9] in Bulgaria registered a trend towards increased corruption in the two years following accession to the Union. The report noted:

> Political corruption and organized crime still remain largely crimes without punishment even after Bulgaria's accession to the EU. Notwithstanding economic growth and past progress in its anti-corruption reforms, Bulgaria still displays two major deficits for countering corruption and organized crime: namely, of political will and of administrative capacity.[10]

The report further pointed out that effective judicial sanctions are yet to be employed against a single cabinet minister or MP, or any executive or upper management official of any business.

The Commission and some Member States have suggested that the level of corruption in the Bulgarian justice system "transcends being just a criminal problem;" that it influences the political process to such an extent that it "distorts the working of the democratic institutions."[11] Similarly, CSD called the situation a "de facto impunity of high level corruption and organized crime" in their 2009 corruption report and further noted that "[s]hould the Bulgarian authorities fail to undertake decisive actions to overcome this negative trend in 2009, public mistrust in state institutions may peak to levels so critical as to impair the latter's proper democratic functioning."[12]

Commission reports are predicated by the qualification that they present "a factual update of progress without providing a detailed assessment of results achieved,"[13] yet the Commission called the absence of convincing results "striking" in its July 2008 Report, and advised that "[t]he core problems remain and need to be addressed urgently."[14] The February 2009 Commission Report tracked progress achieved after July 2008 by listing a number of institutional innovations,[15] followed by a list of what was still needed, and, in conclusion, noted that "in order to demonstrate that an autonomously functioning and stable judiciary is in place, Bulgaria needs to adopt the remaining laws to complete the legal system, and to show concrete cases of indictments, trials and convictions of high-level corruption and organized crime." It is evident from this conclusion that Bulgaria had not yet demonstrated the presence of an autonomously functioning and stable judiciary.

In February of 2009, an advisor to the Bulgarian Prime Minister suggested that the Commission not only monitor and provide cooperation, but become directly involved with the domestic administration of judicial reform in those areas with "structural and persistent" weaknesses. Even though this request may have been a political response to the decision to withhold €220 million in aid to Bulgaria upon OLAF's investigations of corruption involving EU finds, [16] the statement is nevertheless an immediate public cry for help and an admission of failure from the top level of Bulgarian government.

IV. Why No Sanctions?

The possibility of suspending mutual recognition for a Member State is an especially thorny issue in the wake of the Treaty of Lisbon and the increasingly intense efforts to converge the former three pillars of the European Union's legal order, the convergence of which naturally calls for judicial cooperation to be binding. This may partly explain why no sanctions were ever seriously considered in the case of Bulgaria despite arguably unsatisfactory progress in its judicial reform. The apparent futility and formality of the mechanism did not go unnoticed.

The UK European Scrutiny Committee inquired about the applicability of sanctions after reviewing the February 2009 Commission Report and the ensuing Council Conclusion. The Committee "asked in what […] circumstances it might ever be appropriate to impose sanctions, given that each successive Report continued to paint essentially the same picture and to propose the same remedy."[17] The Committee expressed an opinion that CVM had been introduced too late in the process (namely, after accession) and that there were now no effective sanctions in place.[18] The Committee further "recommended that the Commission's final verdict be debated in the European Standing Committee," and that an opportunity be given for proper scrutiny of the next Commission reports prior to the Council's adoption of conclusions on that report.[19]

The progress report of July 2009 remained tepid and cautious, noting under its section on positive developments that "[t]he widespread existence of organized crime and corruption is no longer denied [by Bulgarian authorities] and some efforts are being undertaken by the prosecution and the judiciary to combat these problems."[20] The report further pointed to "mixed results" and "starting" or "continuing" efforts in various areas of institutional functions. Regarding corruption and fraud, the Commission noted:

> Although indications of fraud and corruption (including collusion with organized crime) are abundant in the public domain, law enforcement agencies seem reluctant to take the initiative and seem to wait until some other administration formally reports irregularities before starting an investigation.[21]

In its July 2009 report, the Commission addressed the question of sanctions directly and stated: "[T]he question arises whether the safeguard clause should be triggered." The report proceeded to explain that safeguard clauses are a standard inclusion in accession treaties and that there is no "automatic link" between CVM and these clauses, and it concluded, "The Commission is of the view, based on the [July 2009] assessment, that the conditions for invoking the safeguard clauses are not fulfilled."[22] The Commission provided no further explanation of its reasons for concluding that the conditions for invoking the safeguard clauses had not been met. It could be that the threshold for what constitutes "inadequate progress" is so low that it is practically impossible to meet, short of some structural break-down of judicial institutions. Or the reason may be considerations regarding a fundamental element of reform, which the Council hinted at in its conclusion regarding the Commission Report of July 2008: "the importance of the political will to take the necessary steps."[23] Political will is possibly one of the most important elements for achieving effective reform. External sanctions would not only do little to bolster genuine political will – the sort of institutional motivation arising from internal domestic forces and public opinion – but could instead arguably dampen it.

Clearly, the Commission would have faced complex political considerations[24] if it were to consider suspending mutual recognition for Bulgaria. If the suspension of mutual recognition was triggered as a sanction under Article 37 of the Accession Act, the sanction would also affect other Member States, who would loose the ability to use mutual recognition instruments in Bulgaria. So, it is questionable whether such a suspension, while possibly inciting Bulgaria to step up its efforts, would necessarily provide an overall benefit. Even at a net loss, how-

ever, the step might have been necessary if the protection of basic fair trial guarantees in Bulgaria was clearly inadequate or if Bulgaria's performance in implementing instruments of judicial cooperation was clearly compromised.

If the number of EAWs issued by Bulgaria were substantial, and often involved non-Bulgarian Europeans, the concern over the fitness of the Bulgarian judicial system would arguably grow in proportion. The argument could be brought forward, however, that, even though Bulgaria may not have performed as expected according to its CVM benchmarks, it is nevertheless "good enough" to function amongst and compared to other European Member States when it comes to guarantying the right to fair trial. In other words, it could be argued that, despite Bulgaria's domestic problems with corruption and organised crime as well as its inability to deal with these issues effectively, its judicial system is at the same time comparable to those of other Member States according to general and objective measurements of fair trial guarantees.

V. Is Bulgaria Adequate?

Older Member States have no better and in some cases even worse measurements of certain indicators of judicial system quality than Bulgaria. "[E]fficiency, honesty, and affordability are still challenges for judicial systems in Western Europe, as well."[25] When comparing some factors of post-Soviet transition countries with non-transition European countries (Germany, Ireland, Greece, Portugal and Spain) from 2004-2005, a BEEPS[26] survey revealed diverging results for honesty, quickness, ability to enforce decisions, and affordability.[27] "The most notable differences between transition countries and Western European countries were in perceptions of honesty and fairness. Germany scores much higher than any other country on honesty," while Portugal's score was lower than that of a number of transition countries, including Bulgaria.[28] Bulgaria also scored slightly higher in the speediness of courts than Portugal.[29] Additionally, Bulgaria was seen as more able to enforce decisions than both Portugal and Ireland.[30] Finally, the Bulgarian judicial system rates as more affordable than those of Germany, Spain, Ireland and Portugal.[31]

Nonetheless, public confidence in the Bulgarian judicial system is weak and the perception of corruption pervasive. A study from March 2008, conducted by the Union of Bulgarian Magistrates with the help of the government of the Netherlands, showed that 75% of interviewed participants believed that most of the adjudicated cases are resolved unjustly due to corruption (75% of survey participants), connections between judiciary and police and criminals (45%), political pressures (43%), etc. The most likely reasons for trial delays were listed as being corruption (62%), intentional strategic tactics of the defense and prosecution (58%), the difficulty of securing witnesses and evidence (21% for each), etc. 71% of those surveyed said that all institutions are involved in corruption. Both the judiciary and the public agreed on the existence of corruption, but disagreed as to its extent and pervasiveness. The public at large perceived corruption to be pervasive at all levels and functions of the system, while judiciary members tended to think corruption was concentrated in the highest levels of the justice system.

Problems clearly exist, whether based on the findings of the Commission or on public opinion. But to what extent do these problems influence Bulgaria's ability to fulfill its obligations in implementing mutual recognition instruments? The following sections examine the implementation of the FD on EAW in Bulgaria in greater detail in an attempt to answer this question.

VI. The Implementation of the Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (FD on EAW) in Bulgaria

Having examined the CVM, the safeguard clause, and the struggle of the judiciary to reform itself, we shall turn our attention now to the implementation of the first EU instrument in the field of criminal law based on the principle of mutual recognition – the FD on EAW, adopted on 13 June 2002.[32] All Member States had to take necessary measures to comply with its provisions by 31 December 2003.[33] Regretfully, only half of them[34] observed this time limit. The last Member State to transpose the FD on EAW into its national legislation was Italy – in April 2005.[35] At that time, Bulgaria was an EU candidate country and the process of approximation of its legislation with EU law was underway. As part of this process, Bulgaria adopted a new piece of legislation in 2005 – Extradition and the European Arrest Warrant Act.[36] As indicated by its name, the law governs both extradition and surrender pursuant to an EAW. Prior to 2005, extradition was regulated in the Criminal Procedure Code (CPC). For the first time, provisions governing international cooperation in criminal matters were taken from the CPC and formed into a new law. The first part of the new law dealing with extradition came into force immediately. The second part concerning the EAW came into effect after Bulgaria's accession to the EU, i.e., on 1 January 2007.

The surrender procedure established by the FD on EAW has several features that significantly distinguish it from extradition, but two of them proved to be particularly problematic for the Member States – the obligation to surrender their own nationals and the abolishment of the double criminality require-

ment. As to the former, the problem was that many Member Sates had constitutional provisions banning the extradition of own nationals. Some of them had to change their constitutions in order to be able to comply with the FD on EAW.[37] Yet others decided to adopt statutory provisions implementing the FD on EAW without changing their constitutions. However, this resulted in challenging the constitutionality of the newly adopted provisions. Some Constitutional or Supreme Courts[38] declared them unconstitutional while others found no violation.[39]

What is the situation in Bulgaria? In the implementing law, it is provided that Bulgarian nationality is an optional ground for non-execution of an EAW – Article 40 (4). The question of the constitutionality of the requirement to surrender Bulgarian nationals has never been put before the Bulgarian Constitutional Court. Still, it was briefly addressed in 2004 when the Constitutional Court was ruling on another issue. At that time, Article 25, para 4 of the Constitution stated: "No Bulgarian citizen can be expelled or surrendered to another state."[40] In decision No 3 of 2004,[41] the Constitutional Court pointed out that there would be no incompatibility between the Constitution and Bulgaria's obligation to surrender its own nationals under the FD on EAW and the transposing legislation. It should be noted that, at the time of the decision, Bulgaria was only a candidate country and the Extradition and European Arrest Warrant Act had not yet been adopted. The argument of the Constitutional Court was that, following the accession of the country to the European Union, the Member States of the Union would not fall into the category of 'another state,' given that Bulgarian citizens would be also citizens of the European Union. The court also reasoned that the criminal justice systems of all Member States were in line with the Charter of Fundamental Rights of the European Union and with the FD on EAW, which guarantee a fair trial in each one of them; criminal law and procedure in all Member States were based on the same principles due to the parallel European citizenship.

Although a number of objections could be made against these arguments,[42] they have been easily accepted by both the Bulgarian judiciary and Bulgarian society. No debates in this regard ever took place. A year later though – in 2005 – Article 25, para 4 of the Constitution was amended. Since then it reads:

> No Bulgarian citizen may be surrendered to another state or to an international tribunal for the purposes of criminal prosecution, unless the opposite is provided for by international treaty that has been ratified, published and entered into force for the Republic of Bulgaria.[43]

This text still raises the question as to whether Bulgaria may surrender its nationals in execution of an EAW because the provision refers to an "international treaty that has been ratified, published and entered into force for the Republic of Bulgaria." Obviously, the framework decisions adopted under the former third pillar do not have these characteristics. It should also be noted that the constitutional provision prohibits surrender only for the purpose of criminal prosecution. It says nothing about the surrender of Bulgarian nationals for the purpose of execution of a custodial sentence. Nevertheless, there is no debate in the judiciary, the Bar, and civil society on these issues. It is widely accepted that Bulgarian nationals may be surrendered to Member States, and this is not unconstitutional.

The second controversial provision in the FD on EAW – the abolishment of the double criminality requirement − posed no problems in Bulgaria either. The abolishment of the double criminality requirement for the 32 categories of offences was never considered to infringe on the legality principle or any other legal principle or rule. Therefore, it was fully transposed into the national legislation with respect to all 32 categories of offences. All of them were accurately listed in the relevant national provision,[44] although not all of them exist under the Bulgarian Criminal Code.

After evaluating the Bulgarian implementing law, it must be said that its provisions fully transpose the FD on EAW. Many of the national provisions are almost a literal translation of those in the FD on EAW. However, some differences between the implementing law and the FD on EAW do exist. One of them concerns the scope of the EAW. Pursuant to Article 2 of the FD on EAW, an EAW is issued for acts punishable by the law of the issuing Member State by virtue of a custodial sentence or a detention order for a *maximum* period of at least 12 months or, where a sentence has been passed or a detention order has been issued, for sentences of at least four months. The provision clearly states that the *maximum* period of the custodial sentence or detention order should be 12 months or more. In the analogues Bulgarian provision,[45] the word "maximum" is missing and it reads that an EAW may be issued for acts punishable by the law of the issuing Member State by means of a custodial sentence or a detention order of at least one year and, where a sentence has been passed or a detention order has been issued, for sentences of at least four months. With this wording, the provision implies that the minimum (but not the maximum) period of the custodial sentence or the detention order must be 12 months, which changes the scope of the EAW. For example, under the FD on EAW, if the offence is punishable with a custodial sentence from 6 months to 5 years, an EAW may be issued and executed because the maximum of the custodial sentence exceeds 12 months. Under Bulgarian law, however, such a warrant may not be issued and executed because the minimum imprisonment is less than one year. The same problem arises when Article 2 (2) FD on EAW is compared with Article 36 (3) of the Bulgarian Extradition and European Arrest Warrant Act. Most probably, this is a result of purely linguistic misunderstanding and incorrect translation.

Initially, Bulgaria had poorly transposed Article 4 (2) and Article 4 (3) of the FD on EAW, which provide for two optional grounds for non-execution of an EAW. It was stated in the implementing law that the execution of an EAW may be refused if the offence it is issued for falls within the jurisdiction of the Bulgarian judicial authorities. The provision merely required that the offence fall within Bulgarian jurisdiction. It was irrelevant whether the Bulgarian authorities had initiated criminal proceedings prior to receiving the EAW or not. Potentially, the Bulgarian authorities could take a decision not to execute the EAW for this reason and later never commence criminal proceedings against the requested person. Or they could start such proceedings (on the basis of the information contained in the EAW) first and decide on the warrant later. In the latter case, they usually decided not to execute it on the grounds that the requested person was already being prosecuted for the same act in Bulgaria.[46] This situation was considered unacceptable and not in compliance with the FD on EAW. That is why the relevant provision – Article 40 (1) of the Bulgarian law − was amended. Now it states that the execution of the EAW may be refused if, prior to its receipt, the requested person was already charged with the same offence or the criminal proceedings against him/her were dismissed. This amendment proves the willingness of Bulgaria to comply fully with the FD on EAW.

As to the other optional grounds for non-execution, as well as the mandatory ones, it may be said that Bulgaria accurately transposed them. It should be mentioned here that, under Bulgarian law, when it comes to the offences which fall beyond the 32 categories of offences under Article 2 (2) FD on EAW, the lack of double criminality is a mandatory ground for non-execution.

EAWs may be issued by the prosecutor or the court. The former has power to issue an EAW in pre-trial proceedings and in cases of conviction when a custodial sentence has to be enforced. The court issues an EAW at the trial stage. If the whereabouts of the requested person are known, the EAW is transmitted directly to the executing authority by fax, e-mail, or any other secure system that enables the receiving authority to authenticate the EAW. Otherwise, it may be transmitted through Interpol, the Schengen Information System (SIS), and the European Judicial Network (EJN) telecommunications system. In practice, however, SIS may not be used because Bulgaria is not part of it. The traditional and most used channel for transmission is Interpol. An EAW may also be channelled through the Ministry of Justice.[47]

The presence of the defendant at the pre-trial phase is not mandatory if, according to the prosecutor, it is not necessary for the establishment of the material truth. At trial, his/her presence is mandatory only if he/she is charged with a crime carrying a custodial sentence of more than 5 years. If this is not the case, the court may require his/her presence when it is considered necessary for the establishment of the truth. Hence, the Bulgarian authorities have some latitude on deciding whether to issue an EAW. It is difficult to say how this discretion is used in practice.

The implementing law provides for the same means of transmission of EAWs regardless of whether Bulgaria is the issuing or executing Member State: when the whereabouts of the requested person are known, the warrant may be transmitted directly to the competent Bulgarian authority – one of the 28 district courts in the territory of which the requested person resides; otherwise, the channels of Interpol, SIS, or the telecommunications system of the EJN maybe used. As mentioned above, the use of SIS is practically impossible. Direct transmission may be carried out by fax, e-mail, or any other secure system that enables the receiving authority to authenticate the EAW. The Ministry of Justice may also be used for this purpose if any difficulties in the regular transmission occur.

Typically, the EAW arrives through Interpol. In this case, the police take all necessary measures to find and arrest the requested person. In case of arrest, the competent local district prosecutor is immediately informed. The requested person can be detained by the police for 24 hours following his/her arrest. The public prosecutor may prolong the detention another 72 hours. During this time, the prosecutor must secure the original and a translation of the EAW into Bulgarian if they were unavailable at the time of the arrest and submit an application to the district court to place the requested person in custody pending the court proceedings regarding the EAW. Should the EAW or the translation be unavailable within the prescribed 72-hour time limit, the requested person must be released − there is nothing to prevent him/her from being arrested again upon receipt of the documents.

If the EAW is received directly by the competent district court, it, after verifying that the requirements of Article 36 and Article 37 of the implementing law have been met (these provisions mirror the requirements set out in Article 2 and Article 8 of the FD on EAW), orders the police to proceed with the detention of the requested person for a maximum of 72 hours. Once the requested person is brought before the court, it must decide on his/her detention on remand.

The court hearing is public and includes the participation of the prosecutor, the requested person, and his/her defense counsel. If the requested person does not have a defense counsel, counsel is appointed for him/her *ex officio* by the court. If he/she does not speak Bulgarian, an interpreter is appointed as well. The court informs the requested person of the grounds

for his/her arrest, the content of the EAW, his/her right to consent to surrender to the issuing Member State(s), and the consequences thereof. The decision of the district court to impose custody may be appealed with the Court of Appeal. At any time during the court proceedings regarding the EAW, the requested person may also apply to the district court for custody to be replaced by another more lenient measure. This application is rarely granted, however, because the requested person is usually considered a flight risk.

The court proceedings on the EAW must take place within seven days of the arrest in a public hearing with the participation of the prosecutor, the defence counsel, and the requested person. The district court has to decide on the grounds of execution/non-execution (mandatory and optional) of the EAW as well as on the grounds for conditional or suspended execution. The court is empowered, at any time during the proceedings, to request additional information, to determine the time limit for receiving it, and to accept information spontaneously submitted by the issuing State. The prosecutor does not have such powers even in those cases in which he/she takes the EAW to the court. If a decision is issued that the requested person must be surrendered, the court is under a statutory obligation to order that the requested person be remanded in custody.

The ruling of the district court may be appealed within five days before the Court of Appeal by the requested person, his lawyer, or the prosecutor. The Court of Appeal has the same powers as the district court. Its decision is final.

In those cases in which the requested person consents to surrender, the procedure varies slightly. Consent on surrender may only be given at the hearing and may be revoked within three days of issuance. If the requested person withdraws his/her consent, the proceedings continue according to the procedure described in the preceding paragraph; otherwise, the court must pass a judgment within seven days of the expiry of the time limit for withdrawing consent. It must be noted that consent to surrender does not obviate compliance with the provisions envisaged in Article 36 (which mirrors Article 2 of the FD on EAW, on the scope of the EAW), Article 41 (which corresponds to Article 5 of the FD on EAW, on the guarantees to be given by the issuing state in particular cases), and Article 39 (which corresponds to Article 3 of the FD on EAW, on grounds for mandatory non-execution of the EAW) of the implementing law, so that, when trying the case, the court must check whether any of them apply. In these cases, the decision of the district court may not be appealed.

If there is an enforceable court decision (irrespective of whether the execution of the EAW is granted or denied), three notifications must be made: the district court must immediately notify the issuing authority (usually by means of a letter translated into the official language of the issuing state and transmitted by fax), the Supreme Cassation Prosecutor's Office, and the Ministry of Justice. In compliance with the FD on EAW, the law sets a time line of 60 days for the entire proceeding.

Bulgaria was the 25th Member State that was evaluated during the fourth round of mutual evaluation, "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States." The experts' visit to Bulgaria took place on 21-24 October 2008. On 27 April 2009, the Report on Bulgaria was released.[48] According to the report, the International Operative Police Cooperation Directorate (IOPCD) within the Ministry of Interior recorded 238 EAWs in the period from 1 January 2007-30 September 2008. This number includes only those EAWs that were forwarded to the IOPCD either for transmission or for the issue of an Interpol notice. Regretfully, there are no data about the EAWs transmitted directly by the Bulgarian judicial authorities to the executing State(s). Arguably, there are not many because the Interpol channels are the traditional and most commonly used means of transmission. In the same period, the IOPCD registered 82 cases in which a person requested by Bulgaria based on an EAW was surrendered and three cases in which an EAW issued by the Bulgarian authorities was refused.[49]

According to the same report, in 2007, Bulgaria received 166 EAWs, of which 112 resulted in the effective surrender of the requested person and 11 were refused. In 2008 (to 17 October),[50] Bulgaria received 129 EAWs, surrendered 61 persons, and refused to execute an EAW in ten cases. The report indicates the following grounds for refusal to execute an EAW:

- Acts not punishable under Bulgaria law – 1;
- Incompleteness of the EAW (no data on the decision on which the EAW is based) – 1;
- Requested person already judged by Bulgaria – 1;
- Existence of domestic procedures for the same act – 8;
- Bulgarian national – 3;
- Territoriality – 1;
- Judgment *in absentia* with no retrial guarantee – 1;
- Custodial life sentence – 2;
- Prosecution cases where the issuing authority did not provide a transfer guarantee – 3.[51]

These numbers prove that the surrender system works successfully in Bulgaria. It is true when considering both issuing and executing EAWs. The same conclusion is to be found in the Report on Bulgaria:

> 7.1.1. The Bulgarian transposing legislation is in line with the FD.
>
> 7.1.2. In general, the procedures under Bulgarian law are adequate for the purposes of the FD.

> 7.1.3. The practical implementation of the EAW has not raised major problems so far and, in general, the EAW appears to work effectively in Bulgaria. It should be noted, however, that experience with the EAW is relatively limited. This, combined with the decentralised system adopted in Bulgaria and the lack of monitoring systems (such as comprehensive statistics, unified registers, etc.: see 7.1.5), lead us to be cautious in this regard. Moreover, there are a number of issues in which Bulgaria has no experience yet, and therefore the question of how the transposing legislation would be implemented in such cases remains open.[52]

In conclusion, although the EAW is a relatively new institution in the Bulgarian legal system, the attitude towards it is clearly positive. Bulgaria easily accepted to surrender of its own nationals despite the constitutional provision and the ban on extradition of Bulgarian nationals under the extradition law; provisions of the implementing law were promptly changed when several problems with their practical application were registered. Some measures making the surrender procedures better organised and more effective still need to be taken, and recommendations in this regard were made in the Report on Bulgaria.[53] However, none of the conclusions or recommendations in the report is based on the fact that the FD on EAW was incorrectly or partially transposed. It can be confidently confirmed that Bulgaria successfully fulfills its obligations under the FD on EAW, as both an issuing and executing Member State.

VII. Lessons Learned and Questions Raised

In the aftermath of the entry into force of the Lisbon Treaty, the principle of mutual recognition of judgments and judicial decisions will increasingly play a crucial role in judicial cooperation in criminal matters. The successful implementation of this principle requires a number of factors, including mutual trust and an understanding of foreign judicial systems and the common minimum standards applied by them. One of the purposes of the CVM is to assess whether these factors exist in Bulgaria and, if not, to provide necessary guidelines and recommendations for reform and/or to apply sanctions. So far, the European Commission has found many shortcomings in Bulgarian judicial reform and its ability to tackle corruption and organised crime, but no sanctions have been applied. Thus, some criticize the CVM as not being sufficiently effective. Nevertheless, it plays a positive role in judicial reform in Bulgaria. It clearly and accurately defines the problems of this reform and puts some pressure on the government to resolve them. Even more importantly, it provides Bulgarian society with another perspective on the achievements and failures of its government and judiciary. The new Bulgarian government elected in the summer of 2009 demonstrates more political will to fight corruption and organised crime. How far it will go and what results it will achieve still remains to be seen.

At the same time, it should be stressed that there are no clear indications that Bulgaria's problems in tackling corruption and organised crime domestically affect its ability to comply with EU instruments in the field of criminal law based on the mutual recognition principle and the FD on EAW in particular. This is the case when certain objective and discernable standards, such as the requirements for transposing the FD on EAW, are applied in the evaluation. It could be said that there is a certain discrepancy between the meager findings of the Commission regarding Bulgaria's judicial reform progress and the apparently successful implementation of mutual recognition instruments in Bulgaria so far. Only the future implementation and practical application of mutual recognition instruments will show whether there are less apparent ways in which the shortcomings of the Bulgarian justice system affect its capacity to apply the mutual recognition principle in criminal matters.

1 The Mechanism was also established for Romania, but this article is confined to analysis of Bulgaria.
2 Commission Decision 2006/929/EC. O.J. L 354, 2006, p. 58.
3 *Ibid.* Art. 1-2. Dates of Commission Reports: June 2007, Feb. 2008, July 2008, Feb. 2009, and July 2009.
4 *S. Alegre/I. Ivanova/D. Denis-Smith*, Safeguarding the Rule of Law in an Enlarged EU: The Cases of Bulgaria and Romania, CEPS Special Report/April 2009, p. 1 [hereinafter Ivanova].
5 Commission Decision 2006/929/EC, Annex.
6 *Ibid.* at (7).
7 "Mutual recognition instruments have blossomed in the criminal justice sphere without any serious consideration of the foundations of mutual recognition … whether it is based on verifiable common standards and what should happen when the requisite standards are not met." Ivanova, *supra* note 5, p. 1.
8 Carvajal and Castle, Mob Muscles Its Way Into Politics in Bulgaria, 15 Oct. 2008, The New York Times.
9 CSD is an interdisciplinary public policy institute dedicated to the values of democracy and market economy.
10 CSD, Crime Without Punishment: Countering Corruption and Organized Crime in Bulgaria, 2009.
11 *Ivanova, supra* note 4, p. 30.
12 Crime Without Punishment, *supra* note 10.
13 Interim Report From the Commission to the European Parliament and the Council, COM(2008) 63 final/2, p. 2.
14 Supporting Document Accompanying the Report from the Commission to the European Parliament and the Council, Bulgaria: Technical Update, 23.7.2008, SEC92008 2350/2.
15 E.g., Listing gain of "some operational capacity" for the Supreme Judicial Council.
16 € 220 million in aid to Bulgaria was withheld at the end of 2008, due to widespread corruption involving EU funds.
17 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xiv/19iv08.htm#note33.

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18 "… this process − which, as we have said before, seems to have been undermined at the outset by the participation of the parties concerned and, by virtue of beginning after accession, to be devoid of any effective sanctions − was introduced too late in the proceedings." *Ibid.*
19 *Ibid.*
20 COM(2009) 402.
21 *Ibid.*
22 July 2009 Commission Report. COM(2009) 402.
23 Press Release, 2925th Council Meeting, General Affairs, Brussels, 23.2.2009, p. 12.
24 "[E]uropean integration is, first and foremost, a political process." *A. Klip*, European Criminal Law: An Integrative Approach, p. 38 (Intersentia, 2009).
25 *J.H. Anderson/Ch.W. Gray*, Transforming Judicial Systems in Europe and Central Asia, Annual World Bank Conference on Economic Development, 2007, The International Bank for Reconstruction and Development / The World Bank, p. 341.
26 Business Environment and Enterprise Performance Survey.
27 Anderson and Gray, *supra* note 25, p. 341.
28 *Ibid.* p. 343.
29 *Ibid.*
30 *Ibid.* p. 344.
31 *Ibid.* p. 345.
32 O.J. L 190, 2002, pp. 1-17.
33 Art. 34 of the FD on EAW.
34 BE, DK, ES, IE, CY, LT, HU, PL, PT, SI, FI, SE, UK − Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), COM(2006) 8 final, p. 2.
35 *Ibid.* The case of Italy is very interesting. It not only transposed the FD on EAW with great delay (16 months) but also did not transpose it properly. "However, law 69/2005 – a hybrid version of a text presented by the opposition which was subsequently drastically amended to the point of subverting its underlying philosophy – appears to be one which negates the Framework Decision, rather than implementing it." *F. Impala,* The European Arrest Warrant in the Italian legal system Between mutual recognition and mutual fear within the European Area of Freedom, Security and Justice – Utrecht Law Review, Volume 1, Issue 2, 2005, p. 56.
36 State Gazette 46/3 June 2005; last amended in State Gazette 52 / 6 June 2008. The Extradition and European Arrest Warrant Act is available in English (without the last amendments) at www.asser.nl.
37 For example, Portugal – Evaluation report on the fourth round of mutual evaluations "The practical application of the European arrest warrant and corresponding surrender procedures between Member States", Report on Portugal, p. 8.
38 The Constitutional Courts of Germany and Poland and the Supreme Court of Cyprus.
39 The Constitutional Court of the Czech Republic and the Supreme Court of Greece.
40 The provision was amended in 2005 – State Gazette 18/25 February 2005.
41 The case was opened upon the request of the President to provide mandatory interpretation of Art. 153 and 158 of the Constitution concerning the applicable procedure for constitutional amendments in several specific areas. A summary of the decision in English and the full decision in Bulgarian are available at the official website of the Constitutional Court: www.constcourt.bg.
42 At that time, the Charter of Fundamental Rights of the European Union was not legally binding; it is difficult to argue that all Member States have implemented the FD fully and correctly; all Member States are state parties to the European Convention on Human Rights, but the Court in Strasbourg has found violations of ECHR provisions (including violations of Art. 6) by many of them. Should all these arguments be correct, it is still difficult to find the logical connection between them and the understanding that "other state" means any other state but not a Member State of the EU.
43 The Bulgarian constitution is available in English at www.parliament.bg/?page=const&lng=en.
44 Article 36 (3) of the Extradition and European Arrest Warrant Act.
45 Article 36 (1) of the Extradition and European Arrest Warrant Act.
46 There were a number of such cases. See P. *Panova,* Evropeiskata zapoved za arest, Sofia, 2009, pp. 144-148.
47 The Minister of Justice is designated as central authority under Article 36 (2) Extradition and European Arrest Warrant Act which transposes Article 7 (1) of the FD on EAW.
48 Evaluation report on the fourth round of mutual evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States", Report on Bulgaria.
49 *Ibid.*, p. 8.
50 Registration for the 2008 report stopped on 17 October 2008.
51 Evaluation report on the fourth round of mutual evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States", Report on Bulgaria, p. 22.
52 *Ibid.*, p. 29.
53 *Ibid.*, pp. 35-36.

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