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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

Focus: EU Criminal Policy – Successor to the Stockholm Programme
Dossier particulier: Politique criminelle européenne – programme succédant à Stockholm
Schwerpunktthema: EU Kriminalpolitik – Nachfolger des Stockholmer Programms

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

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Guest Editorial

Dear Readers,

When the Union prepares itself to negotiate and adopt new strategic guidelines on the basis of Art. 68 TFEU, probably already in June 2014, it could be useful to consider what the Union should do for the development of its criminal policy (provided it could be said the Union has one). Looking back on the development of the EU criminal law since the entry into force of the Treaty of Amsterdam on 1 May 1999, some useful conclusions can be drawn.

Firstly, the EU criminal law is a very recent phenomenon in the development of EU law in general. It was only with the Treaty of Amsterdam that the Union equipped itself with the legal instruments to begin a process of approximation and more substantial cooperation. According to the Treaty, Decisions and Framework Decisions were binding, although they could not have direct effect. It still took several years for the Court of Justice to explain what the legal effects of Framework Decisions were (indirect effect according to the Pupino doctrine).

Secondly, in the ten and a half years that the Amsterdam Treaty has been in force, the output of the Council was impressive. Some 35 Framework Decisions and a few Directives were negotiated and adopted, about 20 Decisions were taken, and close to ten international agreements were made on the basis of Art. 24/38 TEU (Amsterdam). Most of these instruments were concluded on the basis of unanimity between 15 and later 25/27 Member States.

Thirdly, the quality of some of the instruments adopted could sometimes be questioned – with exceptions, and exceptions to the exceptions, and yet again further exceptions. A typical example is the European Evidence Warrant, which is one of the prime examples of poor legislation during this time.

Fourthly, the Union could have been ashamed of itself for the lack of democratic legitimacy in adopting instruments without the actual involvement of elected parliamentarians. This was not the fault of the Union though, but the fault of the many Member States that did not involve national parliaments in the adoption process. The cursory way in which the European Parliament was treated could, however, be attributed to the Union institutions.

Fifthly, another problem in this period was the lack of implementation of Decisions and Framework Decisions already taken. *Pacta sunt servanda* did not seem to apply to the Ministries of Justice. One can observe that the five-year transition period of the Lisbon Treaty is now bearing its fruits and that a number of Member States are implementing, in particular, the many mutual recognition instruments negotiated during this period. There is, however, a fully logical explanation to the lack of implementation: in many Ministries, the responsibility for implementing legislation lies with the same persons/units that negotiated the instruments in question. This means that when an instrument has been negotiated, the negotiators then move on to a new negotiation instead of concentrating on the implementation process. It is a well-known fact that many Ministries of Justice are lacking resources.

Hans G. Nilsson

Ultimately, a discrepancy can be observed between the programmes that were adopted, the political discourse of our leaders, and the reality of the negotiations – the challenge was (and still is) the usual protection of national law and the belief that one's own legislation was/is the most perfect one. Moreover, the enlargement of the Union meant that the necessary mutual trust between legislators and negotiators, rightly or wrongly so, suffered a serious dent that may still take years to repair. These conclusions and how to develop criminal policy in the future is the topic of a longer contribution in this edition of eucrim.

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*The opinions expressed are those of the author and not necessarily those of the institution at which he is employed or those of any of the Member States of the EU.

European Union*

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

Foundations

Schengen

Fourth Bi-Annual Report on Functioning of Schengen Area

On 28 November 2013, the fourth report on the functioning of the Schengen area was published covering the period from 1 May until 31 October 2013. These bi-annual reports are written by the Commission and submitted to the Council and the EP. They typically include a situational picture, the application of the Schengen acquis, and flanking measures.

The report addresses the increase in the number of people from Kosovo and Syria detected for irregular border crossing as well as the Council's reaction to the boat accident near Lampedusa in the summer of 2013. It also focuses on the weaknesses in the Schengen evaluation mechanism and the first months of the SIS II being operational. (EDB)

➤eucrim ID=1401001

* If not stated otherwise, the news reported in the following sections cover the period October 2013–March 2014.

Enlargement of the EU

Progress for Albania, Montenegro, Serbia, Kosovo, and Iceland

On 5 December 2013, the EP Committee for Foreign Affairs called upon the Council to grant Albania the status of candidate country as soon as possible. Thanks to the good progress made in several areas (see eucrim 3/2013, p. 112) Albania is deemed ready to take this step.

Following a meeting of the so-called High Level Dialogue on the Key Priorities on 6 March 2014, the Commissioner for Enlargement and Neighbourhood Policy, Štefan Füle, underlined the commitment on the part of both the Commission and the Albanian government but also mentioned areas in which further progress is needed, e.g., the fight against corruption and organised crime as well as judicial reform. Commissioner Füle also stated that the current increasingly confrontational political climate may put at risk Albania's achievements, as the Member States will look closely at how the government and opposition interact and whether they achieve results. Subject to endorsement by the European Council, a decision on granting Albania candidate status could be taken as early as June 2014.

With regard to Montenegro, the Commissioner for Enlargement and Neighbourhood Policy Štefan Füle stated that the Intergovernmental Conference in December 2013 marked a milestone in the accession negotiations, namely the opening of chapter 23 on judiciary and fundamental rights and chapter 24 on justice, freedom and security. This statement was made during a plenary session of the EP on 5 February 2014.

Other countries that were focused on in this session included the Former Yugoslav Republic of Macedonia as well as Bosnia and Herzegovina. With regard to the latter, Commissioner Füle stressed that constitutional changes and an electoral law to implement the Sejdić-Finci ruling of the ECtHR (see eucrim 3/2013, p. 76) would constitute necessary steps towards the entry into force of a Stabilisation and Association Agreement. The European Commission welcomes the inter-party agreement on electoral reform in the Former Yugoslav Republic of Macedonia and will continue to support the country in addressing challenges through regular dialogue and targeted financial cooperation. The country's relations with neighbouring countries remain a concern.

After the General Affairs Council adopted the negotiating framework for Serbia's accession negotiations on 17 December 2013, the first EU-Serbia Accession Conference took place on 21 January 2014. This marks the actual start of the accession negotiations.

During a meeting in Brussels on 16 January 2014, representatives from

Kosovo presented an overview of the progress made regarding the rule of law in 2013. Kosovo is to prepare a comprehensive rule of law strategy and action plan by the end of April 2014. (EDB)
➤eucrim ID=1401002

Institutions

Council

Greek Presidency's Programme in Justice and Home Affairs

From 1 January until 30 June 2014 Greece holds the Presidency of the Council of the EU. In the field of justice and home affairs, the Hellenic presidency aims to make significant progress in the reform of the data protection legal framework (see eucrim 4/2013, p. 121).

Also, in the area of criminal law, the presidency wishes to further develop initiatives taken under the previous presidencies. These include the proposal for a regulation on the establishment of the European Public Prosecutor's Office and the proposal for a regulation on the reform of Eurojust. With regard to the proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law (see eucrim 2/2013, pp. 42-43), the presidency aims to reach a final agreement and, possibly, adoption of the Directive. The presidency will also continue the discussions concerning the accession of the EU to the ECHR.

In the field of home affairs, one of the priorities is to continue promoting awareness of and international cooperation towards combating illegal immigration. Burden sharing and solidarity are key topics in this context. The Hellenic presidency also intends to make progress on the proposed regulation concerning the European Union Agency for Law Enforcement Cooperation and Training (Europol), with the purpose of achieving a conclusion to discussions at the working party level. (EDB)
➤eucrim ID=1401003

OLAF

New Working Arrangements between OLAF and Supervisory Committee

On 14 January 2014, OLAF Director-General, Giovanni Kessler, and the Chairman of the OLAF Supervisory Committee, Johan Denolf, signed new working arrangements for the cooperation between OLAF and its supervisory committee. The arrangements entered into force immediately.

The text of the arrangements describes the practical working relations between both parties following the entry into force of the new OLAF Regulation on 1 October 2013 (see eucrim 3/2013, p. 77). OLAF should provide the supervisory committee with general information regarding its investigative activities. The text also includes a methodology for providing the supervisory committee with more extensive information while at the same time respecting confidentiality and data protection regulations. Furthermore, the arrangements provide both parties with a timeframe within which this information should be provided.

The text of the working arrangements has been sent to the European Commission, the EP, the Council, and the EDPS. (EDB)
➤eucrim ID=1401004

"Eagle Hunt" Cigarette Seizure in the Mediterranean

On 4 December 2013, the "Eagle Hunt" operation resulted in the successful seizure of 348,000 packs of contraband cigarettes that were being smuggled into Spain by sea. OLAF delivered operational support and key information to the Spanish Customs Administration. The authorities of several other third countries were involved in the cooperation as well. A criminal organisation aimed to evade European duties by fraudulently smuggling cigarettes into the European market. The Spanish authorities initially estimated the seized cigarettes to be worth €1.4 million. (EDB)
➤eucrim ID=1401005

Europol

690 Internet Domain Names Seized

On 2 December 2013, a joint operation between Europol, the U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI), and ten law enforcement agencies from eight countries led to the seizure of 690 domain names. They were behind the illegal sale of counterfeit merchandise online to unsuspecting consumers. The seized domain names are now in the custody of the governments involved in these operations. (CR)
➤eucrim ID=1401006

Cooperation Agreement with Serbia Signed

On 16 January 2014, Europol and Serbia signed a new operational cooperation agreement to fight organised crime, especially priority crime areas affecting Serbia and the EU such as illegal migration, drug trafficking, money laundering, and cybercrime. The agreement allows for the exchange of strategic and operational information, including personal data on known and suspected criminals. (CR)
➤eucrim ID=1401007

Operation Against Counterfeit Cancer Drugs

In January 2014, together with the United States' Food and Drug Administration (FDA), Europol conducted a joint operation against the smuggling of counterfeit cancer treatment prescription drugs from Turkey and other countries into the United States. For the initial investigation, Europol hosted preparatory operational meetings with the FDA at its headquarters in The Hague. Furthermore, Europol supported the arrests with

its counterfeit product experts and mobile office.
➤eucrim ID=1401008

FBI Visit

On 27 January 2014, a high-level delegation from the Federal Bureau of Investigation (FBI) visited Europol's headquarters in The Hague to get a general overview of Europol and its crime fighting capabilities and to identify opportunities to work together more closely. (CR)
➤eucrim ID=1401009

Operation Opson Seizes Fake Food and Drink

Throughout December 2013 and January 2014, Europol and Interpol – together with police, customs, national food regulatory bodies and partners from the private sector, and supported by the European Commission's Directorate General for Health and Consumers – conducted Operation Opson III. The operation targeted the organised criminal networks behind the illicit trade in counterfeit and unregulated food and drink. In Operation Opson III, more than 1200 tonnes of fake or substandard food (such as olive oil, vinegar, biscuits, chocolate bars, spices and condiments, cereals, dairy products, and honey) and nearly 430.000 litres of counterfeit drink (for instance fake champagne and whiskey) were seized across 33 countries in the Americas, Asia, and Europe. The operation also let to the arrests of 96 persons. (CR)
➤eucrim ID=1401010

Deputy Director Operations Appointed

On 11 February 2014, the General Affairs Council of the EU appointed Mr. W.M. van Gemert as Deputy Director Operations at Europol. Europol's Operations Department includes the European Cybercrime Centre at Europol (EC3) and is additionally responsible for supporting the EU Member States in fighting serious organised crime and terrorism.

Before joining Europol, Mr. van Gemert was Director of Cyber Security at the Dutch National Intelligence Service and – *inter alia* – responsible for the Dutch National Cyber Security Centre (NCSC). (CR)
➤eucrim ID=1401011

Threat Assessment on Police Ransomware Published

On 4 February 2014, the European Cybercrime Centre (EC3) at Europol published its first Threat Assessment on Police Ransomware.

Police ransomware is a type of online fraud used to extort money by means of malicious software or malware. Through this malware, the functionality of victims' computers is disabled, displaying a message demanding the payment of a ransom to unlock their computers. The ransomware messages claim to be from law enforcement agencies and use genuine law enforcement agency logos. They accuse the victim of carrying out online activities such as illegal file-sharing, accessing child abuse material, or visiting terrorist websites.

The new Threat Assessment on Police Ransomware aims to increase awareness of the phenomenon and to identify opportunities for international law enforcement intervention and operational coordination. The report provides for an overview of the current threat, explaining the ransomware evolution, social engineering and coercion methods, crime-as-a-service and underground forums, anonymous means of payment, and the profits and effects of ransomware. Furthermore, it illustrates the police ransomware business model, outlining the perpetrators of police ransomware, the development of malware as well as the modus operandi used to set up the infrastructure in order to spread the malware, infect the victims, have the ransom paid, and launder and cash out the money.

In its key findings, the report underlines the exponential growth in police ransomware attacks using new forms of encryption ransomware. The report sees ransomware fraud driven by the growing use of online prepaid solutions and virtual currencies, with ransomware criminals relying on the services of specialised money launderers. According to the report, underground forums are seen as key enablers of ransomware operations. Furthermore, cybercriminals increasing-

Common abbreviations

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

ly invest in protecting their infrastructures and communications integrity. Investigations are complicated by the wide distribution of ransomware perpetrators and infrastructure over many legal jurisdictions, thus requiring lengthy legal assistance processes. Finally, unawareness on the part of the public contributes to the success of ransomware fraud.

Hence, the report recommends increasing the public's awareness of this type of fraud through online communication, traditional means of communication, and local police forces. Furthermore, the ransomware business should be made less profitable by reducing the likelihood of the victim paying the ransom. Options for cashing out and laundering illegal profits should be reduced. Cross-border operations and investigations should be conducted, and the international information exchange related to ransomware improved. Finally, cooperation with private partners should also be improved.

In addition to the threat assessment, Europol also published a brochure with tips and advice on how to prevent personal computers from being infected by police ransomware. Recommendations on how to avoid infection include a regular update of one's software, the use of anti-virus software, the use of trusted websites only to browse and download software, regular backups of the data stored on one's computer, the reporting of police ransomware, and consulting one's anti-virus provider on how to remove the infection from the computer. The brochure strongly recommends not clicking on banners and links without knowing their true origin, not taking anything for granted, and not executing untrustworthy and unknown software. (CR)

➤eucrim ID=1401012

Operation against Bulgarian Organised Criminal Group

A joint operation by Bulgarian and Spanish judicial and law enforcement authorities, together with Eurojust and Europol's European Cybercrime Centre (EC3), led to 25 arrests and 21 house searches in Spain and Bulgaria. The operation aimed at taking down a Bulgarian organised criminal group suspected of a variety of crimes, including payment card fraud, burglary, drug trafficking, and illicit vehicle trafficking. By harvesting financial data from ATMs in Spain and other EU countries, the group created fake credit or debit cards to withdraw cash from ATMs both within and outside the EU. The operation took place on three days (October 2013, January and February 2014). (CR)

➤eucrim ID=1401013

Memorandum of Understanding with Microsoft

In the course of its first annual Cybercrime Enforcement Summit on 12 February 2014, Microsoft Corp. and Europol signed a Memorandum of Understanding (MoU) to increase their cooperation in combatting cybercrime and to build a safer Internet. Under the MoU, Europol and Microsoft shall strengthen their forensic and technical analysis of malware and botnets, the assessment and investigation of emerging malware threats, the enforcement of actions against cybercriminals, and help with the ultimate dismantling of criminal organisations. (CR)

➤eucrim ID=1401014

Agreement with Columbia Entered into Force

On 25 February 2014, an Agreement on Operational and Strategic Co-operation between Colombia and Europol entered into force. Cooperation under this agreement relates to all areas of crime within Europol's mandate at the date of entry into force of the agreement, including related criminal offences. In addition to the exchange of information, cooperation shall also involve all other tasks of Europol mentioned in its Council Decision such as the exchange of specialist knowledge, general situation reports, the results of strategic analysis, information on criminal investigation procedures and crime prevention measures, participation in training activities as well as providing advice and support in individual criminal investigations. Both parties designate contact points and agree to hold regular high-level meetings. Furthermore, Colombia will station one or more liaison officer(s) of the Colombian National Police at Europol. The new agreement terminates the Strategic Cooperation Agreement signed between Europol and Colombia on 9 February 2004. (CR)

➤eucrim ID=1401015

Europol Work Programme 2014

On 16 February 2014, Europol published its work programme for the year 2014. One of Europol's key goals in 2014 is to further develop the European Cybercrime Centre (EC3) with the aim of offering improved analysis of cybercrime information, advanced on-the-spot technical support, an overview of significant cybercrime cases, open source intelligence, cybercrime threat assessments, a forensic capability, and training and capacity-building in close cooperation with CEPOL.

To increase its support for law enforcement operations, in 2014, Europol will provide operational support services tailored to the new EU Policy Cycle priorities, initiate a growing number of high-profile international operations from its headquarters, and identify high-value targets for all 2014 Operational Action Plans. Capacities of the Europol National Units and the Liaison Bureaux in coordinating operational action will be promoted and the use of Europol's real-time operational support capabilities to coordinate simultaneous Member State investigative measures stimulated. Regarding cooperation with third states, Europol is planning to conclude more cooperation agreements with countries in the Balkan region.

To fulfil its strategic goal to become a criminal information hub, Europol will monitor the implementation and evolution of the European Criminal In-

telligence Mode, strengthen its analysis capability, and use financial intelligence more extensively. Data handling and exchange systems shall be optimised, new toolsets used, and innovative new techniques and other best practices in law enforcement collected, assessed, and disseminated.

Looking at its administrative capabilities, in 2014, Europol anticipates seeing progress regarding the new Europol Regulation. Further progress shall be made in the development of ICT solutions to efficiently support its administration, the implementation of additional resource management processes and tools, and the development of a Europol alumni network in the Member State law enforcement community. (CR)

➤eucrim ID=1401016

Eurojust

Vice-President Elected

On 10 December 2013, the Eurojust National Member for the Slovak Republic, Mr. Ladislav Hamran, was elected Vice-President of Eurojust for a three-year term.

Mr. Hamran was appointed National Member for the Slovak Republic in September 2007. Before joining Eurojust, he worked as a prosecutor in the Penal Department of the General Prosecutor's Office. Furthermore, Mr. Hamran is a member of a UN group of experts conducting a comparative study on fraud and has been Eurojust contact point for the CARIN network since 2008. (CR)

➤eucrim ID=1401017

Action against Pakistani Organised Criminal Group

On 13 and 14 December 2013, judicial and law enforcement authorities supported and coordinated by Eurojust and Europol conducted a successful operation against a Pakistani organised criminal group (OCG) suspected of smuggling irregular migrants into the EU. 14 members of the OCG were arrested in France and Portugal, with more than 100 field officers being involved in the action. Furthermore, an Operational Coordination Centre was set up at Eurojust. During the operation, French police officers were operating in Portugal and a Portuguese police officer was operating in France.

The OCG used private cars and vans with up to eight vehicles leaving from Portugal to France and other European destinations every weekend. It is estimated that more than 400 transports have already taken place in one year, allowing several thousand migrants to gain illegal entry into Europe via this OCG. (CR)

➤eucrim ID=1401018

Memorandum of Understanding with Frontex Signed

On 18 December 2013, Eurojust signed a Memorandum of Understanding (MoU) on cooperation with Frontex. With the MoU, cooperation between Eurojust and Frontex shall be defined, encouraged, and improved. Cooperation between the agencies shall be enhanced in order to support the fight against serious cross-border crime such as smuggling and trafficking in human beings. Under the MoU, both Eurojust and Frontex will establish contact points to coordinate cooperation between them. Furthermore, the MoU allows for the exchange of strategic and technical know-how, joint training activities, and the exchange of best practices. (CR)

➤eucrim ID=1401019

Swedish Comments on the Draft Eurojust Regulation

The Swedish delegation has made some comments and remarks on Arts. 1-8 of the draft Eurojust Regulation (see eucrim 2/2013, pp. 41-42) that deal with its objective, tasks, structure, and organisation.

The Swedish delegation asks, *inter alia*, for an explanation of the wording "on its own initiative:" what initiatives should Eurojust be able to take and what form should Eurojust have when it takes such actions? Looking at Eurojust's relationship with the EPPO and at the likeliness that not all Member States will participate in the EPPO, the Swedish delegation sees the need to consider giving Eurojust continued competence for crimes against the financial interests of the EU. Furthermore, Eurojust should have competence over the relevant type of crime, also for Member States who participate in the EPPO. Regarding the execution of requests for mutual legal assistance, EIO and EAW, the Swedish delegation recommends considering adding a provision that specifically aims at speeding up these procedures. Additionally, the inclusion of a provision on the possibility for Eurojust to follow up on agreements made during coordination meetings is suggested.

In its general remarks, the Swedish delegation strongly recommends holding thematic discussions on chapters II and III of the draft regulation dealing with the structure and operation of Eurojust as well as with operational matters. These discussions shall help tackle the insufficiencies in Eurojust's legal framework that were discovered over the last several years, e.g., the tasks of the National Members. The Swedish delegation doubts that the provisions in the draft Regulation are sufficient to guarantee that National Members can focus on Eurojust's operative functions rather than on administrative matters. Furthermore, for smaller Member States, it questions the need to appoint an obligatory assistant. The Swedish delegation also opposes the proposal that the deputy and assistant – who assist the national members according to the proposed regulation – shall have their regular place of work at Eurojust. Finally, Member States shall retain the possibility to give their National Members powers that go beyond the powers foreseen in the draft Regulation.

The comments were published by the General Secretariat of the Council on 23 December 2013. (CR)

➤eucrim ID=1401020

Agency for Fundamental Rights (FRA)

Council Conclusions on Evaluation of FRA

At the JHA Council of 5-6 December 2013, the Council adopted conclusions on the evaluation of the FRA. The Council states that the FRA fulfils to a high extent its mandate to collect, record, and analyse relevant, objective, reliable and comparable information and data relating to fundamental rights issues in the EU and its Member States when implementing EU law. Recommendations include better cooperation between the FRA and the Member States as well as with civil society. According to the Council, it would be impossible under the current legal framework to provide a role for the FRA in the proceedings under Art. 7 TEU. These proceedings are foreseen in order to react to a Member State's breach of the values laid down in Art. 2 TEU, including the rule of law and human rights. (EDB)

➤eucrim ID=1401021

Report on Racism, Discrimination, Intolerance, and Extremism in Greece and Hungary

In December 2013, the FRA published a report entitled "Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary." The report examines the effectiveness of responses by public authorities, statutory human rights bodies, and civil society organisations to racism, discrimination, intolerance, and extremism.

The FRA took Greece and Hungary as case studies but concludes the report with proposals and considerations for fighting racist crime, increasing trust in the police, and combating extremism in all EU Member States. (EDB)

➤eucrim ID=1401022

FRA Manual for Fundamental Rights-Based Police Training

In December 2013, the FRA launched a manual for police trainers that integrates human rights into the heart of police training, which is in line with the EU's goals in the field of justice and home affairs. The manual was tested in police academies across the EU and focuses on specific issues related to human rights and police work such as diversity and non-discrimination, the absolute prohibition of torture, and also the human rights of police officers. (EDB)

➤eucrim ID=1401023

Annual Conference on EU Criminal Justice 2014

Looking Beyond the Stockholm Programme…

ERA, Trier, 16-17 October, 2014

With the Stockholm Programme drawing to a close in 2014, the European Council will set up "strategic guidelines" to provide orientation and define objectives for EU criminal justice (Art. 68 of the Treaty on the Functioning of the European Union). At this conference, high-ranking representatives from EU Institutions, stakeholders, and academics will discuss these guidelines and debate key priorities for legislative and operational planning within the Area of Freedom, Security and Justice for the years 2015–2020.

Key topics are:

- Updating current and forthcoming developments (including the post-2014 perspective for the Court of Justice of the EU in criminal justice);
- The way ahead for the rights of the defence;
- Reinforcing Eurojust and creating the European Public Prosecutor's Office (EPPO);
- New horizons for EU criminal justice in 2015-2020: looking beyond the Stockholm Programme.

Who should attend? Judges, prosecutors, lawyers in private practice, civil servants, and policymakers active in the field of EU criminal law.

The conference will be held in English.

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

Frontex

Code of Conduct for Joint Return Operations Published

On 9 December 2013, Frontex published a Code of Conduct for Joint Return Operations (JRO), setting out common principles and main procedures to be observed in the joint return operations for Member States coordinated by Frontex. The code was created in consultation with EU Member States and the Frontex Consultative Forum and is based on the 2009 Frontex guidelines for joint returns.

JROs are organised in cases where one Member State charters a plane to take returnees back to their country of origin but has empty seats on the plane. This Member State then contacts Frontex, which offers the seats to the authorities of other Member States, who can use the same charter flight for their returnees.

The new Code of Conduct sets out general principles, such as respect for fundamental rights, defines rules for the use of coercive measures, and regulates the organisation of the returns. For the latter, the code outlines the level of fitness required for travel and the requirements for medical examination of the refugee. The code sets out the modus operandi for escorts and their identification, outlines the conditions for recording, and the requirements for the presence of medical staff, interpreters, and external representatives during a JRO. Furthermore, the monitoring of JROs is set out, defining the roles and tasks of monitors during the flights. This function is usually carried out by observers from international organisations, NGOs,

or national authorities. The code specifies that the monitors must have access to all relevant information, including the travel documents of returnees and information about any special conditions, including pregnancy or illness. Monitoring of JROs shall help with gathering information on how they are carried out and ensure that JROs are conducted in a humane manner and in compliance with fundamental rights. Finally, the code sets out an obligation to report violations of the code and defines investigation procedures and sanctions. (CR)

➤eucrim ID=1401024

Working Arrangement with eu-LISA Signed

On 31 January 2014, Frontex and the European Agency for the Operational Management of Large-Scale IT Systems (eu-LISA) signed a Working Arrangement to enhance their cooperation regarding training, ICT-related projects, and the exchange of information such as statistical, anonymous data outputs from the large-scale IT systems (SIS II, VIS, Eurodac) managed by eu-LISA. (CR)

➤eucrim ID=1401025

Report on Second Global ABC Conference Published

The conference report summarises the discussions and key conclusions reached at the Second Global Conference and Exhibition on future developments in Automated Border Control (ABC) that was co-organised by Frontex and the European Commission on 10-11 October 2013 in Warsaw. The conference gathered government officials from national border management as well as immigration authorities from Europe and other parts of the world. It was also attended by representatives from international organisations and EU agencies, including eu-LISA, the European Data Protection Supervisor and the Fundamental Rights Agency, the International Organisation for Standardisation, Interpol, etc. It included airport authorities, representatives from academia, and private companies offering technologies and products related to ABC.

The ABC conference aims to address issues such as ABC in the context of integrated border management, interoperability, and how to balance security and facilitation, ensuring that ABC solutions are cost-effective and incorporate the latest research and development in the field of ABC, risk management of ABC implementation, and the social impacts of these processes. (CR)

➤eucrim ID=1401026

European System of Border Guards: Conference Report

On 14 February 2014, Frontex published the final report of its conference titled "The Feasibility of a European System of Border Guards: A Practitioner's Perspective." The conference was organised by the Academy of European Law (ERA) and Frontex in Warsaw from 28-29 October 2013 and, as outlined in its title, aimed at collecting practitioners' input with regard to a European System of Border Guards.

According to the report, one of the key findings of the conference is that the current EU concept of integrated border management (IBM) should be updated to include, in particular, interagency cooperation with customs, police, migration, and asylum and maritime authorities at the European level. The European level should not have a centralising function but instead serve as "glue" for structured interaction between national border management systems.

Participating practitioners largely acknowledged the agency's role as a crucial factor in improving cooperation between border services in Europe, thus stabilising border security in the region. (CR)

➤eucrim ID=1401027

Draft Frontex Regulation on Sea Border Operations in Progress

On 1 December 2013, the Lithuanian Presidency forwarded a new compromise text of the draft regulation establishing rules on Frontex' sea border operations to the Permanent Representatives Committee (COREPER II), which agreed on the text on 13 December 2013.

Accelerated by the Lampedusa tragedy, the draft regulation wants to ensure the efficient monitoring of the crossing of the Member States' external borders, e.g., through border surveillance. It applies to border surveillance operations carried out by Member States at their sea external borders in the context of operational cooperation coordinated by Frontex. The draft regulation provides for a common approach on issues linked to detection, interception, search and rescue, and disembarkation.

In cases of detection of a vessel suspected of carrying persons circumventing or intending to circumvent checks at border crossing points or of being engaged in the smuggling of migrants, the draft regulation stipulates that that vessel shall be surveyed at a prudent distance and the International Coordination Centre immediately informed. The International Coordination Centre shall also be informed where the vessel is about to enter or where it has entered the territorial sea or the contiguous zone of a Member State that is not participating in the sea operation. In these cases, the International Coordination Centre will convey the information to the National Coordination Centre of the Member State or Member States concerned.

Regarding interception, the draft regulation lays out the measures to be taken upon interception in the territorial sea of the host Member State or a neighbouring participating Member State, on the high seas, and in the contiguous zone (a zone adjacent to the territorial sea as defined in Art. 33 of the United Nations Convention on the Law of the Sea). Measures to be taken range from requesting information on the ownership, registration, and elements relating to the voyage of the vessel to seizing the vessel and apprehending persons on board. They must be appropriate and not excessive. For interception on the high seas, the

2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime and, where relevant, further national and international law, must be additionally observed.

Regarding search and rescue operations, the draft regulations foresees an obligation on the part of the Member States to render assistance to any vessel or person in distress at sea. In situations of uncertainty, alert warning, or distress as regards a vessel or any person on board, the regulation obliges participating units to consider and promptly forward as soon as possible all available information to the Rescue Coordination Centre responsible for the search and rescue region in which the situation occurs and to place themselves at the disposal of this Rescue Coordination Centre. Furthermore, the International Coordination Centre shall be informed as soon as possible of any contact with the Rescue Coordination Centre and, of course, of action it takes.

Concerning disembarkation, the draft regulation stipulates that no person shall be disembarked in, forced to enter or otherwise handed over to the authorities of a country where there is a serious risk that such person would be subjected to the death penalty, torture, persecution, other inhumane or degrading treatment or punishment or that from which there is a serious risk of expulsion, removal, or extradition to another country in contravention of the principle of non-refoulement. Furthermore, intercepted or rescued persons shall not be disembarked in that third country if the host Member State or the participating Member States is/are aware or ought to be aware that this third country is engaged in such practices. In cases of disembarkation in a third country, the intercepted or rescued persons shall be identified and their personal circumstances assessed to the extent possible before disembarkation. The intercepted or rescued persons shall be informed of the place of disembarkation in an appropriate way and be given an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement. Furthermore, the needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection, and other persons in a particularly vulnerable situation throughout the sea operation shall be specifically addressed.

Finally, the regulation stipulates that border guards and other relevant staff participating in a sea operation shall be trained with regard to relevant provisions of fundamental rights, refugee law, and the international legal regime of search and rescue.

The proposed regulation aims at complying with the 2012 judgement of the European Court of Justice, which annulled Council Decision 2010/252/EU and invited the EU colegislators to replace it with new rules within reasonable time period.

On 20 February 2014, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs also approved the draft regulation, which paves the way for its formal adoption by the European Parliament and the Council during the current Greek Presidency. (CR)

➤eucrim ID=1401028

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

European Public Prosecutor's Office – State of Play

During the JHA Council of 3-4 March 2014 the Council was informed by the Greek Presidency on the progress made with regard to the proposal regarding the setting up of a European Public Prosecutor's Office (EPPO).

Member States' ministers had the opportunity to express their views on the structure of the EPPO, on the delimitation of its tasks and competences and on the regime of procedural rights applicable to suspects and victims. Since a majority of Member States considered that the EPPO must be organised around a College representing participating states, the debate focused on how an EPPO with a College can be organised while ensuring that it can still operate efficiently and independently.

Also the exclusive competence for the EPPO for all offences against the EU's financial interests is a point where Member States have not reached agreement yet.

The question whether to insert in the EPPO regulation explicit references to existing and proposed rights in EU law or to refer to safeguards provided for in national law, is a matter that will be examined further on a technical level.

On 12 March 2014, the European Parliament approved MEP Salvatore Iacolino's interim report on the establishment of the EPPO by 487 to 161 votes, with 30 abstentions. In the resolution endorsing this report, the EP recalled that 14 national parliamentary chambers from 11 Member States had triggered the "yellow card" in relation to the Commission's EPPO proposal. Therefore, the EP deemed that the establishment of a EPPO could give particular added value to the Area of Freedom, Security and Justice, assuming that all Member States participate. The EP called on the Council to extensively involve Parliament in its legislative work at all stages of the procedure and recommended *inter alia*:

- Establishing in advance the non-discretionary criteria in order to determine which competent court is to exert jurisdiction, taking into account the rights of the suspect and ensuring that the determination of competence be subject to judicial review;
- Ensuring full independence for the EPPO, both from national governments and from EU institutions;

Report

11th OLAF Conference of Fraud Prosecutors

Possible Effects of Establishing a European Public Prosecutor's Office on the National Systems

The 11th OLAF Conference of Fraud Prosecutors was held from 27 to 29 November 2013 in Brussels. During this event discussions were held with practitioners in EU fraud cases from 25 Member States on the possible impacts of the EPPO establishment on national systems from different angles: compatibility with the national systems, added value in cross-border investigations, and effect on fundamental rights.

Debates among the participants included:

- Different views on the most adequate EPPO structure (collegial or hierarchical), but, irrespective of the structure, the EPPO must be an independent and efficient body;
- EPPO added-value: creating consistent practices of investigation/prosecution across the EU, case prioritisation, specialisation of prosecutors, clear definition of the criminal offences;
- In cross-border cases, mutual legal assistance creates different problems with regard to evidence collection and lack of knowledge of foreign law. The EPPO would bring added value as it would not need mutual legal assistance;
- Some participants suggested that investigation measures should be governed by the national regime and collection of evidence should remain under national law;
- Other positive effects of the EPPO establishment: creation of an EU common database in PIF criminal matters, unified analyses of PIF crimes, finding links between cases, qualified interpretation of the EU legal tools applied in criminal matters;
- Advantages of establishing an EPPO for the protection of fundamental rights: a chance to set procedural rules and procedural safeguards at the European level and also to protect the financial interests of the EU. However, in the matter of accountability, under the Commission's proposal, there would be no judicial control at the EU level. This means a risk of forum shopping exists in the choice of jurisdiction. There is, however, also a risk of the Commission's approach resulting in a protection that is unnecessarily high and that may, therefore, hamper the efficiency of EPPO investigations and/or prosecutions. It is not clear how fundamental rights would be subjected to limitations in order for the EPPO to undertake its competences. Concerns with regard to the right to an effective remedy, as enshrined in Art. 47 of the Charter, have also been expressed;
- On judicial review, concerns with respect to specific circumstances where it has explicitly been excluded in the Commission's proposal, such as the determination of competence when ancillary offences occur (Art. 13.4), transaction (Art. 29.4), and the choice of forum (Art. 27.4).

The overall conclusion of this Conference was that the EPPO would have very important features. It would properly protect European interests; ensure a coherent approach in dealing with PIF crimes, act faster and more efficiently, its advantages overcoming by far any disadvantage.

Andrea Venegoni, OLAF

- Precisely determining the scope of competence of the EPPO;
- Taking account of the fact that all activities of the EPPO should ensure a degree of high protection of the rights of defence;
- Complying with the *ne bis in idem* principle;
- Ensuring that the organisational model of the EPPO guarantees at the central level the appropriate skills, experience, and knowledge of the legal systems of the Member States.

In addition, members of the EP asked the Council to clarify the competence of each existing body in charge of protecting the Union's financial interests. They pointed out that it was of the utmost importance that the relationship between the EPPO and other existing bodies, such as Eurojust and OLAF, be further defined and clearly demarcated. (EDB)

➤eucrim ID=1401029

Corruption

Commission Presents First EU Anti-Corruption Report

On 3 February 2014, the Commission introduced its EU Anti-Corruption Report. For the first time ever, the Commission performed an analysis of corruption within the EU's Member States and the steps taken to prevent and fight it. The aim was to start a debate with the EP, the Member States, and other stakeholders in order to find ways of improving the fight against corruption at the EU level.

In accordance with international legal instruments, the report defines corruption as abuse of power for private gain. The text focuses on specific key issues, some of which are exclusively a matter of national competence. Nevertheless, the Commission deems that it is in the EU's common interest to ensure that all Member States have efficient anti-corruption policies. Therefore, recommendations and considerations are addressed to national authorities. Special attention was paid to corruption in public procurement in a separate thematic chapter. In general, the report consists of three parts:

- 28 country reports covering corruption, areas that still need work, and good practices;
- A general chapter on the main findings, trends, and an analysis on how each Member State deals with public procurement;
- The results of two Eurobarometer surveys carried out in 2013 on how corruption is perceived and experienced by EU citizens and companies.

EU ombudsman Emily O'Reilly welcomed the report and invited the Commission to add a chapter on the performance of the EU administration to the next report.

The anti-corruption report is one of the measures included in the Commission's communication on fighting corruption in the EU of 6 June 2011 (eucrim 3/2011, p. 104). Further anti-corruption reports will be issued every two years. (EDB)

➤eucrim ID=1401030

Fraud

Progress in Fighting Tax Evasion and Avoidance

On 6 December 2012, the Commission presented an action plan for a more effective EU response to tax evasion and avoidance (see eucrim 1/2013, p. 6). One year later, on 5 December 2013, the Commission took a retrospective look at the progress made.

The measures that have been implemented include:

- Extending the automatic exchange of information between EU tax administrations to cover all forms of financial income and account balances;
- Introducing new instruments to fight VAT fraud; this includes the quick reaction mechanism that had already been proposed in 2012 (eucrim 3/2012, p. 99);
- Launching the Platform for Tax Good Governance (eucrim 2/2013, p. 41).

The Commission recognises that much work still needs to be done, e.g., intensifying efforts at the national level. Other measures proposed in the action plan are still being implemented. (EDB)

➤eucrim ID=1401031

Proposal on Customs Risk Management and Customs-Related Fraud

On 25 November 2013, a Commission proposal was adopted for the amendment of Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission in order to ensure the correct application of the law on customs and agricultural matters. Two legal instruments are relevant for information exchange in the area of customs: the aforementioned regulation, on the one hand, and, on the other hand, Decision 2009/917/JHA on the use of information technology for customs purposes, which addresses matters relating to the area of freedom, security and justice.

The proposed regulation aims to improve the detection, investigation, and prevention of customs-related fraud by increasing the exchange of information and available evidence and by improving the functioning of the established system. The Commission developed the proposal because loopholes in the existing systems for the detection of customs-related fraud, such as better verification procedures for goods, should be addressed, In addition, improvements to customs risk management and supply chain security on the national and EU levels should be made. Furthermore, OLAF should be able to directly request documents supporting import and export declarations from the economic operators; the Anti-Fraud Information System should allow Member States to select the users of the data they insert into the system, and clarification is needed as to data protection supervision and the admissibility of evidence in this matter.

In view of the Commission's proposal on setting up the European Public Prosecutor's Office (EPPO) (see eucrim 2/2013, pp. 41-42), the need for revision of the current regulation should be assessed once the EPPO has been established, especially with regard to access rights for the EPPO to the databases operated by the Commission or the Member States under this regulation.

The EP voted in favour of this proposal on 15 April 2014 and stressed that, in order to ensure a high level of consumer protection, the Union had a duty to combat customs fraud and contribute to the internal market's objective of having safe products with genuine certificates of origin. Given the increase in the dimension of customs fraud, it is crucial to increase detection and prevention simultaneously at the national and EU levels. (EDB)

➤eucrim ID=1401032

Counterfeiting

Discussions on Proposed Directive Protecting Euro Currency

On 17 December 2013, the LIBE Committee voted in favour of the proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law (eucrim 1/2013, p.7-8).

The proposal gives law enforcement officers better investigative tools in currency counterfeiting cases, e.g., intercepting communications, covert surveillance, and the monitoring of bank accounts. The MEPs rejected the proposed minimum EU-wide penalty of at least six months' imprisonment for serious cases of producing or distributing counterfeit currency. In cases in which the value of the counterfeited notes or coins is not significant or the circumstances of the offence are not serious, a Member State should be allowed to impose a lower sentence.

In a next step, the text will be negotiated with the Council of Ministers; then the EP will vote in plenary. Ireland decided to participate in the decision-making process. The UK and Denmark decided not to. (EDB)

➤eucrim ID=1401033

Organised Crime

Formal Adoption of Market Abuse Directive

On 14 April 2014, the Council adopted the Directive on criminal sanctions for market abuse (see eucrim 1/2013, p. 8).

At the same time the Regulation on insider dealing and market manipulation was also adopted.

The Directive aims to ensure that trade based on insider information and manipulations of markets by spreading false or misleading information are criminal offences in all Member States. This will avoid offenders benefiting from the large differences between the national laws.

The Regulation updates and strengthens the existing framework to ensure market integrity and investor protection provided by the Directive. For example, the Regulation extends the scope of existing EU legislation to cover trading on all platforms and of all financial instruments which can impact them. It also includes an indicative list of trading strategies that should be considered market manipulation.

The Directive is expected to be published in the Official Journal in June 2014. Member States will have two years for implementing its provisions in national law. (EDB)

➤eucrim ID=1401034

Racism and Xenophobia

Council Conclusions on Hate Crime

During the JHA Council of 5-6 December 2013, the Council adopted conclusions on combating hate crime in the EU. The conclusions are directed at the Member States, the Commission, and the relevant EU agencies.

Among the conclusions addressed to the Member States is the request to ensure full implementation of Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by criminal law. The Member States are encouraged to extend the scope of punishable hate crime offences further within national law. Member States are also called upon to implement Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime by 16 November 2015 and to ratify the Additional Protocol to the CoE Cybercrime Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

The Commission has been asked to assess EU legislation currently in place and, regarding the aforementioned Victim's Rights Directive, to pay attention to how the case-by-case assessment of victims' protection needs is reflected in national law.

The FRA should *inter alia* continue assessing all forms of hate crimes by means of EU-wide surveys. (EDB)

➤eucrim ID=1401035

Procedural Criminal Law

Data Protection

ECJ Declares Data Retention Directive Invalid

On 8 April 2014, the Grand Chamber of the ECJ presented its ruling in two joined cases: C-293/12 Digital Rights Ireland and C-594/12 Seitlinger and Others. Both cases concern requests for preliminary rulings on the validity of Directive 2006/24/EC, also known as the Data Retention Directive.

The Court followed the Advocate General in stating that the Data Retention Directive constitutes a wide-ranging and serious interference with the fundamental right of citizens to privacy. According to the Court's ruling, the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.

Furthermore, the Court pointed out that the directive covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data. This means that no differentiation, limitation, or exception is being made in the light of the objective of fighting serious crime. Also, the legal instrument does not lay down any objective criterion according to which the number of persons authorised to access and subsequently use the data is limited to what is strictly necessary in the light of the objective pursued. Additionally, neither access is given dependent on prior review by a court or independent administrative body nor does the Directive require the Member States to install such a review. An independent court or administrative body should seek to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued.

With regard to the data retention period, the directive set that period at minimum 6 months and maximum 24 months. The Court stated that what is lacking are objective criteria in order to ensure that the retention period is limited to what is strictly necessary. The directive thus constitutes a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

In conclusion, the Court ruled that the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Arts. 7, 8, and 52(1) of the EU Charter of Fundamental Rights. The Data Retention Directive has therefore been declared invalid. (EDB)

➤eucrim ID=1401036

Report on Access to Data Protection Remedies and Handbook on Data Protection Law

On 27 January 2014, the FRA published a report on access to data protection remedies in the EU Member States. A comparative study was conducted regarding the national laws and data protection remedies of all EU Member States. In addition, over 700 persons were inter-

viewed in 16 Member States. Interviewees included victims of data protection violations, judges and lawyers, data protection authority staff and staff from victim support organisations.

The report offers an overview of the legal framework and the procedures people can use in cases of data protection violations as well as examples of actual experiences of victims. The conclusions show that most victims turn to data protection authorities in case of a violation, but court procedures are hardly used due to them being perceived as too complicated, costly and time consuming. The size and duration of the sanctions that data protection authorities can impose vary significantly from Member State to Member State. Criminal sanctions are possible in most Member States but differences exist regarding the duration of sentences or the size of fines.

Recommendations proposed by the FRA include raising awareness of complaint mechanisms, data protection training for legal professionals and improving the rules on the burden of proof, to make it simpler for individuals to bring cases before a court or supervisory authority.

The release of this report was accompanied by the publication of the Handbook on European Data Protection Law by the FRA and the CoE. This handbook covers EU and CoE legal frameworks on data protection as well as relevant jurisprudence. (EDB)

➤eucrim ID=1401037

Commission and US Treasury Joint Report on Value of TFTP Data

The Commission and the US Treasury Department published a joint report regarding the value of the data that have been collected and processed in accordance with the agreement between the EU and the US on the processing and transfer of financial messaging data for the purposes of the terrorist finance tracking program (TFTP Agreement, see eucrim 2/2010, pp. 48-50). The report was published on 27 November 2013. It is based on information provided by the US Treasury Department, Europol, and the Member States.

The joint report contains several concrete examples of cases in which data retrieved under the TFTP Program, including data stored for 3 years or more, have been valuable in counter-terrorism investigations in the EU and the US before and since the agreement entered into force. These cases include investigations relating to the April 2013 Boston Marathon bombings, the July 2011 attacks in Norway by Anders Breivik, and the March 2004 Madrid train bombings. Additionally, the report describes the methodology for the assessment of retention periods by the US Treasury Department and the deletion of non-extracted data.

The EP made a call for suspension of the TFTP Agreement in October 2013, based on the revelations regarding the NSA surveillance programs. Several MEPs requested proof that the collected data had been necessary for terrorism investigations (see eucrim 4/2013, p. 121-122).

The Commission and the US Treasury Department have agreed to carry out the next joint review in spring 2014. (EDB)

➤eucrim ID=1401038

Report by Ad Hoc EU-US Working Group on Data Protection

On 27 November 2013, the report on the findings of the EU co-chairs of the ad hoc EU-US Working Group on Data Protection was published.

The Working Group was established in July 2013 to examine matters related to revelations in the media regarding the collection of data on EU citizens by US data surveillance. Several meetings were held in July, September, and November 2013. Also, a "second track" was established under which Member States can have bilateral discussions with the US authorities on matters related to their national security. This second track also includes issues that the EU institutions may raise with the US authorities related to the alleged surveillance of EU institutions and diplomatic missions.

The US provided information regarding the legal bases upon which programs were carried out allowing large-scale collection and processing, for foreign intelligence purposes and including counter-terrorism, of personal data that has been transferred to the US or is processed by US companies. Several elements remain unclear, including the number of EU citizens affected by these surveillance programmes and their geographical scope. Furthermore, the report mentions the lack of clarity regarding the existence of other surveillance programs; the differences in the safeguards applicable to EU data subjects compared to US data subjects as well as the differences in judicial oversight between the EU and the US data processing legal frameworks.

This final report was prepared under the sole responsibility of the EU co-chairs of the working group. The US representatives had the opportunity to comment on possible inaccuracies in the draft. (EDB)

➤eucrim ID=1401039

Freezing of Assets

Adoption Directive on Freezing and Confiscation of Proceeds of Crime

On 14 March 2014, the Council adopted the new Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The final act was signed on 3 April 2014.

The directive aims to facilitate the freezing, confiscation, and recovery of the proceeds of crime in cross-border cases (see eucrim 3/2013, p. 84). This includes more possibilities for confiscating proceeds of crime in cases of flight or illness on the part of the person concerned. In cases where a judge is convinced that goods were obtained through crime, extended powers of confiscation have been provided for. Finally, the Di-

rective harmonises the rules on confiscation from a third party and adds the necessary safeguards.or illness

The Directive will be published in the Official Journal soon. Member States will have two and a half years to transpose its provisions into national law. Ireland decided to participate in the adoption of this Directive. The UK and Denmark are not taking part. (EDB)
➤eucrim ID=1401040

Cooperation

Police Cooperation

Political Abuse of Interpol's Systems

On 26 November 2013, six MEPs sent a letter to the EU High Representative for Foreign Affairs, Catherine Ashton, the Vice-President of the European Commission, Viviane Reding, and the Commissioner for EU Home Affairs, Cecilia Malmström, expressing their concerns regarding the alleged abuse of Interpol's systems for political purposes as outlined by the Fair Trials International's report "Strengthening respect for human rights, Strengthening Interpol." According to the report, Interpol's system of wanted persons is abused by countries such as Russia, Belarus, Turkey, and Iran in order to target political exiles and its review mechanisms are supposedly not strong enough to prevent this and provide no effective remedy.

The MEPs see this issue as a key concern for the EU, as the effectiveness of its external action against these countries is undermined. They further argue that under such a system, refugees recognised in one Member State risk repeated arrest in other Member State. Hence, they refrain from travelling, meaning *a de facto* limitation of their freedom of movement within the EU. Furthermore, asylum applications may be denied due to the information given in Interpol's Red Notice. Finally, the MEPs raise the issue of which steps are being taken by Europol to refrain from processing information that was gathered in breach of human rights and was received by Interpol members.

Hence, in their joint letter, the six MEPs ask the European Commission to take action. Measures suggested include the establishment of a working group of experts to examine the issue, to seek further information from Interpol as to the standards it applies when determining whether prosecutions are politically motivated, and to encourage Interpol to treat asylum grants by Member States as giving rise to a presumption of removal of information of that person from Interpol's files. Furthermore, the Commission is asked to issue guidelines for Member States should they encounter a person subject to an Interpol Red Notice. Interpol should be informed that those recognised as refugees in one Member State should not be extradited from other Member States insofar as all Member States are bound by the common rules prohibiting the refoulement of refugees. Finally, further information should be sought from Europol regarding its information sharing with Interpol. (CR)
➤eucrim ID=1401041

Josip Perković Arrested

On 1 January 2014, Croatia arrested Josip Perković, a former intelligence chief of the communist Yugoslavia's secret services. Mr. Perković was sought in connection with the murder of a Yugoslav dissident in Bavaria in 1983. His arrest marks the end of an extradition row between Croatia and the EU in which – before its accession to the EU on 1 July 2014 – Croatia changed its laws to prevent the extradition of suspects in crimes committed before the year 2002. The alleged intention was to prevent veterans of the 1991-95 Croatian independence war from facing potential prosecution elsewhere in the EU. Faced with potential legal actions and the loss of EU funding, the time limit was removed in August 2013. A local Croatian court will now decide on Mr. Perković extradition. (CR)
➤eucrim ID=1401042

Internal Security Fund Endorsed

On 10 January 2014, the civil liberties committee of the European Parliament endorsed the new Internal Security Fund, which aims at improving police cooperation, border surveillance, and crime prevention. This instrument with its financial support for police cooperation, preventing and fighting crime, and crisis management will provide funding of €1 million for the next seven years. It shall be used in crime prevention, to combat cross-border, serious, and organised crime, including terrorism, and to boost cooperation between law enforcement authorities at the national and EU levels. (CR)
➤eucrim ID=1401043

European Investigation Order

Directive on European Investigation Order Adopted

On 14 March 2014, the Council adopted the Directive regarding the European Investigation Order (EIO) in criminal matters (see eucrim 2/2013, p. 47).

The EIO replaces a variety of legal measures that currently exist in judicial and police cooperation in criminal matters by one single instrument. Automatic mutual recognition of investigation orders is thus introduced and the grounds for refusal by another Member State to execute the order limited. The EIO is a judicial decision; its recognition or execution should be carried out with the same priority and speed as in a similar national case. The general deadline for execution of an EIO is 90 days.

This should simplify the execution of cross-border investigative measures such as hearing witnesses, obtaining information or evidence already in the possession of the executing authority, and – under specific conditions – interception of telecommunications.

The issuing authority may only issue an EIO when it is necessary and proportionate for the purpose of the proceedings and when the requested investigative measure could have been ordered under the same conditions in a similar national case.

The directive will be published in the Official Journal soon. When it enters into force, Member States have three years to adopt the necessary national legal provisions. The UK decided to participate in the EIO Directive by using the opt-in option provided for in Protocol 21 of the Lisbon Treaty. Ireland and Denmark are not taking part. (EDB)
➤eucrim ID=1401044

Law Enforcement Cooperation

Number of Vietnamese Irregular Migrants Doubled in 2013

Despite numerous large-scale investigations in 2011 and an initial decrease in the number of Vietnamese irregular migrants detected in the EU, the total number of investigations into the facilitation of Vietnamese irregular migrants doubled in 2013, totalling more than 20 cases. Vietnamese irregular migrants typically enter the EU along its eastern land borders and are assisted onwards to their final destinations such as the UK, France, Belgium, and Germany. (CR)
➤eucrim ID=1401045

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Stricter Conditions for Applying to the Court

On 1 January 2014, Rule 47 of the Rules of Court came into force. It introduced stricter conditions for applying to the Court in order to enhance efficiency and to speed up the examination of applications. According to the two major changes introduced, which are immediately applicable, any form sent to the Court must be duly completed and accompanied by copies of the relevant documents. Further, incomplete files will no longer be taken into consideration for the purpose of interrupting the six-month period within which an application must be submitted to the Court following the final decision of the highest domestic court with jurisdiction. The new, simplified application form is available on the Court's website (see also eucrim 4/2013, p. 123). In order to inform potential applicants, the Court has launched a broad information campaign. The relevant information is available in all languages of the State Parties to the ECHR. A video, information documents, and a pamphlet are available in selected languages.
➤eucrim ID=1401046

ECtHR: Pending Cases Considerably Reduced in 2013

On 30 January 2014, the President of the Court highlighted the good results of the Court in 2013. Speaking at the annual press conference of the ECtHR, President Spielmann noted that, by the end of 2013, the pending cases had been reduced below the symbolic figure of 100,000 (down from 160,000 in September 2011). This confirms the effectiveness of the new working methods (in particular, the single-judge procedure and the new powers of the three-judge committees), which were introduced by Protocol No. 14 (see eucrim 1-2/2009, pp. 27- 28; 4/2009, pp. 147-148.). It was also noted that a special account had been set up with a view to tackling the backlogged cases.

The Court also issued its annual activity report and the statistics for 2013 at the press conference. According to the contents, those states with the highest number of judgments finding at least one violation of the ECHR were Russia, Turkey, Romania, and Ukraine.
➤eucrim ID=1401047

Other Human Rights Issues

Police Misconduct Undermines Public Trust in Effective Law Enforcement

On 25 February 2014, Nils Muižnieks, the CoE Commissioner for Human Rights, released a comment about police misconduct in Europe that undermines public trust in effective law enforcement and in the state in general. As examples, the Commissioner highlighted the following:

- The excessive use of force during demonstrations (e.g., in the context of the Gezi Park events in Turkey or the most recent developments in the Ukraine);
- The mistreatment of persons while in police detention (problematic practices by the national police of Spain);
- Violence targeting minorities (ill-treatment of migrants and the Romani people in Greece);
- The phenomenon of institutionalised racism (ethnic profiling in France).

* If not stated otherwise, the news reported in the following sections cover the period October 2013–March 2014.

The Commissioner pointed out that European states have the fundamental duty to combat impunity for human right violations committed by law enforcement officials and to identify and punish those responsible. Nevertheless, many current investigations are ineffective, as members of the same force investigate the actions of their colleagues. The comment urged the states to develop clear guidelines concerning the proportionate use of police force and - as possible new solutions - highlighted the creation of independent police complaint mechanisms (like in the UK, Ireland, and Denmark) or the empowerment of national ombudsmen to investigate.

➤eucrim ID=1401048

Specific Areas of Crime

Corruption

GRECO: Fourth Round Evaluation Report on Spain

On 15 January 2014, GRECO published its Fourth Round Evaluation Report on Spain and addressed a total of 11 recommendations to the country. The fourth and latest evaluation round was launched in 2012 in order to assess how states address issues such as conflicts of interest or declarations of assets with regard to Members of Parliament (MPs), judges, and prosecutors (for further reports, see eucrim 2/2013, pp. 47-48, 1/2013, p. 13, 3/2013, p. 87, 4/2013, p. 124.).

The report expressed concerns about the proliferation of corruption scandals tainting the credibility of political institutions of Spain and called for a comprehensive integrity package with clear ethical standards on:

- The prevention of conflicts of interest;
- Gifts and other advantages;
- Accessory activities;
- Financial interests.

The code should be implemented by means of practical measures, including confidential counselling possibilities to provide MPs with guidance and advice on ethical questions. Additionally, rules shall be introduced on how MPs should engage with lobbyists and other third parties seeking to influence the legislative process.

Beside the need for a code of conduct for judges, the report calls for objective criteria and evaluation requirements to be laid down in law for the appointment of the higher ranks of judiciary, which shall ensure a greater independence, impartiality, and transparence of this process.

With regard to prosecutors, GRECO advises to reconsider the method of selection and the term of tenure of the Prosecutor General, to increase transparency of communication between the Prosecutor General and the government, and to provide for greater autonomy in the management of the means of the prosecution services.

➤eucrim ID=1401049

GRECO: Fourth Round Evaluation Report on France

On 27 January 2014, GRECO released its Fourth Round Evaluation Report on France, addressing a total of 11 recommendations to the country. The report welcomed the series of recent reforms but noted important gaps in the prevention of corruption in France. The report concluded that there is lack of adequate rules to bind MPs with regard to conflicts of interest, gifts and other benefits as well as asset declarations. Further, GRECO called for a thorough reform with regard to parliamentary assistants (avoiding fictitious jobs and disguised lobbying), as well as operational expense allowances and special funds managed by ministries but used by MPs. The report called for internal disciplinary measures to supplement the range of criminal law measures in relation to possible breaches of rules on the integrity of MPs.

GRECO called for far-reaching reforms of the labor and commercial courts with a view to strengthening the independence, impartiality, and integrity of lay judges. Regarding the prosecution service, the report suggests establishing a procedure for the appointment of prosecutors that is in line with that for judges (the latter allows for an opinion by the Judicial Service Commission, which is binding for the Minister of Justice). Further, the capacity of the Minister of Justice to ask or obtain information in a particular case should be regulated precisely in order to avoid suspicion of disguised orders.

➤eucrim ID=1401050

GRECO: Publication of Confidential Report on Belarus and Compliance Report on Ukraine

On 3 February 2014, for the first time in its fifteen years of existence, GRECO published a summary of its Joint First and Second Round Evaluation Report on Belarus. The report assesses the compliance of Belarus with the CoE anti-corruption standards and examines the independence, powers, and means of national bodies responsible for the fight against corruption. The summary was published because Belarus did not follow the positive transparency policy applied and accepted within GRECO to authorise publication of the entire report.

In further news, on 26 February 2014, GRECO published its compliance report on Ukraine concerning recommendations on incriminations and the transparency of party funding. The report concludes that Ukraine has satisfactorily implemented or dealt with in a satisfactory manner only three of the sixteen recommendations contained in the Third Round Evaluation Report.

➤eucrim ID=1401051

Money Laundering

MONEYVAL: Fourth Round Evaluation Report on Croatia

On 20 January 2014, MONEYVAL published its fourth evaluation report on Croatia. The report sets out Croatia's

levels of compliance with the FATF 40+9 Recommendations and makes recommendations on how certain aspects of the system could be strengthened. The report notes that the AML and ATF legislation in Croatia complies with international and European standards to a large extent. The AML Office of Croatia has sufficient structural and operational independence as well as adequate resources. Further, there is a well-established legal framework available for international mutual legal assistance and cooperation. However, the fact that no cases have been prosecuted in respect of third parties laundering on behalf of others, as well as the generally low number of convictions, implies the lack of effectiveness of ML criminalisation. Furthermore, the legal framework applicable to confiscation and provisional measures is complicated, and the rate of confiscation is low.

➤eucrim ID=1401052

MONEYVAL: Fourth Round Evaluation Report on Bulgaria

On 21 January 2014, MONEYVAL published its fourth evaluation report on Bulgaria.

A 2010 risk analysis of the Bulgarian authorities identified multinational organised criminal groups as the greatest risk for money laundering. MONEYVAL welcomed that the authorities achieved final convictions on a number of standalone ML cases. Additionally, the FIU appears to be operationally independent, and the supervision and monitoring of implementation of the AML and ATF requirements is well developed. Bulgaria also provides for a wide range of mutual legal assistance and cooperation. However, the report notes that, although the ML offence is broadly in line with international standards, it needs to extend the list of predicate offences as well as to cover all aspects of terrorism financing. Further, MONEYVAL also encourages the authorities to apply criminal sanctions for money laundering to legal persons. Finally, the report states that, even though there are a wide range of measures provided by the confiscation regime, the total value of confiscated assets remains low.

➤eucrim ID=1401053

MONEYVAL: Fourth Round Evaluation Report on Israel

On 6 February 2014, MONEYVAL published its fourth evaluation report on Israel. The main findings can be summed up as follows: Israel has secured convictions for both ML and ATF on a regular basis and achieved a substantial increase in the number of cases involving seizure of the proceeds of crime. The FIU now has access to a much greater range of information. The supervisory framework is well established and the supervisors have adequate powers. Also, comprehensive mechanisms are available for national and international cooperation.

Nevertheless, MONEYVAL encouraged the authorities to address several concerns. The legislation should promptly address the lack of AML and ATF regimes for designated non-financial business and professions, such as lawyers, notaries, auditors, tax advi-

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptation of the provisional application (a)
Criminal Law Convention on Corruption (ETS No. 173)	Austria	25 September 2013 (r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Georgia	10 January 2014 (r)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Republic of Moldova Georgia Sweden Finland	8 August 2013 (r) 10 January 2014 (r) 20 January 2014 (r) 16 April 2014 (a)
Convention on Cybercrime (ETS No. 185)	Czech Republic Mauritius Panama	22 August 2013 (r) 15 November (acceded) 5 March 2014 (acceded)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)	Spain	27 November 2013 (s)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Monaco Austria Georgia Belarus Poland	10 July 2013 (r) 13 December 2013 (r) 10 January 2014 (r) 23 January 2014 (s) 30 April 2014 (r)
Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)	Azerbaijan	4 April 2014 (r)
Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)	Belarus Greece	26 November 2013 (acceded) 11 April 2014 (r)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptation of the provisional application (a)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Georgia	10 January 2014 (r)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Sweden Russian Federation Slovenia Switzerland Andorra	28 June 2013 (r) 9 August 2013 (r) 26 September 2013 (r) 18 March 2014 (r) 30 April 2014 (r)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	FYROM Spain United Kingdom Azerbaijan Cyprus Bosnia and Herzegovina Slovenia Georgia	21 November 2013 (r) 27 November 2013 (s) 6 January 2014 (s) 6 January 2014 (r) 7 February 2014 (r) 24 March 2014 (s) 11 April 2014 (r) 14 April 2014 (r)
Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)	Albania United Kingdom Serbia Latvia	14 August 2013 (r) 6 January 2014 (s) 10 January 2014 (r) 24 February 2014 (r)
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213)	Bulgaria Czech Republic San Marino Montenegro Monaco Republic of Moldova FYROM Liechtenstein Serbia Azerbaijan Slovakia Albania Poland Estonia	5 November 2013 (s) 5 November 2013 (s) 6 November 2013 (r) 8 November 2013 (signed, without reservation as to ratification) 13 November 2013 (r) 18 November 2013 (s) 21 November 2013 (s) 26 November 2013 (r) 13 December 2013 (s) 18 December 2013 (s) 7 February 2014 (r) 11 February 2014 (s) 9 April 2014 (s) 30 April 2014 (r)
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214)	Netherlands Turkey Estonia	7 November 2013 (s) 20 December 2013 (s) 17 February 2014 (s)

➤eucrim ID=1401056

sors, real estate agents, and dealers in precious metals and stones. The latter shortcoming is of particular concern, given the great economic importance of the diamond industry. Further deficiencies remain, in particular with regard to provident funds, insurance companies, and money service providers who are not obliged to verify the identity of the beneficial owner of their customers. Furthermore, the definition of beneficial owner is not in line with the international and European standards, and there are serious shortcomings in the requirements to identify politically exposed persons and establish their source of wealth. Finally, there is insufficient information available on the beneficial owners of private and foreign trusts, and there are no legal requirements on trust service providers to obtain, verify, and retain records of the trusts they create.

➤eucrim ID=1401054

Procedural Criminal Law

CEPEJ: Revised Guidelines on the Creation of Judicial Maps to Facilitate Access to Justice and on Judicial Time Management

At its last plenary meeting (on 5-6 December 2013), CEPEJ adopted its revised guidelines on the creation of judicial maps to support access to justice. The original document intended to identify important factors to be taken into account by national policy makers when deciding the size and location of particular courts (see eucrim 3/2013, p. 88).

Also, the SATURN Guidelines for judicial time management have been updated. These guidelines (first published in 2008) are updated every five years in order to take into account the developments that occurred in the Member States in the field of court management (see also eucrim 3/2009 p 85-86; 4/2009 p. 154; 1/2010 p. 24).

➤eucrim ID=1401055

Where Should the European Union Go in Developing Its Criminal Policy in the Future?

Hans G. Nilsson, jur dr h.c.*

The Lisbon Treaties sought to address several of the criminal policy shortcomings that I have mentioned in the editorial of this number of eucrim. Whether they have been adequately addressed is still too early to assess, but some of the experiences show that we are on the right track. In particular, the use of QMV (Qualified Majority Voting) and co-decision under the ordinary legislative procedure have permitted less tortuous compromises to be made.

It should also be said that the Lisbon Treaties also brought some new challenges to the development of criminal policy in the European Union. Contrary to what many believe, the Union's criminal law competence was restricted compared with the criminal law competences of the Amsterdam Treaty, since it was made clear that the Union's competence in this area is also based on the principle of conferral. The Union can also only deal with certain procedural issues, certain defined aspects of substantive criminal law, and at most when it is essential to support already adopted policies. In negotiations in the Council, it is sometimes heard that the Union has no competence in relation to certain parts of Commission proposals, e.g., when preventive aspects are dealt with or when statistics are required. When the Council discussed confiscation, it was questioned whether confiscation was a "sanction," and the final result was that the Union only could adopt rules on confiscation relating to the so-called eurocrimes enumerated in Art. 83:1. Confiscation provisions of a general nature could not be adopted.

I. Within this Restricted Framework Provided by the Lisbon Treaty, what Could or Should the Union Do?

Discussions in the context of preparation of the Art. 68 strategic guidelines show that there is not much enthusiasm within the Union for taking many legislative initiatives in the next five years. Words like "consolidation," "implementation," "evaluation," and "no new legislation" have become buzzwords in the debate. In reality, this means legislative lethargy and comes close to a stop in the development of an EU criminal policy. At the recently held Commission conference called "Assises of Justice," the key words repeated by many speakers were "*Festina Lente*" – make haste slowly.

There are a number of areas, however, where the Union could, and should continue its work – and not necessarily legislative work. I will deal with some of these areas in the following. But first, I would like to make a general remark. Criminal law has been territorially anchored for centuries and even thousands of years. It is an extremely sensitive part of national law, where national parliaments and a number of authorities dealing with law enforcement in the widest sense of the word are involved. It involves the ultimate power of the nation state, namely to arrest and punish individuals that have infringed the criminal code or criminal provisions in specific parts of the legislation.

At the same time, crime has become increasingly international; criminals use the opening up of borders for their own criminal purposes, and they have become highly professional. There is an obvious need for the Member States to cooperate and become more efficient in fighting crime. As one Justice Minister put it: "We cannot fight 21st Century criminals with the weapons of the 19th Century." "Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice," as stated in the preamble to the Framework Decision on the European Arrest Warrant.

There is a paradox in this opening statement – we are trying to create (the Treaty of Lisbon has in fact declared it) an *area* of justice, but at the same time criminal law is exceptionally territorial. And the Treaty itself obliges the Union to respect the different legal systems and traditions of the Member States (both, in general, in Art. 67 and, in particular, in Art. 82, where they are taken into account). It is clear that the equation is very difficult to apply in a consistent way.

II. Where Should the Union Continue Its Criminal Law Work?

One area in which the Union could do more is the area of evaluation, where the Lisbon Treaties provide a clear legal basis in Art. 70 for a so-called "peer evaluation." The Stockholm

Programme has also called on the Commission to come up with a proposal in the area. This has never been done (although the Schengen evaluation was finally adopted on the basis of Art. 70, but it was proposed with Art. 77 as its legal basis), and the Union is still evaluating criminal policies, in fact policies on organized crime, on the basis of an old Joint Action from 1997.

Another area where the Union should continue its work is in the field of judicial training. There as well, the Stockholm Programme made a number of proposals to further this very important area for the creation of mutual trust. However, one proposal was never formally made: the setting up of a special judicial training school within the Union – "Eurotrain." Why should the Union have a police school (CEPOL) and not a judicial one? There is a big difference between networks for judicial training, which are to a great extent focused on national procedures and practices, and a truly European Union School, where general principles of European law, the Charter, and the ECHR as well as the case law of the ECJ and the ECtHR would be taught. The EU-specific judicial ignorance of judges and prosecutors in many parts of Europe is surprisingly poor, probably because they believe that criminal law is only national and not European. For example, the *Pupino* case is not known among most judges or prosecutors I meet. It is even unknown in many Ministries. Where it is known, it is not applied. A 3-month course in a European Union School would remedy this.

The Lisbon Treaties for the first time also gave explicit competences to the Union in the area of crime prevention, to the exclusion of approximation. Has the Union set up a research institute, as foreseen in the Stockholm Programme? How much money is spent every year on crime prevention? Are we seriously trying to approximate the collection and analysis of crime statistics at the European Union level? The answer is no.

When it comes to the approximation/harmonisation of substantive criminal law and procedural law, is it appropriate that we should take a "legislative break" and concentrate on implementation and evaluation instead? All instruments made under the Amsterdam Treaty should have been implemented by now, several even many years ago, but many of them have either not yet been implemented or have just recently been implemented. Is this an argument for not adopting any new legislation if it is necessary, as shown in impact assessments? Nowadays, impact assessments are a Treaty obligation (but one can easily argue that the Union should continue to improve them).

The European Commission recently published its first anti-corruption report. The report contains country reports, but the Commission did not foresee making any proposals as regards the substantive criminal law aspects of corruption despite the fact that the EU acquis relating to corruption is not that well developed. We have a Framework Decision on private corruption (with exceptions and compromises), a Protocol to the PIF Convention on corruption within the framework of the protection of the financial interests of the Union, a convention on corruption of EU officials, and a contact point network on corruption with a very uncertain future, which seems not to be linked to the Union at all.

This is not much. It is fragmented and not comprehensive. Is so-called trafficking in influence an offense everywhere in the Union? It is not. If a French judge asks for a search in another Member State on the basis of a trafficking in influence offense, he might not get it because it is not an offense in the other Member State because of lack of double criminality. This is far from being an area of justice.

And what about the offense of money laundering? This is another one of the ten so-called euro-crimes in Art. 83:1 TFEU. There are still Member States of the Union in which it is not punishable to launder the proceeds from your own drug trafficking or kidnapping ransoms. And a number of exceptions still exist in relation to the all-crimes approach of the 1990 (yes, 1990!) Council of Europe Convention on money laundering.

When it comes to organised crime, as mentioned in Art. 83:1, the fact is that the Union has no clear definition of what that is. We have a "definition" in a Framework Decision of a "criminal organisation" but there are so many loopholes in it that it is rendered practically useless for purposes of approximation.

On the non-repressive side, the Union has improved its record considerably in the past few years. We already have a full corpus on victim's rights with six adopted Directives that fully or partially deal with such issues. Moreover, the Union has adopted three measures from the Stockholm Roadmap on suspected and accused person's rights in criminal proceedings, and three more measures are under negotiation.

But more still has to be done. The codes of criminal procedure of the Member States are not confined to six measures but also raise a number of other issues. I am not suggesting that we have to make a European Code of Criminal Procedure – this is pure utopia – but I am suggesting that we need to approximate more standards for suspects in order to increase mutual trust and confidence among citizens, legislators, and the judiciary/law enforcement. It is only in this way that we can progressively increase confidence and trust in each other's judicial systems while fully respecting each other's legal systems and traditions. Issues like judicial remedies come to my mind in this context.

III. Long-Term EU Criminal Policy

From a long-term perspective, it seems clear to me that, if the Union wishes to develop its criminal policy, there is a need for a Treaty change. The casuistic, piecemeal approach of Art. 82 and, in particular, Art. 83, is not very appropriate in order to develop a genuinely effective criminal policy, and is certainly contrary to the very idea of the creation of an *area* of justice.

The right of extension of Union competence provided in Art. 83 is not sufficient, as it requires unanimity and the consent of the European Parliament. The fight against racism and xenophobia is but one example. We have an old Framework Decision but are not allowed to do further legislative work in this area (to the extent that it goes beyond discrimination), since there is no legal basis in Art. 83 for doing so. And yet the fight against racism and xenophobia is mentioned in paragraph 3 of the core Art. 67 as one of the key issues for the Union. There is no logic, but only politics to this choice. The Union, moreover, does not have any competence to approximate all 32 categories of offenses mentioned in Art. 2 of the Framework Decision on the European Arrest Warrant.

In the longer term, the Union will have to make a choice on where to go: in the direction of a United States of Europe, with federal crimes coexisting with "local" crimes, or towards maintaining the 30 different legal systems we have with a careful and cautious fragmented approximation on a step-by-step basis? No doubt the latter approach will prevail. But it may also lead to further fragmentation, opt-ins and opt-outs, and more complexity for law enforcement and judges to the detriment of fighting serious, organised, and cross-border crime – an area where we all share a common view.

Criminal law is a whole. It is a system. If one touches one part of the system, other parts will be affected as well. This is true not only for Member States but also for the Union. If we are serious about our stated Treaty aim, namely to create an *area* of justice, we need to take down some more of our borders for law enforcement and judicial authorities as well.

We have now inserted into the Treaty the principle of mutual recognition. Taken to its extreme, this would mean that a judicial decision by a judge in one Member State would be immediately and unconditionally executed without any further formality. The reality in Council negotiations, even immediately after 9/11, was/is totally different. In the Framework Decision on the EAW, there are three mandatory grounds for non-recognition, seven facultative ones (which a number of Member States have made mandatory through legislation), and at least seven other different ways of postponing surrender to another Member State. In the European Investigation Order Directive that was recently adopted, there are provisions to the effect that, if you cannot execute an investigative measure for your own law enforcement, you cannot do it for a foreign one either. Through the backdoor, we are reintroducing territoriality in the area of freedom, security and justice.

One can observe a successive "clawing back of powers from Brussels" in a number of areas of discussion in the past five years, in particular in the mutual recognition instruments. The recent yellow card from national parliaments in 11 Member States in respect of the setting up of the European Public Prosecutor's Office is another sign that Member States want to be very cautious in this very sensitive area. In the foreseeable future, as witnessed in the post-Stockholm discussion, *Festina Lente* will rule.

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* The opinions expressed are those of the author and not necessarily those of the institution at which he is employed or those of any of the Member States of the EU.

EU's Criminal Policy and the Possible Contents of a New Multi-Annual Programme

– From One City to Another…

Lorenzo Salazar

The steps forward of the European Communities or of the European Union have always been quite associated with the names of the cities where the crucial decisions – very often long prepared in advance in Brussels, Strasbourg or elsewhere – were presumed having been finally taken: Rome, Maastricht, Amsterdam, Nice, Lisbon…

The same is true of the turning points in the field of Justice and Home Affairs after the entry into force, in November 1993, of the Treaty establishing the European Union (the Maastricht Treaty).

Immediately after the entry into force of the Amsterdam Treaty, on 1 May 1999, a clear need emerged to streamline the future initiatives to be taken within the framework of the reinforced Justice, Freedom and Security (JLS) scenario provided for under the treaty in order to implement its new objective "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to … the prevention and combating of crime" (Art. 2 TEU).

In the years preceding the entry into force of the Amsterdam Treaty, the experience with "soft-law programs," such as the "Plan of Action against Organized Crime" adopted by the Council on 28 April 1997,[1] had already been tested by the Justice and Home Affairs (JHA) ministers with quite satisfactory results. Nevertheless, only on the occasion of the "special meeting" of the European Council held in Tampere in October 1999 (to date the only meeting of the heads of state and government of the EU exclusively devoted to Justice and Home Affairs matters), could a first "multi-annual program", providing the Union with real "political guidelines and concrete objectives" for all the JLS policies, be considered adopted.

It was indeed in Tampere that the heads of state or government (together with the president of the Commission) put forward ideas of paramount importance, such as the principle of mutual recognition of judicial decisions, the setup of Eurojust, or the abandonment of extradition in favor of a system of surrender, i.e., the European Arrest Warrant.

Five years later, the "Tampere Conclusions" were followed by "The Hague Programme"[2] (2004) and then by the "Stockholm Programme"[3] (2009).

If, in the Hague Programme, the so-called "principle of availability" for law enforcement authorities[4] could still be perceived as "the" strong message sent out by the document (though rapidly forgotten), it is generally acknowledged that none of these programs has ever achieved a level of ambition even comparable with the "Tampere Conclusions." The periodic exercise swiftly turned into a sort of "shopping list," where it was not always easy to make the distinction between "real priorities" and just a long (and increasingly longer) list of wishful thinking. The relatively concise 62 paragraphs of the Tampere Conclusions first expanded in The Hague from 14 pages in the Official Journal to a 38-page long programme in Stockholm; one could even say that the actual content of the documents seems to be inversely proportional to the number of pages used to convey it.

I. Implementing Art. 68 TFEU

Art. 68 TFEU, introduced by the Lisbon Treaty, stipulates that "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."

The Stockholm Programme was in fact formally adopted by the European Council just a few days after the entry into force of the Lisbon Treaty (1st December 2009) though conceived well before that date. As clearly stated at the very beginning of the document "this programme defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice in accordance with Article 68 TFEU," due to the fact that, for a few days, this provision of the TFEU had formally provided the European Council with a task that had in fact already been in its hands for a decade.

Hence, the Stockholm Programme became the first programmatic document of the new "Lisbonized" era, because (at least

formally) it implemented the new provision of the treaty. At the same time, it can also be considered the last multi-annual programme to have been adopted by the European Council under the "old" methodology inaugurated in Tampere.

It is no secret that the European Commission has never shown great enthusiasm regarding these types of programmatic documents coming from the European Council. This seems particularly due to the fact that the Commission looks at them as possibly jeopardizing its power of initiative in a sector in which Member States are still provided with the possibility of putting forward legislative proposals in the field of criminal justice and police matters.

It should be also recalled that, when the action plan for implementing the Hague Programme was presented, it was jointly adopted by the Council and the Commission.[5] After the Stockholm Programme, the implementing "Plan of Action" was instead adopted by the Commission alone,[6] without any negotiations with the Council, thus providing the best evidence of the strong wish on the part of the Commission to immediately firmly take back in its hands any room for maneuver that had only temporarily been abandoned in favor of the European Council.

What is even more important to note is that the relationship between the two documents is not always stable and well defined and, especially after the Stockholm Programme, the implementing document does not, at least in some cases, necessarily have much to do with its precursor.

II. The New Strategic Guidelines: When (and Where)?

Less than four years after the adoption of the Stockholm Programme, the European Council of June 2013 decided that, at its June 2014 meeting, it "will hold a discussion … to define strategic guidelines for legislative and operational planning in the area of freedom, security and justice (pursuant to Article 68 TFEU). In preparation for that meeting, the incoming Presidencies are invited to begin a process of reflection within the Council. The Commission is invited to present appropriate contributions to this process."[7]

The rush in which the decision was taken to hold this debate well in advance of the sunset of the Stockholm Programme (December 2014) was a bit surprising and what was expected by many to be the "Rome Programme" will probably be recalled as the "Athens Programme." Putting aside any contention over geographic indications, the reasons for anticipating this debate in the European Council could perhaps be explained by the extraordinary situation of an "institutional jam" anticipated throughout 2014: successive changes in the European Parliament (elections in May), in the Commission (new President designated in June, with the new College due to become operational in November), and following the election of the new President of the European Council (October).

This already frightening scenario is accompanied by the additional incertitude in the JLS Area resulting from the end of the transitional period under Protocol No. 36 and – in direct connection with this – by the already decided UK opt-out from the overall pre-Lisbon *acquis*. The UK opted out in order to avoid becoming subject to the judicial control that the Court of Justice will be able to exercise over all the former "third pillar *acquis*" after the 1st of December 2014 (i.e., all the instruments adopted in the field of criminal justice and police cooperation before the entry into force of the Lisbon Treaty).

The accelerated process put in place by the European Council in June 2013 has pushed all the institutions to move on in order to be prepared for the *rendezvous* of June 2014 without having to devote an excessive amount of time to this task.

The Council started discussions among ministers under the Lithuanian Presidency already (2nd semester 2013) on the future "multi-annual program," and these discussions have continued under the Greek Presidency in the 1st half of 2014 in order to pave the way for the debate in the June European Council.

The European Commission launched in late 2013 two public consultations on the future of the JLS Area, one organized by the Directorate General Justice (DG Justice), in the context of a conference of the "*Assises de la Justice*" held in Brussels in November 2013,[8] and the other by the Directorate General Home Affairs (DG Home).[9] In response to the public consultations, a number of contributions were transmitted to the Commission by different stakeholders, including many EU Agencies.[10]

The debates contributed to the issuing of two parallel Communications, both released by the Commission on 11th March 2014: "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union"[11] and "An open and secure Europe: making it happen," [12] which set out the political priorities that, in the view of the Commission, should be pursued for Europe to be a true common area of justice and security in which fundamental rights are guaranteed.

Shortly after the adoption of the two Communications, the European Parliament, for its part, held, on 19th March 2014, a joint Committee meeting together with national parliaments on the "Future Priorities in the Field of Civil Liberties, Jus-

tice and Home Affairs;" the conclusions of the meeting devote particular attention (together with the crisis related to illegal immigrants in the Mediterranean sea, the future of Europol, and data protection and electronic mass surveillance) to the European Public Prosecutor's Office and judicial cooperation in criminal matters.

III. The new strategic guidelines: What Should They Look like…?

After analyzing all the different inputs and proposals provided by the Commission Communications, the debate of the JHA Ministers, and the other bodies involved, one could hardly argue that they contain a real impetus to move towards a new "Tampere", where strong ideas, somehow comparable to mutual recognition, Eurojust, or the European Arrest Warrant, could be found.

The above mentioned Communication of the Commission on "The EU Justice Agenda for 2020," using a sort of triple "C" approach, clearly states that *"*… the focus of EU justice policy in the years to come should be on *consolidating* what has already been achieved, and, when necessary and appropriate, *codifying* EU law and practice and *complementing* the existing framework with new initiatives."[13] The accent is clearly put on the effective implementation of the existing *acquis* and its "consolidation," while the codification of this framework or its integration with new legislative initiatives should be taken into consideration only when *necessary and appropriate*.

The focus on the concrete "mise en oeuvre" of the legal instruments, after the great legislative efforts of the first decade of this century, had in fact already been announced in the Stockholm Programme, where it was stated that "increased attention needs to be paid in the coming years to the full and effective implementation, enforcement and evaluation of existing instruments;[14] nowadays "implementation vs. (new) legislation" seems to become a sort of *mantra* which must be repeated in any contribution in the JHA sector, no matter what the Institution or the body providing it.

The only exception to this approach, which seems to view the possible adoption of new legislation as necessary or (at least) desirable in criminal matters, seems to be related to the improvement of procedural rights of the defendants, to "further strengthen the level-playing field and the consistency of the protection of the rights of suspected persons" and to continue the process inaugurated in 2009 with the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings."[15] The roadmap was adopted by the Council at its meeting of October 2009, just before the entry into force of the Lisbon Treaty; it can be considered as *the* success story in the present EU criminal justice scenario and has been already substantially implemented through a number of different directives, based on Art. 82 § 2 TFEU, which have already adopted, are on the way to being adopted, or are still under negotiation in the Council. These directives provide "minimum rules" in the field of the rights to interpretation and translation, for persons involved in criminal proceedings to receive appropriate information, for them to have access to a lawyer, while the other three initiatives already put on the table by the Commission deal with the rights of children involved in criminal proceedings, legal aid, and the presumption of innocence.

While waiting for the finalization of the instruments still under negotiation, the time may be right for already starting a reflection on a possible new "Post-Stockholm Roadmap" to strengthen the procedural rights of suspects and accused persons in criminal proceedings.

Taking into account the results already achieved with the first roadmap and what still remains to be dealt with, a tentative (but surely not exclusive) list of measures, which could be taken into consideration in view of the drafting of a new programmatic document in the field of procedural rights, could include the right of a person to be heard before a custodial measure is imposed; the right to an effective appeal against certain decisions taken against him and to a remedy (including a compensation) in case of miscarriage of justice; a definition of the *ne bis in idem* principle going beyond Art. 54 of the Schengen Convention; and minimum rules to limit an excessive pre-trial detention, stressing the nature of the measure as a "last resort."

In favor of the idea of starting the process of a new roadmap, we could also consider that the more instruments of an horizontal nature providing for additional guarantees we have, the less necessary a discussion of the insertion of specific procedural guarantees into each single instrument under negotiation becomes. This was the case, for instance, in the debate surrounding the proposal for a regulation on the creation of a European Public Prosecutor's Office (EPPO), where the issue of whether or not one should provide specific procedural guarantees regarding the action of the new body has become central to the negotiations.

Another subject which would certainly require future (and further) attention is how to ensure that criminals and criminal organizations are effectively deprived of their illicit assets beyond the cases already covered at present by criminal convictions. The recently adopted Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime[16] has delivered a quite deceptive result as

to the final aim of the instrument, which, unlike the original proposal of the Commission, does not include cases of "non-conviction based confiscation." If we wish to tackle organized crime in an effective way, we should move towards the full implementation of the principle of mutual recognition of judicial decisions also in this field, thus providing for the concrete possibility to recognize and execute any decision of confiscation pronounced on the territory of the Union, provided that it has a true judicial nature and is adopted with full respect for the fundamental rights of the persons involved.

IV. A "Must Have": Judicial Training

EU law is providing practitioners, particularly national judges and prosecutors, with instruments that are even more sophisticated and which at the same time increasingly have an impact on the daily lives of EU citizens (e.g., the European Arrest Warrant).

Practitioners need to be able to handle these instruments efficiently. To this aim, they must be provided with adequate training in order to respond to the high level of sophistication achieved by EU law in this field and, more generally, to the goal of building up a single area of justice throughout the EU based on mutual confidence, a goal that requires professional handling of all the legal resources provided and put in common by the EU.

The present situation of judicial training in the EU seems to be characterized by a certain disproportion between the target already announced by the Commission in its Communication (training 50% of the 700,000 legal practitioners within the EU, including all new judges and prosecutors) and the dimension and resources of the main actor in this field, the European Judicial Training Network (EJTN). Created as a network composed of the national institutions responsible for judicial training in the different Member States, the EJTN still has the legal form of a Belgian ASBL (i.e., a *non-profit* organization under Belgian law) and, even after adoption of the new financial framework, it is completely dependent on an annual grant from the Commission. This situation can be seen as even less satisfactory when compared with the far less sensitive training of law enforcement authorities (at least from the point of view of the handling of legal instruments), for which an EU agency (CEPOL) was created already many years ago.

In the "EU Justice Agenda for 2020," the Commission states that "the experience of the EJTN should be consolidated and expanded to include all new judges and prosecutors" but does not specify how this objective should be achieved. Notwithstanding the difficult financial situation and general reluctance of EU institutions and Member States to go along with the idea of creating new agencies, the possible "upgrading" of the already existing EJTN to the status of a real European Law Academy could be considered one of the best investments one could envisage for the future development and effective implementation of EU law.

V. What Next?

Together with the Union's external action,[17] the Area of Freedom, Security and Justice is the only area in which the European Council is explicitly called upon by the treaties to lay down or define "strategic guidelines." Reading this in connection with the other specificities peculiar to Title V TFEU, notably the derogation to the general principle that the "Union legislative acts may only be adopted on the basis of a Commission proposal," this seems to provide a clear indication that, in these two specific areas, the treaties decided to keep the task of orienting the action of the Union in the hands of the European Council (which is not an intergovernmental body but a full-fledged European institution under Art. 13 TEU).

After Tampere, The Hague, and Stockholm, the strategic guidelines to be adopted by the European Council in June will certainly constitute a turning point among the "old-fashioned" multi-annual programs (the Stockholm programme, though adopted after entry into force of the Lisbon Treaty, is still to be considered part of them). A "new" system, should inevitably be based on the true "strategic" nature of the guidelines, i.e., fewer pages of the Official Journal but more substance, in order to provide genuine input and orientation for the subsequent action of the Commission and the Council (as far as Member States still have the possibility to put forward proposals in the field of criminal justice and police matters).

Faced with a European Commission that appears progressively less inclined to be "guided" in the exercise of its right of initiative by the European Council, the more the guidelines are able to provide strong messages on selected topics, the greater the chance that they will gain acceptance and be transformed into concrete future initiatives or proposals by the Commission itself or by the Member States.

One can expect, for instance, that, in June, the European Council, after having probably agreed on the importance of EU justice policy to ensure economic growth, may also wish to send a strong message about its wish to fight economic crime and illicit assets. It may also wish to see the proposed regulation on the European Public Prosecutor's Office adopted by a given deadline, taking on board as many Member States as possible on the common understanding that the unanimity required by

Art. 86 TFEU for the adoption of the regulation does not include Denmark (which does not participate in title V of the treaty) nor the United Kingdom and Ireland (which have not opted into the regulation and thus will not participate into its adoption).

At the same time, the June conclusions could also express the wish to proceed towards the quick adoption of a new agenda on the procedural rights of accused persons, in order not to lose the *momentum* created by the results achieved with the first roadmap and without putting aside the need for further improvement of the rights of the victims, which are probably not yet developed as much as needed at the level of the Union.

Last but not least, knowing that the new multi-annual financial framework (MFF) will last until 2020, there seems to be an emerging consensus among Member States to align the duration of future policy planning with the financial planning period; if this indication is confirmed, the new programme could be valid for at least six years after its adoption. The synchronization of the policy period with the MFF certainly sounds reasonable; at the same time, it could also raise some concerns about possible reduced flexibility due to such a long period, which, at the end of the day, will leave more margin for maneuver in the hands of the European Commission.

If the European Council is able to provide the Council and the Commission with such clear indications, the system will find its institutional balance again. Justice and Home Affairs are indeed at the heart of national sensitivities; if the times in which initiatives lay in the sole hands of Member States are definitely over, it is at the same time difficult to imagine that the Commission alone could really be able to provide an answer to all the political needs related to this area.

After 15 years of experience and the "golden age" of Tampere, the process seems to have progressively lost its "propulsive impetus" in The Hague and in Stockholm. Regardless of whether the new programme is known as the Athens, Rome, or even the Brussels Programme, what is really at stake is the question of whether the European Council will again be able to firmly take into its hands the compass of the Area of Freedom, Security and Justice and provide clear orientation on the way forward. It is neither necessary nor desirable for the Commission to give up its role of initiating the Union's annual and multi-annual programming (see Art. 17 TEU) – and the Commission would not do so under any circumstances – but the co-legislators, the Council, and the Parliament, as well as the Commission, have an interest in being provided with a clear framework within which they can develop their respective actions.

If this is not the case and if the conclusions of June are (again) deceptive from the point of view of the substance of their content, one could question whether Art. 68 of the treaty has provided an efficient policy instrument or even whether a multi-annual programme as such can still be considered an adequate policy instrument.

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1 O.J. C 251, 15.8.1997 p. 1.
2 O.J. C 53, 3.3.2005, p. 1.
3 O.J. C115, 4.5.2010, p. 1.
4 See point 2.1 of the Conclusions: "the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State".
5 O.J. C 198, 12.8.2005, p. 1.
6 COM(2010) 171 final.
7 See p. 21 of the Conclusions (fn 4).
8 "Shaping Justice policies in Europe for the years to come", Brussels 21-22 November 2013.
9 A cycle of three Conferences, in Rome, Berlin and Brussels, on the subject "Debate on the future of Home Affairs policies: an open and safe Europe – What next?"
10 Results of the proceedings, discussion papers, and written contributions are available at: http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm. Among the European Political Center – EPC, "The Stockholm programme: what's next? Contribution to the informal meeting of Justice and Home Affairs Ministers (Vilnius, July 2013)", Brussels, 11 July 2013; Fundamental Rights Agency – FRA, "Fundamental rights in the future of the European Union's Justice and Home Affairs", Vienna, 31 December 2013; JHA Agencies Network, "Common General Considerations by the JHA Agencies", La Valletta, 27 February 2014.
11 COM(2014) 144.
12 COM(2014) 154.
13 COM(2014) 144 final, see point 4.
14 See point 1.2.3 of the Stockholm Programme, O.J. C 115, 4.5.2010, p. 1.
15 O.J. C 295, 4.12.2009, p. 1.
16 O.J. L 127, 29.4.2014, p. 1.
17 See Art. 16.6 TEU

All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020

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When the Stockholm agenda was being negotiated in 2009, the negotiators faced the uncertainty that the Lisbon Treaty would never survive its initial failure of 2007 and thereby risked the same fate as the doomed Constitutional Treaty of 2005. Such a scenario would have ended the fast track to further EU integration in criminal law as a better route to pursue than the alternative, namely the Court's case law. Five years after the successful entry into force of the Lisbon Treaty and the Stockholm Programme, and with all the legal possibilities in place to move forward with this EU project, the political climate in the EU seems all the more difficult, and it is marked by intense and heated debate on the subject. The Commission's communication, however, on "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union" indicates that there is reason for hope.[1] Most importantly, the document demonstrates that the EU's policy in this area has been largely streamlined with other EU polices, as EU criminal law has also been affected by the financial crisis.

The EU's area of freedom, security and justice is an area that has had to respond to this question more urgently than perhaps any other EU policy area. Not only is the AFSJ still the fastest expanding field in contemporary EU integration, but it is also a very sensitive field, dealing with the most delicate legal issues such as the fight against crime, security, fundamental rights of protection, and judicial cooperation. The Stockholm Programme, which entered into force in conjunction with the Lisbon Treaty, is already coming to an end in 2014. The transnational Protocol No. 10 is likewise coming to an end and some Member States like the UK have to decide on their commitment to the Union and to criminal law (The UK's semi-permanent opt-out under Protocol 36 and hence the uncertainty are also coming to an end). This would indicate the beginning of something new: a novel era for AFSJ law.

This is certainly the hope of the Commission, which has set out its view in two communications: one dealing concretely with justice and home affairs and the other indirectly so in terms of the rule of law, which is of importance for the AFSJ.[2] Thus, for the first time, the AFSJ and the new multi-annual programme has been placed in the wider context of the future of Europe. 2020 is the EU's vision when all will get well. What then would not be more suitable than including the AFSJ in this schedule?

This brief contribution will offer some reflections on the future of AFSJ law and what the author considers to be the main challenges for EU governance in this area by offering eight key points for further reference in the future. This article will focus on criminal law but also underline the importance of a holistic understanding of the AFSJ as a whole – not isolated but related to the EU acquis in its entirety while still being characterized by the core of its sensitive subject matter of criminal law and human rights protection.

I. Background

In December 2009, the Stockholm Programme was adopted in tandem with the entry into force of the Lisbon Treaty. Hence, it was adopted at a sensitive constitutional moment for EU integration, when the famous pillar structure of the EU was abolished and when the Court of Justice gained jurisdiction in the thorny legal area of crime, security borders, and the fight against terrorism. While the founding AFSJ council Programme, Tampere concluded in 1999 was groundbreaking in the sense that it adopted mutual recognition to the AFSJ (then under the former third pillar), Stockholm was more challenging in elaborating on the new legislative powers as granted by the Lisbon Treaty. Yet perhaps Tampere has been the most important document for the development of the AFSJ law ever, as it extended the mutual recognition template, as traditionally applied within the internal market, to the criminal law cooperation area. While mutual recognition within the AFSJ has been much criticized for its overemphasis on law enforcement and little focus on procedural safeguards, it has had a remarkable effect on the "EU" indirectly harmonizing national criminal law and criminal procedure.

According to Art. 68 TFEU, the European Council "shall define the strategic guidelines for legislative and operational planning;" part of this planning involves the drawing up of a multi-annual agenda of points to be achieved in the AFSJ.

This is well underway now. The European Council in its 27–28 June 2013 conclusions mandated the future Presidencies to start discussions on new strategic guidelines in the area of freedom, security and justice with a view to its June 2014 meeting. The intention is to agree on the new Post-Stockholm Programme (2015–2020) at the European Council on 26–27 June 2014. The new programme will be formally adopted under the Italian Council Presidency (July–December 2014) and may be called the "Rome Programme."[3] With this contextual background in mind, I will set out my main concerns and suggestions for the future AFSJ programme in the following.

II. The New AFSJ Multi-Annual Programme

The underlying tone of the Commission's communication on the EU Justice and Home affairs Agenda for 2020 is that, in the 15 years that have passed since the Treaty of Maastricht and the complex pillar structure that previously marked EU criminal law, this area is finally on track as being intensively related to other EU policies. It has just taken a bit longer. A very recent Eurobarometer survey, "Justice in the EU" (November 2013), offers an interesting foray into the empirical reality of AFSJ culture in EU legal practice. The basic message of this survey is that the construction of the AFSJ has come a long way but is still far from its completion and, although fairly positive towards the EU enterprise, that there is still room for improvement when it comes to the efficiency of the judiciary.[4] Whilst the evaluation seems to confirm the common stereotypes – that Southern European countries distrust their judiciaries while the Nordic countries, Germany, the Netherlands, the UK, and Belgium are more positive towards their judicial systems – the results could, of course, also reflect the national cultures as to how the questionnaires were filled in.

In the following, I will set out eight key points that, in my view, are of crucial importance for the development of the AFSJ in the future Rome programme (if that is to be the name). Therefore, this reflection should be seen as a plea for the EU legislator and the judiciary to focus on certain central aspects.

III. Eight Key Points of Reference for the Future Regarding Criminal Law and the Drafting of a New Multi-Annual Programme

1. The rule of law and the AFSJ

It seems to be a tactical move on the part of the Commission to issue a communication on the rule of law in conjunction with its Europe 2020 communication for the AFSJ.[5] As rightly observed by the Commission, the rule of law is the backbone of any democracy and all Union activity. The Commission points out that where Member State mechanisms to secure the rule of law cease to operate effectively this endangers the functioning of the EU's need to protect this principle as a common value of the Union. It could be said that the rule of law encompassing the broader notion of "justice" is the basic constitutional principle on which other EU principles are based. The rule of law really is, therefore, the backbone upon which to base AFSJ cooperation. In addition, the rule of law is connected to the principle of legality in criminal law and to the principle of conferred powers in EU law. The EU needs to be firm on its commitment thereto, as it is so closely related to the protection of human rights and the kind of criminal law that will emerge in 2020.

2. Holistic view: How different is the AFSJ from the rest of the EU acquis?

There is a constant need at the EU level to reconcile the complexity of EU constitutional law in general with the peculiarities of criminal law. As the Commission stipulates in its communication mentioned above,[6] there are no rights without effective remedies, and it is important to highlight the role of Art. 47 Charter on Fundamental Rights, which codifies these rights in the Treaty together with Art. 19 TFEU. To achieve a smooth operation of the enforcement system, the Commission proposes a holistic view of the consumer law acquis as a fundamental part of the AFSJ, which integrates civil law cooperation, criminal law cooperation, security and border control. In particular, the digital market and E-justice directives are of importance here, touching as they do on financial crime legislation and the question of trust in the market. Hence, the realization of an enforcement system of the Charter and effective judicial protection should constitute the starting point for any successful cooperation in the AFSJ. As Peers points out in his recent analysis of the new multi-annual programme, while there are frequent references to the Charter and human rights protection, there is not much discussion as to its enforcement.[7] This is an important point, as the enforcement of the Charter and the boundaries of Art. 51 clearly have important implications for the scope of fundamental rights protection vis-à-vis Member State autonomy in this area.

The point is that the AFSJ is not to be seen in isolation from the rest of the EU acquis but should be viewed holistically as a whole in the EU without denying the special features of AFSJ law. Criminal law, in particular, offers a delicate test case, dealing as it does with very sensitive issues of human rights protection and the deprivation of freedom as well as security and moral-philosophical issues.

3. Mutual recognition: Mutual trust is the bedrock upon which EU justice policy should be built[8]

The creation of trust is long-term fundamental construction work for the EU. Much of the judicial cooperation in this area is based on the principle of mutual recognition. The difficulty in this area is that the notion of trust has been a difficult parameter to monitor and initially was pushed in favor of justifying increased EU action and the adoption of instruments like the European Arrest Warrant in early cases such as Advocaten voor de Wereld.[9] In this case, the Court of Justice insisted that the EU judicial area for criminal law cooperation had sufficient mutual trust in order to justify the application of mutual recognition in this area. But a lot of water has passed under the bridge since then. In its recent communication, the Commission states that people are increasingly crossing borders and that they are increasingly frustrated with the cumbersome procedures. Interestingly, the Commission links this to the economic crisis and points out that, as a result, border crossing has affected the efficiency and capacity of some national legal systems and that this undermines trust. More trust is needed.

Therefore, in its communication the Commission sets out to focus on three key words: consolidate, codify, and complement. With this approach, the Commission means that it will focus on the need to uphold fundamental rights, meaning ensuring effective remedies and improving judicial training. Specifically, it emphasizes the need for digitalization as that facilitates access to justice. With codification, the Commission means that the need to bring the legislation enacted so far with regard to due process rights into one instrument would make it more accessible. Finally and of utmost interest, with "complement" the Commission means that the EU should develop a common sense of justice linked to the broader question of values.

This neatly brings us to the fourth key point of this paper, Europe's justice deficit, namely that of border control and the new role of the criminal law. Accordingly, this is an area in which the question of values is put to the test.

4. Border crisis and relationship with criminal law and effectiveness

While this analysis is confined to the impact of the AFSJ developments in criminal law, it should not be denied that many of the key future challenges concern not only criminal law but also asylum issues, security, and border control. The migration crisis has hardly escaped anyone. At present it seems a little unclear how there can be a common European solidarity here when not more is being done at the political level. Moreover, from the perspective of criminal law, migration law is an interesting example of the application of criminal law in the new area. Increasingly often, the EU is now invoking criminal law sanctions as a preventive measure.

For example, in the *El Dridi* judgment,[10] the principle of effectiveness (as developed in EU criminal law) was relied upon by the European Court of Justice to define the competence and margin of discretion Member States have concerning the coercive measures that could be implemented in the context of the procedure for the return of illegally staying third-country nationals.[11] Here, the effectiveness principle was employed as a way of restricting competences in the sense that the Member State may not prevent the achievement of the objectives of the Returns Directive,[12] specifically as regards the implementation of an efficient policy of removal and repatriation of illegally staying third-country nationals.[13] Thus, there are good reasons to believe that the effectiveness principle will continue to play an important role in this area and help shape the constitutional contours of an AFSJ.[14]

5. EU regulation of cybercrime and data protection

Needless to say, this area is set to offer challenges in the future. The recent spying scandals and the transatlantic dimension of EU law in this area confirm the close relationship between the development of EU policies and politics. An example of a delicate measure in this area is the "European terrorist finance tracking system."[15] The proposal specifically concerns EU-US cooperation and the collection of data in the fight against terrorism and its financing. It illustrates the difficulties that the EU faces with regard to the adequate protection of data in the security context. Although cybercrime is the latest security buzzword, the need to fight it has been around since the advent of the Internet, and counter-action has been taking shape over the past ten years. During this period, the EU has been making significant efforts to develop a framework for dealing with cybersecurity in the EU area.[16] It has therefore drawn up a proposal for a directive to tackle this threat; this proposal is closely linked to the EU's fight against organized crime[17] and is based on Art. 83(1) TFEU, which covers computer crime in the broad sense.[18] The recently agreed upon Cyber Crime Directive is a legal guinea pig in this respect as regards how to reconcile an adequately high level of fundamental rights protection with the EU's insistence on and objective of achieving internal security.[19] In any case, perhaps the recent judgment in *digital rights*, confirms a change of attitude by the Court of Justice as regards how far EU law can go in the name of 'effectiveness'. [20] The Directive under scrutiny authorized the gathering of data and far reaching surveillance

mechanisms in order to ensure the effective fight against crime. The Court annulled the Directive on the grounds of breach of proportionality as it held that the Directive had a too sweeping generality and therefore breached, inter alia, the basic right of data protection as set out in the Charter of Fundamental Rights Article 8.

6. Fundamental rights and the Charter

The importance of the Charter for the future of EU criminal law cannot be underestimated and hence it has been touched upon throughout this brief reflection. As Peers points out in his recent analysis of the post-Stockholm agenda, any reference to ensuring the correct implementation of EU legislation and rhetorical commitments to the Charter mean nothing without the Commission committing itself to bringing about more infringement actions in such cases. In respect of due process rights, Art. 49 of the Charter provides a requirement of legality and proportionality in a more extensive way than the ECHR. Also, Art. 47 of the Charter guarantees the right to an effective remedy, as noted above, while Arts. 48-49 stipulate the presumption of innocence and the right of defense.[21] The latter provision also makes clear that the severity of penalties may not be disproportionate to the criminal offence. It is therefore likely that the binding status of the Charter will both be of significant symbolic importance and have a substantive impact on criminal law. The future will show how far-reaching the Charter is in light of the limitations set by Art. 51 Charter and it insistence on an implementation measure to trigger its application in the Member States.[22] In any case, it always applies to the EU institutions in all their activities and that is very important. Several important instruments have recently been adopted in this area such as the Directive on the Right of Access to Lawyer.[23]

7. Differentiation: the way forward?

Perhaps the most complex issue for the future, not dealt with by the Commission in its communication on Europe 2020 and the AFSJ, is that of the flexibility provisions.[24] As is well known, the UK, Ireland, and Denmark have negotiated a unique approach to the AFSJ project. This poses challenges not only for those trying to analyze the current state of play but also for national courts as well as the Court of Justice when applying EU constitutional principles. These Member States have the opportunity to opt out of criminal law cooperation provisions as provided for by the Lisbon Treaty and Protocols Number 21 and 22.[25] They can later opt in under the conditions set out in the protocol. In addition, Transitional Protocol No 36 contains specific rules that apply only to the UK and in which the UK must decide by 2014 whether it wishes to participate in remaining third pillar measures at all and whether it accepts the jurisdiction of the Court in this area.[26] The consequence of any opt-out (not participating in a measure) is that the Court of Justice will not have jurisdiction to monitor it and, furthermore (obviously), that the Member State is question is not participating. An opt-out also applies to any international agreement concluded by the Union in relation to the cooperation in question. In other words, an opt-out has serious consequences for the EU in general. Moreover, according to Protocol nr 22, Denmark has opted out from the AFSJ venture and participates in Schengen-related measures and pre-Lisbon third pillar instruments on the basis of international law as before; they continue to be binding and applicable to Denmark as previously, even if these acts are amended. It could be the case, however, that Denmark notifies the other Member States that it wishes to join the EU criminal law "project."

Clearly, this is bound to be a political decision and will be the cause of further complexity in the legal discussion on the AFSJ. Future case law must clarify what this tells us with regard to the scope of the Charter. The opt-out area and the concept of a multi-speed Europe is a testing ground for the AFSJ and the scope and function of the traditional EU constitutional principles.

8. External dimension of the AFSJ and growing importance of agencies

While the AFSJ sphere is becoming increasingly securitized, with an increasing mixing and mingling of the internal and external agenda, the number of actors in the AFSJ scene is increasing. The Commission has issued yet another communication "An open and secure Europe: making it happen," which follows the path set by the Stockholm programme and stresses the increasing importance of the EU's internal agenda.[27] As the Commission puts it: "steps taken to ensure freedom, security and justice in Europe are also influenced by events and developments outside the EU." In other words, the external agenda shapes the internal agenda here.

In the context of Europe 2020, the global impact of the AFSJ has mostly been linked to consumer concerns and the digital agenda. As noted above, however, the digital agenda touches upon difficult issues of the balance between "fundamental rights" and the growing international surveillance trend. The external dimension to AFSJ law and EU criminal law is, however, of growing importance and closely linked to the transatlantic endeavours to fight terrorism and cybercrime. The growing role of agencies such as Eurojust and Europol are increasingly important agents in the AFSJ machinery, and

their role raises issues of accountability, e.g., how to hold these agencies accountable in the absence of any concrete guidelines. The letter issued by the Director General of Justice and Home Affairs Council of the European Union is an interesting read in this regard.[28] Importantly, the letter stresses the potential of these agencies in contributing to the creation of a common culture in AFSJ law.[29]

IV. Within which Parameters Should the AFSJ Navigate? – Final Remarks

The future Rome programme (if that will be the name) is by no means an end to the complexities faced by the EU in the AFSJ but instead the beginning of an even more perplexing era. It is still a safe bet that the future of EU criminal law and AFSJ law more broadly depends on the EU's ability to uphold and strengthen the rule of law. Instead of going in circles, the justice agenda should now lead the way towards the creation of a genuine justice area in criminal law (and other areas). Therefore, there is no need to cross the Rubicon (to borrow an expression in the AFSJ context from the House of Lords in the Dabas[30] case) as was done a long time ago and, most recently, in Rome 1957. The Rome programme should therefore be embraced as an opportunity to navigate back to basics through different means: a strong commitment to the rule of law and human rights protection as the guiding dictum in all AFSJ law. The future of EU criminal law, therefore, will largely depend not only on the politics within the EU's institutions but also on the level of sophistication among all those who practice or research the area as well as their capacity to influence the debate on how to shape the face of criminal law in 2020.

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1 COM (2014) 144 final, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union.
2 Ibid; see for an excellent analysis S. Peers, 'The next multi-year EU Justice and Home Affairs programme. Views of the Commission and the Member States', available at statewatch.org.
3 For an analysis, see S. Peers, op. cit. (n. 2). See also letters from Commissioners C. Malmström and V. Reading available at http://www.statewatch.org/news/2014/mar/eu-com-post-stockholm.pdf.
4 http://ec.europa.eu/public_opinion/flash/fl_385_en.pdf.
5 COM (2014) 158 final, A new EU framework to strengthen the Rule of Law.
6 COM (2014) 144 final.
7 S. Peers, op. cit. (n. 2).
8 COM (2014) 144 final.
9 *Advocaten voor de Wereld* [2007] ECR I-3633.
10 Case-C-61/11, *El Dridi*, judgment of 28 April 2011 n.y.r. See also Case C-430/11 *Sagor,* judgment of 6 December 2012.
11 On the interpretation of this Directive, see D. Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation' in K. Zwaan (ed.) *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers: Nijmegen), pp. 7-24; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. L 348, 24.12.2008.
12 Directive 2008/115/EC, O.J. L 348, 24.12.2008, p. 98.
13 Case C-61/11, *El Dridi* judgment of 28 April 2011, n.y.r., para 41-43.
14 On the role of effectiveness in criminal law, see E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012).
15 COM (2011) 429 final, A European Terrorist Finance Tracking System: available options.
16 L. Buono, 'Gearing up the Fight against Cyber Crime in the EU: A New Set of Rules and the Establishment of the European Cyber Crime Centre' (2012), *NJECL*
17 Proposal for a directive on attacks against information systems, COM (210) 517.
18 Proposal for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.
19 Directive 2013/40/EU, L 218/8 directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. See also COM(2010) 517, Proposal for a Cybercrime Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.
20 See case note E. Herlin-Karnell (2009), C-301/06, CML Rev and Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, Judgment of 8 April 2014.
21 In her recent opinion delivered on 18 October in Radu C-396/11 (para. 103), AG Sharpston, discusses the boundaries of Art. 49 of the Charter by stipulating that it would be interesting to explore the boundaries of these provisions within the context of Art. 3 ECHR, where the ECtHR has held that a grossly disproportionate sentence could amount to ill-treatment contrary to Art. 3 ECHR. The Court did not elaborate on this issue.
22 See Case C-617/10 *Åkerberg Fransson,* Judgment of 26 February 2013, n.y.r., for a liberal interpretation of the scope of the Charter.
23 Directive 2013/48/EU.
24 See E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in D. Acosta and C. Murphy, (eds.), *Europe's Area of Freedom, Security and Justice* (Hart Publishing 2014).
25 See, e.g., S. Peers, *EU Justice and Home Affairs* (Oxford, Oxford University Press, 2011); A. Hinarejos, J. Spencer and S. Peers, Opting out of criminal law: What is actually involved? Centre for European law Cambridge working paper 2012/1.
26 See J. Piris, *The Lisbon Treaty, A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 199-200; P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford, Oxford University Press, 2010) 341; E. Herlin-Karnell, op. cit. (n. 24).
27 COM (2014) 154 final, An open and secure Europe: making it happen
28 http://www.statewatch.org/news/2014/mar/eu-council-jha-agencies-post-stockholm-7313-14.pdf.
29 Ibid.
30 House of Lords in *Dabas (Appellant) v High Court of Justice, Madrid (Respondent)* (Criminal Appeal from Her Majesty's High Court of Justice) [2007] UKHL 6, 28 February 2007.

The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings

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On 22 October 2013, the European Parliament and the Council adopted Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant (EAW) proceedings. The Directive also addresses the right for suspects and accused persons in criminal proceedings, and for persons subject to EAW proceedings, to have a third party informed upon deprivation of liberty and the right to communicate with third persons and with consular authorities while deprived of liberty.[1] The part of the Directive regarding the right of access to a lawyer is the core measure of the roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings, which was adopted by the Council in 2009. The Directive, which is inspired to a large extent by the *Salduz* case law, is a true milestone that has been welcomed by all stakeholders.

This article describes the genesis of the Directive and provides a description of some of its main elements. The difficulties that some Member States had with the proposal of the Commission are addressed, contributions by the six-monthly rotating Presidency of the Council are described, and the important role played by the European Parliament during the co-decision process leading to the final text of the Directive is highlighted.

I. Genesis of the Directive

1. Background

In 2004, the European Commission submitted a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.[2] This proposal aimed to introduce a comprehensive set of common minimum standards and so address the imbalance between, on the one hand, the substantial progress that had been made in the European Union with a view to combating crime and, on the other hand, the procedural rights of suspects and accused persons in criminal proceedings. However, since the Council was unable to reach unanimous agreement, as required under the rules of the Amsterdam Treaty, work on the proposal was abandoned.

Work on the issue of procedural rights was relaunched in 2009 when, on the eve of the entry into force of the Lisbon Treaty, the Council adopted a roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.[3] In contrast to the 2004 Commission proposal, which envisaged creating a comprehensive set of procedural rights, the roadmap is based on the idea that action should be taken following a step-by-step approach, one area at a time. Therefore, the roadmap contains a non-exhaustive list of five measures – A to E – in respect of which the Commission is invited to submit proposals. Since its adoption in 2009, the roadmap constitutes the basis for the work in the European Union on strengthening the procedural rights of suspects and accused persons in criminal proceedings; the roadmap and its genesis were described in more detail in an earlier article published in this journal.[4]

On the basis of the roadmap, the European Parliament and the Council adopted, in 2010, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[5] ("measure A"), and, in 2012, Directive 2012/13/EU on the right to information in criminal proceedings[6] ("measure B").

2. The Salduz judgment

According to the roadmap, measure C was meant to deal with "legal advice and legal aid." The short explanation in the roadmap provided that "the right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice."

The right to legal advice, and the accompanying right to legal aid, is often considered to be the most important procedural right of suspects and accused persons in criminal proceedings. Differences of opinion between the Member States regarding the rules to be established in this domain were the main reason why the Member States could not reach agreement on the

comprehensive Commission proposal of 2004. This is understandable, since the systems of the Member States regarding legal advice are very different, and anything in the European Union that costs money, including the right to legal aid, is always very sensitive. For these reasons – the importance of the rights concerned and the difficulties in reaching agreement in the past – the proposal by the Commission on measure C was awaited with great interest.

There was also considerable interest in the proposal because it would provide an interpretation by the Commission of the judgment of the European Court of Human Rights (ECtHR) in the *Salduz* case.[7] In this judgment of November 2008, the Strasbourg Court ruled that "in order for the right to a fair trial to remain sufficiently practical and effective, Art. 6(1) [of the European Convention on Human Rights (ECHR)] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right." According to the ECtHR, "even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Art. 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

This ground-breaking judgment, which has been confirmed in many subsequent judgments, forced various Member States to amend their national law and practices, as they did not provide access to a lawyer from the first interrogation by the police. For example, in France, the system of *garde à vue*, according to which suspects could be deprived of liberty for two periods of 24 hours with a very limited right of access to a lawyer (only a 30-minute consultation), was deemed not to be in line with the *Salduz* case law. A similar situation arose in Scotland, where the possibility to keep a suspect in custody for six hours without the right of access to a lawyer was considered to be in clear contravention of *Salduz*.

It was not always clear, however, which precise amendments the Member States would need to make in their national legal systems because of *Salduz*, since there was no unequivocal interpretation of this judgment. In fact, the judgment raised various questions: Should access to a lawyer be provided only when the suspect is taken into police custody – as was the case in *Salduz* – or should it also be provided when the suspect is at large but is invited to come to the police station in order to answer some questions? Which reasons qualify as "compelling reasons" that would justify a derogation from the right of access to a lawyer? At which other moments during the criminal proceedings would the suspect have the right of access to a lawyer, and what would the right of access to a lawyer actually entail?

3. The Commission proposal

On 8 June 2011, the Commission presented its proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right to communicate upon arrest.[8] In this proposal, the Commission decided to combine one aspect of measure C (legal advice, "C1") with measure D, concerning communication with relatives, employers, and consular authorities. The second aspect of measure C, however, concerning legal aid ("C2"), was not addressed in the proposal.

The Commission was, of course, perfectly free to design its proposal in this manner, as the roadmap itself states that the order of the rights indicated therein is *indicative* and that the explanations provided in the roadmap merely serve to give an indication of the proposed actions. More importantly, the roadmap contains only an *invitation* to the Commission to present proposals; it does not affect the basic right of initiative of the Commission, this institution remaining entirely free to decide not only whether or not to present a proposal but also on the contents of its proposals.[9]

Various Member States criticised the fact that the right to legal aid had not been addressed in the proposal, observing that this right is intrinsically linked to the right to legal advice. The Commission replied that this split had been carried out in order to speed up the process: since the issue of legal aid is very complex and the information available on this issue was very patchy, it would have required much more time to present the proposal if legal aid had been included. According to the Commission, this would not have been appropriate, given the need for action on the substantive right arising from the *Salduz* line of jurisprudence. In the view of the Commission, dealing with the substantive right alone would also put the focus on the complex issue of the interpretation of the *Salduz* case law.

4. Negotiations under the Polish Presidency – Criticism of the proposal by Member States

In the Council, the negotiations on the proposal started under the Polish Presidency in July 2011. Soon the acronym "A2L" was used in order to identify the file, although one also continued to make reference to "measure C" (although, strictly speaking, it was now measure "C1 + D").

During the first meetings, various Member States complained that the Commission proposal was too ambitious; it was stressed that the proposal went far beyond the requirements of the ECHR, as interpreted in the case law of the ECtHR.[10]

In a unique move on the eve of the meeting of the Justice and Home Affairs ("JHA") Council in October 2011, five Member States (Belgium, France, Ireland, the Netherlands, and the United Kingdom) submitted a letter at ministerial level in which they voiced their misgivings regarding the proposal.[11] During the meeting itself, the opposition was led by Mr. Kenneth Clarke, the UK Secretary of Justice, who forcefully but eloquently criticized the proposal. Clarke denounced the lack of balance in the proposal between the interests of suspects and accused persons, on the one hand, and the interests of the State in prosecuting crime, on the other. Clarke signalled that the latter interests were often equivalent to the interests of victims of crime, which the Union should also protect.

Clarke indicated that the ambitious character of the Commission proposal text had led the UK to decide not to make use of the possibility foreseen in Art. 3 of Protocol 21 to the Lisbon Treaty to opt-in to the proposal for a Directive. His Irish colleague, Mr. Alan Shatter, announced the same decision for his country. This meant that both Member States, who had opted-in to measures A and B from the outset of the negotiations on these Directives, would remain outside the application of the Directive on measure C, unless they decided to opt-in at a later stage after adoption of the Directive. In order to maintain the possibility of such an opting-in at a later stage, both Member States remained closely associated with the negotiations in the Council on the proposal for measure C, in particular during the first year of the negotiations (until the general approach was reached).

The Polish Presidency, eager to achieve concrete results during its term in office, made remarkable efforts in autumn 2011 in order to reach agreement within the Council on the text of the Directive. This did not appear possible, however, mainly because the French government indicated that it did not want any sensitive decision to be taken in the months preceding the 2012 French Presidential elections, which were held in spring 2012.[12] As a result, only a progress report was presented at the meeting of the JHA Council in December 2011.[13]

5. Negotiations under Danish Presidency – General approach

The Danish Presidency took over in January 2012. Wanting to make a fresh start on the file, it presented a revised text[14] and launched a questionnaire[15] in order to better understand the particularities in the various Member States. The replies to the questionnaire[16] also contributed to promoting mutual understanding among the Member States concerning each other's positions.

The Danish Presidency tried to find a text that would be acceptable to all Member States, including the UK and Ireland. This was not an easy task, as the positions of the 27 Member States differed considerably, but the Danes made tremendous efforts and found solutions for most problems. The efforts of the Danish Presidency were remarkable, since Denmark did not have an immediate "personal" interest in the file – in accordance with Art. 1 of Protocol 22 to the Lisbon Treaty, this Member State does not participate at all in measures in the area of freedom, security and justice.

In June 2012, the text of the Directive, as it resulted from the discussions in the Working Party and Coreper, was submitted to the JHA Council in Luxembourg with a view to reaching a general approach (the provisional agreement in the Council that forms the basis for negotiations with the European Parliament). In the days before the Council meeting, although it became clear that some Member States – such as Portugal and Italy – would most likely not subscribe to the text, it seemed that a qualified majority of Member States would be able to agree to the text and thus allow a general approach to be reached, in particular since Ms. Christiane Taubira, the new French Minister of Justice, had indicated that the new French government would take a flexible position on the text.

This situation changed, however, on the eve of the Council meeting, when Mr. Alberto Ruiz-Gallardón, the Spanish Minister for Justice, withdrew Spain's support for the text, claiming that the standards set out in the Directive would not be high enough. During a tense Council meeting, the Danish Presidency, with the help of the Commission, tried to win the support of the opposing Member States to agree to the text as a basis for negotiations with the European Parliament. After long discussions, Spain and Italy ultimately did support the text, since they too felt that the time was ripe to start negotiations with the European Parliament. In a joint declaration[17] with the Commission, however, they made it clear that the current text did not meet their expectations as regards the protection of fundamental rights and procedural guarantees, and they requested the Presidency to take full account of their concerns during the upcoming negotiations with the European Parliament. While this declaration paved the way for a general approach in the Council, it immediately triggered concerns by some Member States, which were happy with the text as it was.[18]

On a more positive note, the UK and Irish Ministers stated that, if the text were more or less to remain, they would most likely opt-in to the Directive. This was a very different tone from the one that was voiced in the meeting of the JHA Coun-

cil in October 2011. All in all, if there was one thing that emerged from this Council meeting, it was that the Member States were very divided on how the Directive should "look." This division among the Member States did not constitute a very favourable position for the Presidency of the Council to start the negotiations with the European Parliament in the context of the co-decision process (ordinary legislative procedure of Art. 294 TFEU).

6. Negotiations with the European Parliament and in the Council under the Cyprus and Irish Presidencies

The negotiations between the Council and the European Parliament started in July 2012, after the LIBE Committee of the European Parliament had adopted its orientation vote on the basis of a report presented by rapporteur Oana Antonescu (PPE, Romania).[19] In its vote, the LIBE Committee generally kept very close to the original proposal of the Commission while adopting amendments steering the text in a "pro-rights" direction on some points, e.g., the issue of confidentiality. As a result, at the beginning of the negotiations, the positions of the Council and the European Parliament were very far apart.

In the first phase of the negotiations, under the Cyprus Presidency, both co-legislators notably tried to explain their own positions and to understand the positions of the other party. With the help of the Commission, attempts were made to find compromise solutions.[20] While substantial progress was made under the Cyprus Presidency, it appeared impossible to reach an agreement during its term in office, since some controversial issues – such as derogations, confidentiality, and the EAW – were still outstanding.

The Irish Presidency installed two very skilled negotiators to "crack the last nuts." Clever drafting was done,[21] and subtle pressure was exercised on some Member States in order to persuade them to accept solutions that were acceptable to most other Member States. On the side of the European Parliament, the rapporteur managed to steer a middle course between the pragmatism needed to reach agreement and the pressure exercised upon her by all kinds of lobby groups (ECBA, CCBE, Justicia, Open Justice, Fair Trials International, Amnesty International, etc).

On 28 May 2013, the negotiating parties reached provisional agreement on a final compromise text on the draft Directive. On 4 June 2013, Coreper approved the final compromise text and authorised its President to send the habitual letter to the European Parliament,[22] stating that, should the European Parliament adopt its position at first reading, in accordance with Art. 294(3) TFEU, in the exact form as set out in the final compromise text, the Council would, in accordance with Art. 94(4) TFEU, approve the Parliament's position, and the act shall thus be adopted in the wording corresponding to the Parliament's position.

Subsequent to an examination from a jurist's-linguist's point of view, the plenary session of the European Parliament approved the text of the Directive on 10 September 2013, and the Council did the same on 6 October 2013. After signature on 23 October 2013, the Directive was published in the Official Journal on 6 November 2013.[23] According to its Art. 15, Member States are obliged to transpose the Directive into their national legal systems by 27 November 2016.

In the *Official Journal*, the Directive takes up 11.5 pages, of which two-thirds (7.5 pages) consist of 59 recitals accompanying the mere 18 articles. These figures – few articles, many recitals – indicate that it was not easy for the legislators to reach agreement on the Directive; when it is difficult to reach agreement on the operative part of a text, solutions are often sought in the recitals.

II. Description of the Directive

The Directive can be described along four lines of difficulties that appeared during the negotiations between the Member States, and between the Council and the European Parliament. They concern the difficulty relating to the interpretation of the concept of the right of access to a lawyer (1), the difficulty relating to the fact that, on several points, the Directive has a far-reaching effect on the national legal systems (2), the difficulty relating to the safeguards that should apply regarding derogations and confidentiality (3), and the difficulty relating to the changes in respect of the EAW system (4).

1. Difficulty relating to the interpretation of the concept of the right of access to a lawyer

a) Opportunity and guarantee approach

The legal systems of the Member States as they stood at the time of the discussions in the Council varied considerably as regards the idea of what is meant by the "right of access to a lawyer" and, more importantly, as regards the practical implications of this right. In most Member States, including Germany, Austria, and Poland, the right of access to a lawyer refers to the *opportunity* for a suspect or accused person to be assisted by a lawyer at specific moments during the criminal proceedings (before or during questioning by the police or by other law enforcement or judicial authorities, during certain investigative acts, during the trial, etc.). In these Mem-

ber States, when a suspect or accused person has the right of access to a lawyer, this basically means that the person is entitled to have a lawyer and that the State will not prevent this lawyer from being present at the said moments during the criminal proceedings. The issue of the funding of the lawyer in these Member States is independent from the opportunity to be assisted by a lawyer; while a suspect or accused person may have the right of access to a lawyer, he may not have the possibility to effectively exercise this right, as there might be no legal aid available if the person concerned doesn't have the means to pay the lawyer himself.

In some other Member States, however, such as Belgium, France, and the United Kingdom, the right of access to a lawyer is intrinsically linked to the funding of the lawyer. When a suspect or accused person has the right of access to a lawyer, the system of the Member State ensures that there is legal aid available if the person concerned cannot pay the lawyer himself. The right of access to a lawyer thus *guarantees* that the suspect or accused person is assisted by a lawyer.

The difference between the systems of these two sets of Member States meant that their representatives had different approaches during the negotiations in the Council. The Member States with the "opportunity approach" could be relatively generous in allowing for a broad scope regarding the right of access to a lawyer, since such a right would not automatically imply costs for the Member States concerned. The Member States with the "guarantee approach," however, were vigilant in keeping the scope of the right of access to a lawyer narrow, since each broadening of this right would imply extra costs to their legal aid systems. Understandably, it was also the latter set of Member States which had the greatest difficulties with the fact that the Commission proposal, contrary to the indications in the Roadmap, did not address the issue of legal aid.[24]

b) Solution: a provision on the level of obligations

The difference in approach between the two sets of Member States characterised the discussions in the Council for a long time, most notably under the Polish and Danish Presidencies. The latter, however, managed to find a compromise solution between the two positions by inserting a provision in the text (Art. 3.4) regarding the level of obligations that the Member States would have.

It was decided to differentiate between two situations, namely when the suspect or accused person is at large (not deprived of liberty) and when this person is deprived of liberty. If the suspect or accused person is not deprived of liberty, e.g., when he is invited by means of a letter to present himself at a police station to answer some questions, the Member States must endeavour to make general information available in order to facilitate the obtaining of a lawyer by the suspect or accused person. Such information can, for instance, be made available on a website or by means of a leaflet that is available at police stations. However, it is clarified in recital 27 that the Member States do not need to take active steps to ensure that a suspect or accused person who is not deprived of liberty be assisted by a lawyer if he has not made arrangements himself to be assisted by a lawyer. The suspect or accused person concerned should be able to freely contact, consult with, and be assisted by a lawyer. This low level of obligations for situations in which the person concerned is not deprived of liberty is clearly inspired by the *opportunity* approach.

If suspects or accused persons are deprived of liberty, e.g., when they have been arrested and brought to the police station, the level of obligations resting on the Member States is higher. In such a situation, in fact, the Member States must make the necessary arrangements to ensure that suspects or accused persons are in a position to effectively exercise their right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. It is clarified in recital 28 that such arrangements could imply, *inter alia*, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose; such arrangements could include those on legal aid if applicable. This higher level of obligations for situations in which the person concerned is deprived of liberty is clearly inspired by the *guarantee* approach.

It must be underlined that the concept of the right of access to a lawyer as such remains the same throughout the Directive; its nature does not depend on whether the suspect or accused person is deprived of liberty or not. However, the practical consequences of the right are different in the two situations. One could say that the basic nature of the concept of the right of access to a lawyer is "opportunistic," in that the suspect or accused person is entitled to have a lawyer and that the State will not prevent the lawyer from being present at specific moments during the criminal proceedings, but that it comes with more "guarantee" obligations for Member States when the suspect or accused person is deprived of liberty.

2. Difficulty of reaching agreement on the proposal because of potential far-reaching effects for the national legal systems

a) Minor offences

The issue of minor offences was discussed at length during the negotiations in the Council and during the negotiations with

the European Parliament. In both measures A and B, certain minor offences had been excluded from the scope, since it was felt that Union law should not be concerned with small offences: *de minimis non curat lex*. There was also a policy line behind the exclusion of minor offences, as there is clearly a trade-off between strong defence rights and a (slightly) narrower scope excluding certain minor offences: if minor offences are excluded, it is easier to insist on a set of strong defence rights in relation to more serious offences.

In measures A and B, the minor offences that had been excluded were those offences that are dealt with in the first instance by an authority other than a court having jurisdiction in criminal matters; only when the case comes before such a court, would the Directive concerned apply. This exclusion therefore concerned offences that are dealt with in first instance by a prosecutor, the police, or some administrative authority.

From the beginning of the negotiations on measure C, however, Luxembourg indicated that the exclusion of minor cases as contained in measures A and B would not be sufficient in the context of this new measure, which is more far-reaching and (financially) intrusive. Luxembourg explained that almost all sanctions in its country are imposed by a court, including sanctions for minor traffic offences, such as speeding and parking offences, and sanctions for infringements of municipal regulations, such as mowing the lawn late in the evening. The exclusion as contained in measures A and B, which hinges on the authority imposing the sanction, would therefore be of no use to Luxembourg. In order to be put in the same position as the other Member States, Luxembourg requested that minor offences as qualified under its law also be excluded from the scope of the Directive. Hence, in the general approach, an exclusion was made for "minor offences, in respect of which the law of the Member State provides that deprivation of liberty *cannot* be imposed as a sanction."

Following up on the Luxembourg position, the Netherlands indicated that it wanted to extend the exclusion for minor offences. The Netherlands explained that a number of relatively minor offences in its country are considered to be a criminal offence. These include public drunkenness, employing the emblem of the Red Cross without being entitled to do so, minor offences in municipal regulations, such as nudism in non-designated public spaces, and minor traffic offences, such as speeding, ignoring traffic lights, and tailgating. These offences are nearly always sanctioned by a fine but, as an alternative to a fine, deprivation of liberty can be imposed. Published guidelines for the prosecution service, however, which have the status of "law" in the Netherlands, prescribe that (short periods of) deprivation of liberty should only be requested – and are therefore only likely to be imposed – in exceptional circumstances. Following a request by the Netherlands, in the general approach, the exclusion suggested by Luxembourg was therefore extended to read "minor offences, in respect of which the law of the Member State provides that deprivation of liberty cannot *or shall not* be imposed as a sanction."

While the exclusion requested by Luxembourg was generally felt to be acceptable, several Member States expressed misgivings about the extension of the exclusion for minor offences as proposed by the Netherlands. In the negotiations with the European Parliament, the Presidency also had a hard time defending the Dutch position, since MEPs rightly pointed out that the exclusion as requested by the Netherlands was not watertight: it all depended on a practice in the Netherlands that the prosecution would not request deprivation of liberty to be imposed for certain minor offences.

However, it was not excluded that, at the end of the day, the judge would decide to impose deprivation of liberty (e.g., when a person has committed the same minor offence multiple times). If, in such a situation, the person had not been granted access to a lawyer in the pre-trial phase, he might have made self-incriminating statements without having had access to a lawyer. During a talk with the juris-consult of the European Parliament, who underlined the strength of the position of the co-legislator, the Netherlands also began to appreciate that, although the risk of persons ultimately being deprived of liberty without having had access to a lawyer was low in their jurisdiction, because of the guidelines for the prosecution, the exclusion for minor offences as proposed by them might be applied on a very wide basis in other Member States. As a result, the Netherlands decided to give up its position, and only the Luxembourg exclusion for minor offences was added to the text, see Art. 2.4 under (b).

While, as a result of the Luxembourg request, the exclusion for minor offences was slightly broadened, thus marginally weakening the protection of suspects and accused persons, the provision on minor offences was strengthened on another point. In fact, it had emerged in the course of the discussions that, in certain circumstances, a person who had (allegedly) committed an offence falling under the exclusion for minor offences, as contained in measures A and B, could nevertheless be deprived of liberty. This situation, which could for instance happen in Sweden,[25] was of great concern to the European Parliament, which – understandably – felt that the Directive should always apply to suspects and accused persons who are deprived of liberty. Therefore, a new paragraph was inserted in Art. 2.4, which clearly states that the Directive shall, in any event, fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

b) Questioning

For some Member States, it was difficult to agree to the provisions on questioning of suspects and accused persons, because the new *Salduz*-inspired rules would result in far-reaching consequences for their legal systems. Two of the Member States affected by these rules were France and, to an even greater extent, Belgium.

In France, the system of *garde à vue* allows the police to deprive suspects of their liberty for a maximum of two periods of 24 hours in order to, *inter alia*, question the suspect in the context of the criminal investigation. Suspects used to have a very limited right of access to lawyer when they were placed in *garde à vue* (only a 30-minute consultation with their lawyer was allowed). This changed, however, after the *Salduz* judgment and, notably, after the French legislator adopted a law reforming the system of *garde à vue*.[26] This legislation was scheduled to enter into force on 1 June 2011 but, in a judgment of 15 April 2011, the *Cour de Cassation* ruled that the legislation should enter into force with immediate effect. Under the new law, when suspects are placed in *garde à vue,* they have the right of access to a lawyer at all times during questioning. However, the fact that France just before the start of the negotiations on the proposal for a Directive had enacted a new law, which was not as detailed as the proposal of the Commission, made it difficult for this Member State to show flexibility on the text, since, understandably, it was reluctant to change its law again after such short period of time.

Belgium was the Member State that had the most serious problems with the provisions in respect of allowing a lawyer to be present during questioning of a suspect or accused person. Belgium has a classic inquisitorial system, in which the examining judge leads the criminal investigation. The role of this examining judge, who is considered to be independent and impartial, is to lead the investigation "*à charge et à décharge*" (looking both for incriminating and exculpatory evidence). Both public prosecutor and examining judge have the obligation to ensure the legality of the manner in which evidence is gathered. In principle, the pre-trial stage is of a non-adversarial nature. Therefore, in Belgium, an official interview of a suspect or accused person is normally organised on a non-adversarial basis without the possibility for the suspect or accused person to have access to a lawyer. However, when adversarial questioning is required, the questioning is organised in such a manner that the lawyer can be present.

Under *Salduz* and in the proposal of the Commission, however, no distinction is made between questioning on an adversarial basis, on the one hand, and questioning on a non-adversarial basis, on the other hand. As a rule, a suspect or accused person should always have the right of access to a lawyer prior to and during all questioning by the police or by another law enforcement authority or judicial authority. A large majority of Member States and the European Parliament agreed to this rule, and it has now been set out in Arts. 3.2 under (a) and 3.3 under (a) and (b) of the Directive. Hence, as a result of the Directive, the inquisitorial Belgian system will have some elements of the adversarial common law system, in which defence lawyers "oppose" the prosecution. This fundamental change to its system led Belgium to abstain from voting at the time when the Directive was adopted (all other Member States voted in favour).

Belgium and the other Member States, however, were able to maintain a certain control over the way in which lawyers can participate during questioning. The European Parliament, relying *inter alia* on the judgment of the ECtHR in *Dayanan*,[27] insisted that lawyers should be able to participate *actively* during questioning: they should not just be given a seat in the corner of the room without the right to say anything. The Member States, however, wanted to ensure that lawyers would respect certain rules of conduct during questioning, in order to avoid the risk that the criminal investigation would be jeopardized. A compromise was found by stating, in Art. 3.3 under (b) of the Directive, that suspects or accused persons have the right for their lawyer to participate actively during questioning – they may *inter alia* ask questions, request clarification, and make statements[28] – while clarifying that such participation should be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During the negotiations, the example was given that the procedures could mean that lawyers may only ask questions after the competent authorities had posed their questions.

c) Witnesses becoming suspects

Another difficulty concerned the situation in which a person is questioned as a witness but becomes a suspect during questioning. This situation often occurs in practice: persons who are questioned as a witnesses can start making self-incriminating statements, as a result of which they become suspected of having committed a criminal offence themselves. It is generally held that the police and other law enforcement authorities should not prolong questioning after the change of identity from "witness" to "suspect" has taken place without giving the person concerned the safeguards of a suspect or accused person. It should be noted, however, that it is not always easy to determine the exact moment when the change of identity actually takes place, since it basically concerns a change in the "mind-set" of the interrogators.

The Commission, in a clear reference to the *Brusco* judgment of the ECtHR,[29] proposed that a witness,[30] who is heard by the police or by another enforcement authority in the context of a criminal procedure, should be granted access to a lawyer if, in the course of questioning, he becomes suspected of or accused of having committed a criminal offence. The Commission also proposed that Member States should ensure that any statement made by such a person before he is made aware that he is a suspect or an accused person may not be used against that person.[31]

During the negotiations in the Council, Member States expressed substantial misgivings about the proposals of the Commission, which they felt were intrusive and went beyond the scope of the Directive. As to the latter criticism, it was observed that, in accordance with Art. 2.1, the Directive only applies when persons are *made aware* that they are suspected or accused of having committed a criminal offence. This element, which requires action on the part of the competent authorities, allows the Member States to maintain a certain control over the application of the Directive, and it was therefore understandable that the Member States did not want to give this up as regards witnesses becoming suspects.

A solution was found by stating, in Art. 2.3, that the Directive applies "under the same conditions as provided for in paragraph 1" to witnesses who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons. As a result, Art. 2.3 does not have any real effect in substance, as it basically confirms that the Directive only applies to persons from the time they are made aware – by the competent authorities of a Member State, by official notification, or otherwise – that they are suspected or accused of having committed a criminal offence. Given that the situation in *Brusco* is very common in practice, however, it was felt that an explicit reference to this situation in the Directive would be appropriate.

The added value, in fact, lies in recital 21, according to which, in the course of questioning, a witness becomes a suspect or accused person, either questioning should be suspended immediately or the questioning may be continued, on the condition, however, that the person concerned has been made aware that he is a suspect or accused person and is able to fully exercise the rights provided for in the Directive, in particular the right of access to a lawyer. Moreover, in such a situation, the person should be informed, in accordance with Directive 2012/13/EU, that he has the right of access to a lawyer as well as, *inter alia*, the right to remain silent.

The fact that this "rule" was placed in recital 21 and not in the operative part of the Directive, is part of the final compromise between the Council and the European Parliament. As a consequence of this placement, however, it appears that the rule does not have direct effect.

d) Investigative and other evidence-gathering acts

The issue of the right of access to a lawyer during investigative and other evidence-gathering acts was the subject of a lot of discussion, in particular during the initial negotiations in the Council. The Commission's proposal provided that suspects or accused persons should have the right of access to a lawyer "upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence."[32]

In the Council, it was observed that this text would go so far as to prevent Member States from carrying out routine acts, such as taking fingerprints of suspects or accused persons, without the presence of a lawyer. In the months following the presentation of the proposal, Commissioner Viviane Reding often found herself in a defensive position when she was asked questions about this specific provision, which Member States perceived as an illustration of the lack of balance in the Commission proposal.

In view of these misgivings, some Member States requested the deletion of the entire provision relating to investigative and other evidence-gathering acts, not least because it could give rise to several practical problems: What would be the situation, for instance, when a suspect or accused person has the right of access to a lawyer in respect of an investigative act, such as a house search, but the lawyer concerned does not turn up on time? Do the authorities then have to wait to carry out the house search until the lawyer arrives? The Commission, however, supported by several other Member States, considered that the Directive would not be complete without a provision on the right of access to a lawyer during investigative and other evidence-gathering acts.

The Polish Presidency proposed a clever compromise solution, which was ultimately accepted by the Council and the European Parliament. The solution consisted in establishing a list of investigative and other evidence-gathering acts at which suspects or accused persons should, *as a minimum*, have the right of access to a lawyer. Member States who so wish could then decide to also provide this right in respect of other such acts. The minimum list as finally agreed in Art. 3.3 under (c), which was established taking account of the case law of the ECtHR,[33] comprises the following acts: *identity parades*, at which the suspect or accused person appears among other persons in order to be identified by a victim or witness; *confron-*

tations, where a suspect or accused person is brought together with one or more witnesses or with victims, where there is disagreement between them on important facts or issues; and reconstructions of the scene of a crime in the presence of the suspect or accused person in order to better understand the manner and circumstances under which a crime was committed and to be able to pose specific questions to the suspect or accused person.[34]

In contrast to other relatively routine acts, such as fingerprints, blood samples, DNA tests as well as searches of premises, land, and means of transport, the above-mentioned three investigative or evidence-gathering acts are normally prepared in advance, which should allow lawyers to be present in time.[35] The presence of a lawyer at these acts will have added value by ensuring that they are carried out fairly.

e) Remedies – use of evidence

The other element of the Commission proposal relating to witnesses, namely that (incriminating) statements made by witnesses who become suspects may not be used against them, was very much contested by a group of Member States who also contested the proposal of the Commission on the issue of remedies. The Commission had proposed that statements made by a suspect or accused person or evidence obtained in breach of his right to a lawyer may not be used as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.[36]

While some Member States, could agree to these proposals, as they have strict rules prohibiting any use of illegaly obtained statements or evidence for a conviction in their national laws (e.g., Italy), the opposing Member States felt that the proposals were too intrusive, since, in their opinion, it should be left to the judge in each case to decide whether or not and, if so, to what extent such statements or evidence could be used for a conviction. Sweden, which forcefully led the opposing Member States, repeatedly explained that it wanted "to keep its system," namely the system based on the principle of free submission and assessment of evidence, which would be in the interest of having courts rendering just and materially correct judgments. This crusade paid off because, in the final text of the Directive, Art. 12 on remedies is only a shadow of the corresponding text in the Commission proposal.

In the light of the above, it is hoped that the Member States and the Court of Justice of the European Union will give substantial emphasis to Art. 12.1, according to which Member States should ensure that suspects and accused persons have an *effective* remedy under national law in the event of a breach of the rights under this Directive. This rule is complemented by Art. 12.2, containing the obligation for Member States to ensure that, in the assessment of statements or evidence obtained in breach of the right of access to a lawyer, the rights of the defence and the fairness of the proceedings are respected. Both obligations should be read in the light of recital 50, which reiterates the observation of the ECtHR in the *Salduz* judgment, according to which the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

3. Difficulty of reaching agreement on the proposal because of differing opinions on applicable safeguards regarding derogations to the right of access to a lawyer and the principle of confidentiality

The question of whether the Member States should be allowed to derogate from the right of access to a lawyer and from the principle of confidentiality of communication between the suspect or accused person and his lawyer – and, if so, to what extent – caused a division not only between the Member States but also between the Council, on the one hand, and the European Parliament, on the other.

It was interesting to note that, in the Council, southern European Member States that had in the past suffered from dictatorial or military regimes (Italy, Portugal, Spain) were fiercely opposed to allowing the State to make derogations from the right of access to a lawyer and to the principle of confidentiality. These Member States understandably wanted to avoid the negative experiences of the past, where the rights of individuals were often disrespected, by not allowing the State to make any derogations and therefore, at least on paper, excluding abuse. In essence, these Member States wanted to ensure that no infringements to the rights of individuals could occur. Northern Member States, however, probably having more confidence in the State and its institutions, felt that it should be possible to make derogations in certain well-defined circumstances, e.g., when making a derogation would be essential in order to avoid substantial prejudice to criminal proceedings.

a) Derogations from the right of access to a lawyer

In its proposal, the Commission suggested that Member States should be allowed to derogate from the right of access to a lawyer but only when such derogation is justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person. During the negotiations in the Council, various (Northern) Member States felt that this condition relating to life and limb, as proposed by the Commission, was too restrictive. They con-

sidered that "compelling reasons" as such should be enough to derogate from the right of access to a lawyer, and they referred in this context to the *Salduz* judgment, where the ECtHR had stated that denial of access to a lawyer could be justified for "compelling reasons," without any further qualification or condition. In the general approach, this line of reasoning was adhered to, although Portugal opposed it, and Italy and Spain, supported by the Commission, made clear that they would seek improvements to the text during the negotiations with the European Parliament.

During these negotiations, the European Parliament insisted from the outset that it would not accept that derogations from the right of access to a lawyer be made on the wide ground of compelling reasons only. Hence, a solution was sought by defining the compelling reasons more clearly and thereby limiting the possibilities of making derogations. In the end, agreement was reached by authorising derogations for compelling reasons relating to life and limb, as proposed by the Commission (but complemented with a reference to the liberty of the person), and for compelling reasons relating to situations where immediate action by the investigating authorities is imperative in order to prevent substantial jeopardy to the criminal proceedings ("ticking bomb exception"), see Art. 3.6.

The European Parliament, however, was only able to accept the derogations for these compelling reasons under strict conditions. Indeed, it was agreed in Art. 3.6 and recital 38 that derogations could only be made in exceptional circumstances and only at the pre-trial stage, that they should be temporary and strictly limited in time, that they should not be based exclusively on the type or seriousness of the alleged offence and should not prejudice the overall fairness of the proceedings, and that they should be proportionate and only be applied to the extent justified in the light of the particular circumstances of the case. Moreover, it was decided to insert extra guarantees for the use of the derogations in recitals 31 and 32 by stating that the competent authorities may only question suspects or accused persons without the lawyer being present if these persons have been informed of their right to remain silent and can exercise that right and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. It was further clarified that questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to averting serious adverse consequences for the life, liberty, or physical integrity of a person or to obtain information that is essential to preventing substantial jeopardy to criminal proceedings. In line with *Salduz*, it was also underlined that any abuse of these derogations would, in principle, irretrievably prejudice the rights of the defence.

Last but not least, recital 38 instructs Member States to make restricted use of the derogations. In the corridors, the Member States discreetly remarked that this instruction was clearly superfluous because, in view of the many conditions and "belts and braces" that had now been attached to the derogations, it would be very difficult for Member States to make any derogation whatsoever from the right of access to a lawyer.

It should be noted, finally, that Art. 3.5 contains a specific derogation related to the geographical remoteness of a suspect or accused person. This derogation was inserted at the request of France, which feared that, if a suspect or accused person was deprived of liberty in a place where no lawyer could be made available on short notice, e.g., in French Guyana or on a military nuclear vessel in the Indian Ocean, it would not be able to fully comply with Art. 3.2 under (c) of the Directive, according to which suspects or accused persons have the right of access to a lawyer "without undue delay after deprivation of liberty." In the application of this specific derogation, however, Member States may only buy time: they may neither question the suspect or accused person nor carry out any of the investigative or evidence-gathering acts indicated in Art. 3.3 under (c) of the Directive, see recital 30.

b) Confidentiality

The way in which confidentiality of communication between a suspect or accused person and his lawyer should be treated was probably the most difficult issue of the entire Directive. According to the case-law of the ECtHR,[37] one of the key elements of effective representation of a client's interests by his lawyer is the principle that the confidentiality of information exchanged between them must be protected. According to the Strasbourg Court, the privilege of confidential communication encourages open and honest communication between clients and lawyers, and it is protected by the ECHR as an important safeguard of the right of defence. In the *Campbell* judgment,[38] however, it seemed that the ECtHR indicated that exceptions to this rule may be permissible, because the Court had stated that "the lawyer-client relationship is, *in principle*, privileged."

In its proposal for a Directive, the Commission had suggested that Member States should ensure that the confidentiality of communication between the suspect or accused person and his lawyer be guaranteed. [39] No derogations were envisaged. During the negotiations in the Council, various Member States asked for the possibility to include derogations in the text. They referred to the *Campbell* judgment and indicated that they had a practice that allows certain exceptions to the principle of confidentiality, in particular in the situation when there is an urgent need to prevent serious crime, notably terrorism, and in the situation when there is a suspicion that the lawyer

is colluding with the suspect or accused person in a criminal offence. In the general approach, it was therefore envisaged that, in these two situations, Member States should be allowed to make derogations from the principle of confidentiality of communication between a suspect or accused person and his lawyer.[40] Some Member States, however, supported by the Commission, expressed serious concerns in this regard.

The European Parliament, supported by the Commission, very much insisted on having an absolute rule on confidentiality, without any derogations. After extensive discussions, in which all options were examined – including the "nuclear" option of deleting the provision on confidentiality altogether – the Irish Presidency presented a compromise for a new text for Art. 4 that was acceptable to all Member States and the European Parliament.

The Presidency observed that the Commission proposal and the general approach required Member States to "guarantee" the confidentiality of communication between a suspect or accused person and his lawyer. According to the Presidency, however, it would be impossible in practice for Member States to guarantee such confidentiality, since the communication between a suspect or accused person and his lawyer might not be under the control of the Member States (for example, if the communication takes place during a meeting in the lawyer's office), and the breach of confidentiality may come about via the lawyer himself or by accident (documents sent to the wrong address). The Presidency therefore considered that what is intended is that Member States should "respect" the confidentiality of communication between the lawyer and the suspect or accused person, in the sense that Member States should honour this confidentiality and refrain from interfering with it. The Presidency noted that the term "respect" had been used in this sense in several other EU instruments, and it is clarified in recital 33 that this entails an active obligation for Member States to "ensure that arrangements for communication uphold and protect confidentiality."[41]

The Presidency also observed that, while it would be uncertain if any or all of the derogations contained in the general approach would pass the scrutiny of the ECtHR, it seemed appropriate to clarify which communication falls under the principle of confidentiality by adding the words "in the exercise of the right of access to a lawyer provided for under this Directive." As a result, the text of Art. 4 came to read as follows: "Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law."

This text without derogations is accompanied by two recitals, which seek to clarify the situations in which the Directive would not apply, in order to give the Member States some margin for manoeuvre. Recital 33 explains *inter alia* that a colluding lawyer is not considered to be operating in the exercise of the right of access to a lawyer provided for under the Directive. In this way, there is some reference, albeit in a recital, to the situation of a colluding lawyer as covered in the corresponding derogation in the general approach. Recital 34 states that the Directive is without prejudice to a breach of confidentiality, which is incidental to a lawful surveillance operation by competent authorities, and without prejudice to the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Art. 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Art. 72 TFEU. This addresses to a large extent the derogation in the general approach relating to the situation when there is an urgent need to prevent serious crime, particularly terrorism. The text of the Irish Presidency thus satisfied both the European Parliament and the Member States – or it left them at least equally dissatisfied, thus constituting a fair compromise.

4. Difficulty of reaching agreement on the proposal in view of substantial changes to the EAW system

Like measures A and B, measure C on the right of access to a lawyer was not only meant to provide procedural rights for suspects and accused persons but also for persons that are subject to EAW proceedings ("requested persons"). Art. 11.2 of Framework Decision 2002/584/JHA[42] provides that requested persons who are arrested for the purpose of execution of an EAW have the right to be assisted by a legal counsel. Therefore, the right of access to a lawyer already exists in the *executing* State. The big novelty of the Commission proposal was also to provide the right of access to a lawyer in the *issuing* State. The lawyer in the issuing State should assist the lawyer in the executing State with a view to the effective exercise of the rights of the requested person in the executing State. The Commission explained that the lawyer in the issuing State is often in a much better position to obtain and verify factual information and to provide advice on the law in the issuing State; this may help the lawyer in the executing State to defend the interests of the requested person and may also lead to a quick "resolution" of the EAW, e.g., through a voluntary return of the person concerned or a withdrawal of the EAW where warranted.

In the first months of the negotiations in the Council, however, a large majority of Member States opposed the idea of granting access to a lawyer in the issuing State. Member States felt that

the system of the EAW was working well and that any modification would lead to the risk of jeopardizing the system in its entirety. It was also believed that granting access to a lawyer in the issuing State could prolong the surrender procedure, and could bring about substantial costs for the Member States. The Polish Presidency therefore decided to delete the paragraphs concerned from the Commission proposal, which was also in line with clear guidance from the Council preparatory bodies.[43]

During the negotiations with the European Parliament, however, the issue was back on the table. EP rapporteur Oana Antonescu made it a priority on her "wish list," and she was supported in this position by the shadow rapporteurs, the Commission, and various lobby groups. The latter even organised special studies and conferences in order to underline the importance of dual representation for requested persons.[44] In the end, the Council reluctantly gave in and agreed to granting the right of access to a lawyer in the issuing State as well, but only after having ensured that the tasks of this lawyer were clearly limited to providing the lawyer in the executing State with "information and advice" (Art. 10.4). The Council also insisted on clarifying in the operative part of the text (Art. 10.6) that the provisions on the lawyer in the issuing State were without prejudice to the (strict) time limits set out in Framework Decision 2002/584/JHA. In addition, the Irish Presidency succeeded in replacing the expression "right of *access*" to a lawyer in the issuing Member State with the expression "right to *appoint*" a lawyer in the issuing Member State (Arts. 10.4, 10.5, and 10.6). The difference between these two expressions is, however, far from clear.

III. Measure D

The Directive also includes measure D of the roadmap, by providing rules on the right to have a third person informed of deprivation of liberty (Art. 5); on the right to communicate, while deprived of liberty, with third persons (Art. 6); and on the right to communicate with consular authorities (Art. 7). Although these articles also needed substantial negotiation before they could be agreed upon, they were relatively uncontroversial compared to the rules on the right of access to a lawyer.

IV. Conclusion

The Directive on the right of access to a lawyer is the core measure of the roadmap on strengthening the procedural rights of suspects and accused persons in criminal proceedings. Building on the case law of the ECtHR, in particular the *Salduz* judgment, the Directive provides detailed rules on the right of access to a lawyer for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings.

Although defence lawyers and human rights lobby groups may have wanted an (even) more ambitious text, it seems that there is general satisfaction with the result achieved. Indeed, the Directive sets a high level of protection for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings, while taking due account of the interests of the State in prosecuting crime – which, as noted, are often interests that correspond to the interests of victims of crime.

The European Parliament, supported by the Commission and by some Member States, played an important role in "upgrading" the text of the Directive, in particular if the final text is compared with the text of the general approach. Nevertheless, one has to realise that in the "game" of the co-decision process, the Council is used to setting the standards in the general approach lower than it can actually accept, in order to be able to "give something away" to the European Parliament.

Attention should now be focused on the implementation of the Directive by the Member States. Crafting a good Directive is one thing, but it is at least as important that the Directive be implemented and applied in a manner that is faithful to the letter and the spirit thereof. Herein lies an important task, not only for the Commission but also for the national courts and the Court of Justice of the European Union, since it is very likely that lawyers representing suspects and accused persons across Europe will rely on the Directive. It will probably lead to a considerable body of jurisprudence on access to a lawyer at both the domestic and Union levels.

A last issue concerns the question of whether the United Kingdom and Ireland will opt-in to the measure on the basis of Art. 4 of Protocol 21 to the Lisbon Treaty. Whereas an opt-in by the UK seems unlikely in the context of the current political climate in London, an opt-in by Ireland – which very diligently led the final negotiations in the Council and with the European Parliament – is still not ruled out. While recognising the rules of *Europe à la carte* as created by the Lisbon Treaty, one could admit that such an opt-in by Ireland – but also by the UK and, if it would have been possible, by Denmark – would to a certain extent be "fair," since it would ensure that the same minimum standards that apply in 25 Member States in respect of British and Irish citizens would also apply in the UK and Ireland as regards citizens of the other Member States.

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* This article solely reflects the opinion of the author and not that of the Council. The author would like to thank Tricia Harkin for the valuable comments that she made in the process of developing this article. Any mistakes, however, should be attributed to the author only.

Steven Cras
General Secretariat of the Council
of the European Union

1 OJ L 294, 6.11.2013, p. 1.
2 COM (2004) 328 final. Council doc. 9318/04.
3 Resolution of the Council of 30 November 2009, O.J. C 295, 4.12.2009, p. 1.
4 See Cras and De Matteis, "The Directive on the right to interpretation and translation in criminal proceedings", *eucrim 2010/4*, p. 153.
5 O.J. L 280, 26.10.2010, p. 1. See on this Directive the article mentioned in the previous footnote.
6 O.J. L 142, 1.6.2012, p. 1. See on this Directive Cras and De Matteis, "The Directive on the right to information", *eucrim 2013/1*, p. 22.
7 ECtHR, *Salduz v. Turkey*, judgment of 27 November 2008, in particular point 55. This judgment has been confirmed in various other subsequent judgments. Note that all case law of the ECtHR can be found on the ECHR HUDOC search portal, see http://cmiskp.echr.coe.int/tkp197/search.asp.
8 The Commission proposal is set out in Council doc. 11497/11.
9 It being understood that, in the field of judicial cooperation in criminal matters, a quarter of the Member States can also present a legislative initiative, see Art. 76 TFEU.
10 Some people had the impression that the Commission had made such an ambitious proposal because its proposal for the previous measure (B) had generally been considered too weak − the text of the Directive on the right to information was therefore made more "pro-rights" during the negotiations in the Council and with the European Parliament (e.g., the Council added the right to remain silent to the rights about which the suspect or accused person has the right to be informed).
11 Council doc. 14495/11.
12 The 2012 French Presidential elections were held on 22 April and 6 May 2012 (in some overseas territories, one day earlier in each case).
13 Council doc. 18215/11.
14 Council doc. 18240/11.
15 Council doc. 5219/12.
16 Council doc. 5897/12 + ADD 1 + ADD 2.
17 Council doc. 10908/12, p. 3.
18 For instance, representatives from the Netherlands stated that the exclusion for minor offences, as agreed in the text of the general approach, was very important to them.
19 Vote taken on 10 July 2012, inter-institutional file 2011/0154 (COD).
20 A lot of (informal) work was carried out in the Brussels café "Karsmakers," which is the reason why some people call this Directive the "Karsmakers Directive".
21 The finishing touch on new texts was usually made in the bar of the Brussels Metropole hotel, where the President of the Council Working Party used to stay.
22 ST 10190/13.
23 O.J. L 294, 6.11.2013, p. 1.
24 It should be noted that, on 27 November 2013, after the adoption of the Directive on the right of access to a lawyer, the Commission presented a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings, see Council docs. 17635/13 + ADD 1 + ADD 2 + ADD 3.
25 Under Swedish law, in the exceptional situation where a suspect is unknown and refuses to say who he is or where he lives, or if he doesn't have a residence in Sweden and there is a risk that he will flee or otherwise evade legal proceedings or punishment, deprivation of liberty can be used no matter what kind of offence the person is suspected of.
26 Law 2011-392, JORF No. 0089 of 15 April 2011.
27 ECtHR, *Dayanan v. Turkey*, judgment of 13 October 2009. See, most notably, point 32, where the possible activities of a lawyer are listed: "Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."
28 See recital 25.
29 ECtHR, *Brusco v. France*, judgment of 14 October 2010. See, in particular, as from point 47.
30 In fact: "any person other than a suspect or accused person." In practice, mainly witnesses are concerned.
31 See Art. 10 of the Commission proposal.
32 See Art. 3(1) under (b) of the Commission proposal.
33 For identity parades, see ECtHR, *Mehmet Şerif Öner v. Turkey*, judgment of 13 September 2011, points 21 and 22; for reconstructions of the scene of a crime, see ECtHR, *Shabelnik v. Ukraine*, judgment of 19 February 2009, point 57, and ECtHR, *Karadag v. Turkey*, judgment of 29 June 2010, points 46-48. Confrontations were added because they are considered to be the same, in essence, as questioning, save that they are conducted in the presence of one or more witnesses or victims.
34 See recital 26.
35 See recital 26. Member States can address the situation of lawyers not arriving on time in the practical arrangements that they can make.
36 See Art. 13 of the Commission proposal.
37 See e.g. ECtHR, *Castravet v. Moldova*, judgment of 13 March 2007, in particular point 49.
38 ECtHR, *Campbell v. the United Kingdom*, judgment of 25 March 1992, point 46.
39 Text slightly paraphrased. See Art. 7 of the Commission proposal for the full text.
40 See Council doc. 10908/12, Art. 4.2.
41 See, e.g., Directive 2011/95/EU (Art. 21.1) and Directive 2009/140/EC (Art. 1.1.b), as well as, precisely on confidentiality, Regulation (EC) No. 1829/2003 (Art. 31.7).
42 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190, 18.07.2002, p. 1.
43 Council doc. 18215/11, points 30-32.
44 See, e.g., the study by Justice, "European Arrest Warrants − Ensuring an effective defence", September 2012, http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf

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