



Focus: Procedural Rights in Criminal Proceedings

Dossier particulier: Droits procéduraux accordés dans le cadre des procédures pénales

Schwerpunktthema: Verfahrensrechte im Strafverfahren

Editorial

Prof. Dr. Ulrich Sieber

The Directive on the Right to Interpretation and Translation
in Criminal Proceedings: Genesis and Description

Steven Cras/Luca de Matteis

The Procedural Rights Debate: A Bridge Too Far or Still Not Far Enough?

Wendy De Bondt/Prof. Dr. Gert Vermeulen

Effective Remedies for the Violation of the Right to Trial
within a Reasonable Time in Criminal Proceedings

Dr. Inmaculada Ramos Tapia

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Imprint

* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage www.mpicc.de/eucrim/search.php and then entering the ID-number of the link in the search form.

Editorial

Dear Readers,

On the eve of 2011, eucrim can look forward to celebrating its fifth anniversary: the first issue was published in 2006. The idea for the creation of eucrim came about in 2003 at the *Strafrechtslehrertagung*, the regular meeting of law professors in the German-speaking world, where the development of European criminal law was discussed. During these deliberations, remarks highly critical of Europeanisation but supported by incomplete and misleading information were made, and participants complained about a lack of information in the field of European criminal law. To improve this unsatisfactory situation, I proposed in the discussion that the Max Planck Institute for Foreign and International Criminal law create an electronic newsletter with summaries of current developments in European criminal law.

Thanks to the European Commission's support and the help of the 32 associations for European criminal law, the first issue of eucrim already went far beyond the newsletter I originally had in mind. Today, *eucrim's news section* is an effective information tool based on a clear systematisation of European criminal law. News items offer comprehensive summaries of ongoing events and provide links to more in-depth information. In addition, *eucrim's articles section* enriches the publication with features of a traditional law journal specialised in European criminal law.

The success story of eucrim would not have been possible without the help of many people. I am very much indebted to the representatives of the European Commission for their support, especially to Mr. Lothar Kuhl of OLAF. For their excellent work, I would also like to express my gratitude to the former and current managing editors of eucrim, Mr. Thomas Wahl and Dr. Els De Busser, to all other members of the eucrim team, both at the Max Planck Institute and beyond, as well as to all of our authors.

In the future, eucrim will continue to support the development of European criminal law by synthesising the theoretical and practical aspects of this complex process. In order to achieve better results, future research must be more attuned to the fact that the traditional model of a pyramidal relationship between the nation state and its citizens has become obsolete. Problems of the EU that transcend the territorial limits of the nation state can no longer be solved simply by resorting to traditional, parallel systems of national criminal law. Criminal law in Europe today is characterised by a fragmented cumulation of numer-

ous legal orders. The interactions between the various subsystems of criminal law require a carefully drafted architecture with new cooperative and supranational models for transnationally effective European criminal law. Thus, research on these fundamental questions, comparative criminal law, and an international doctrine of criminal law can contribute significantly to the establishment of a better and more coherent European criminal justice system.

At the same time, European criminal law should strive for a more systematic inclusion of empirical and practical considerations. Implementation studies must identify the law in action, and criminological research must analyse the social effects of new regulations. In addition, the knowledge of practitioners on the national and international levels represents a wealth of information that should be afforded more attention than it is today, not only by academics but also by politicians. This requires new types of studies that bring together criminal law and criminology "under one roof".

In its substance, European criminal law must reflect an appropriate balance of security and liberty, the fundamental – and often conflicting – aims of criminal law. While an effective coordination of differing national systems is essential for the common European judicial area, it can jeopardise the civil liberties of the accused. This development must be counterbalanced by the introduction of protective legal instruments, such as special remedies and common procedural safeguards, as illustrated in this issue of eucrim.

Eucrim and the Max Planck Institute will continue to contribute to the evolution of European criminal law in the coming years. I invite all our readers to support this process and wish you a joyous holiday season and a very successful and happy 2011.

Prof. Dr. Ulrich Sieber
Editor in Chief of eucrim, Max Planck Institute
for Foreign and International Criminal Law



Prof. Dr. Ulrich Sieber



European Union*

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

Foundations

Reform of the European Union

Limited Treaty Change for Crisis Resolution Mechanism

At the European Council of 28 October 2010, government leaders of the Member States agreed to establish a permanent crisis management mechanism and make changes to the Lisbon Treaty accordingly.

The proposal was initiated by French President Nicholas Sarkozy and German Chancellor Angela Merkel on 18 October 2010. In a joint statement both leaders announced a joint proposal for introducing this permanent financial stability mechanism.

The mechanism would replace the temporary European Financial Stability Facility that was established in May 2010 and expires after three years. A permanent mechanism would enable the handling of possible future financial crises in a more methodical manner. According to the text of the joint statement, this would include arrangements for the

private sector to contribute to restructuring and for Member States to take appropriate measures to preserve financial stability in the eurozone as necessary. Additionally, shorter and more effective sanction procedures are among the proposed measures.

The President of the European Council, Herman Van Rompuy, announced plans for consultations with the Member States on a limited change to the Lisbon Treaty required to this effect. According to the President, the “no bail-out clause” of Art. 125 TEU, however, will not be touched. He also announced that the Commission would be presenting proposals soon.

During the next European Council meeting on 16-17 December 2010 progress on this matter will be discussed with a view to taking final decisions, both on the outline of a crisis mechanism and on an amendment of the applicable Treaty provision.

The goal is to have any amendment ratified by mid-2013, which is the expiry date of the temporary European Financial Stability Facility. (EDB)

►eucrim ID=1004001

Revised Framework Agreement on Relations between Commission and Parliament Signed

On 20 October 2010, the President of the European Commission, José Manuel Barroso, and the President of the European Parliament (EP), Jerzy Buzek, signed a revised Framework Agreement governing the relations between both institutions. This Framework Agreement adapts the existing Agreement of 2005 to the Lisbon Treaty.

Negotiations on the text have been ongoing since February 2010, but the Legal Service of the Council and the Coreper (Committee of Permanent Representatives) pointed out a number of institutional, political, and legal problems raised by the text. The Coreper therefore recommends that the Council adopt a statement and has sent letters to the President of the Commission and the EP. Three particular points of concern are listed in the statement and the letters.

Firstly, the Council’s Legal Service notes that several provisions of the Framework Agreement have the effect of modifying the institutional balance set out in the Treaties in force (TFEU and TEU), e.g., the “special partnership” between the Commission and the EP mentioned in the text is not provided for by the Treaties.

Secondly, the Council’s Legal Service is of the opinion that the Framework Agreement confers powers upon the EP that are not provided for in the Treaties, such as participation of the EP in committee meetings set up to assist

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

the Commission in implementing EU legislation.

Thirdly, according to the Legal Service, the autonomy of the Commission and its President is limited by the text of the Framework Agreement, e.g., by attaching time constraints to the Commission's power of initiative that go beyond Art. 225 TFEU.

The Council is of the opinion that it can not be bound by this Framework Agreement. Therefore, the Council plans to submit to the Court of Justice any act or action of the EP or the Commission that applies the provisions of the Framework Agreement and has an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties. This statement by the Council still needs to be approved during a future Council meeting. (EDB)

► [eucrim ID=1004002](#)

Enlargement of the EU

Fight Against Corruption and Organised Crime Priority for Croatia's Accession Negotiations

In a speech made during a conference in Zagreb on 10 September 2010, the Vice-President of the European Commission, Viviane Reding, focused on Croatia's progress in negotiations to accede to the EU (see also [eucrim 3/2010](#), pp. 86-87).

Referring specifically to Croatia's judicial reform and the fight against corruption, she explained "Consequences of EU membership for the judiciary" to the participants at the Conference, emphasising that much has been accomplished since the opening of negotiation talks on Chapter 23 concerning judiciary and fundamental rights. More progress is, however, still needed. The implementation of anti-corruption efforts needs to be strengthened and efficient internal control mechanisms for the judiciary should be set up. The Vice-President announced that special attention would be paid to effective investigations, prosecutions, and

court rulings in organised crime and corruption cases, as well as strengthened preventive measures in fighting corruption and conflicts of interest. (EDB)

► [eucrim ID=1004003](#)

Institutions

Commission

Commission Strategy on Implementation of Charter of Fundamental Rights

On 19 October 2010, the Commission adopted a strategy for the effective implementation of the Charter of Fundamental Rights by the EU. With the EU Charter of Fundamental Rights becoming legally binding and the EU's accession to the European Convention of Human Rights (see also [eucrim 3/2010](#), p. 86), the aim of the Commission's strategy is to ensure that all EU laws comply with the Charter at each stage of the legislative process. In order to achieve this goal, the Commission plans to:

- Reinforce its assessment of the impact of new legislative proposals on fundamental rights on the basis of a fundamental rights "checklist";
- Launch an inter-institutional dialogue to determine methods for dealing with amendments to existing legislation that raise questions of compatibility with fundamental rights;
- Improve information services on fundamental rights for EU citizens;
- Publish an Annual Report on the application of the Charter.

The strategy explicitly includes the European Parliament (EP), the Fundamental Rights Agency (FRA), and other human rights bodies in the process and asks for contributions from all stakeholders. Currently, the Commission is preparing the first Annual Report covering 2010 and expects it to be released in spring 2011. (ST)

► [eucrim ID=1004004](#)

European Court of Justice (ECJ)

ECJ Supports National Courts' Authorities in Enforcing EU Law

On 7 October 2010, the ECJ delivered its judgment in case C-382/09 on questions concerning the Common Customs Tariff, anti-dumping duties, and fines of an amount equal to the total anti-dumping duties. The Supreme Court of the Republic of Latvia (Augstākās Tiesas Senāts) referred the case to the ECJ for a preliminary ruling, and its first question dealt with specifying the classification of certain goods (ropes and cables) in the Integrated Tariff of the European Communities (TARIC).

The second question addressed whether Art. 14 (1) of Regulation No. 384/96 (on protection against dumped imports from countries not members of the European Community) must be interpreted as precluding the legislation of a Member State that provides for the imposition of a fine (in the event of an error in the tariff classification of goods imported into the customs territory of the European Union) equal to the total amount of the anti-dumping duties applicable to those goods according to their correct tariff classification. Art. 14(1) of Regulation No. 384/96 provides for the possibility to impose anti-dumping duties by regulation, but Regulation No. 384/96 does not contain provisions on fines to be imposed in the event of breach of its provisions. Regulation 1796/1999 imposing anti-dumping duties on steel ropes and cables originating – *inter alia* – in Ukraine, also does not provide penalties for breaches of its provisions. Since the Member States are obliged to effectively enforce EU law, the ECJ found that Member States are certainly empowered to impose fines to secure effectiveness of the Regulation if the Regulation itself does not contain provisions to do so. The ECJ also ruled that the amount of the imposed fine must be analogous to those fines applicable to infringements of national laws of a similar nature and importance. The principle of

proportionality should be respected. The referring Court is to determine whether this is the case or not, even if this means that the amount of the fine is equal to the total anti-dumping duties. (ST)

►eucrim ID=1004005

OLAF

OLAF Contributes to Italian Milk Quota Fraud Case

On 11 October 2010, two men were sentenced to imprisonment for fraud, involving approx. €20,000,000 in evaded levies under the EU milk quota scheme. The offenders had created a network of companies simulating commercial operations of sale and purchase of milk in order to evade the extra levy on milk, which all EU milk producers that exceed a certain milk quota have to pay. OLAF significantly contributed to the investigations by providing information on the criminal network and by coordinating the exchange of information between the two Italian courts before which the suspects were tried. (ST)

►eucrim ID=1004006

OLAF Coordinates Mission Revealing Large-Scale International Smuggling

Following intensive cooperation between OLAF and law enforcement authorities in several Member States and in the U.S., OLAF announced on 1 October 2010 that a second suspect in the so-called “Miami Case” had been arrested and indicted in the U.S. for his alleged part in smuggling hundreds of millions of cigarettes from Miami, Florida into the EU.

The so-called “Miami” case is a major international cigarette smuggling case, which came to light after Irish Customs searched cargo shipped from Miami to Ireland and seized six containers of cigarettes falsely declared as “furniture”. Following a request for assistance from the Irish authorities, OLAF then coordinated an EU mission to Miami, which

revealed large-scale cigarette smuggling into several EU countries. (ST)

►eucrim ID=1004007

Fraud in EU-Funded Research Project – Company Director Sentenced to Imprisonment

On 13 September 2010, a UK company director was sentenced to imprisonment for theft and fraud concerning EU-funded research projects. Instead of forwarding the EU funds to other companies participating in an EU-funded research project on “safeguarding EU food exports,” the offender had deposited the sum of €174,513 in the account of a second company, owned by him. During the investigations, OLAF provided information to the respective UK authorities regarding EU procedures and implementation research projects and assisted the authorities in identifying EU officials who later provided evidence in the criminal proceedings. (ST)

►eucrim ID=1004008

OLAF and EP Follow Ombudsman’s Recommendations

On 20 September 2010, the European Ombudsman, P. Nikiforos Diamandouros, released a statement in which he welcomed OLAF’s decision to accept his recommendations concerning the financing of several EP buildings (see eucrim 3/2009, p. 65).

In the case, the complainant, a journalist had been denied access to EP documents concerning the external financing of the Willy Brandt and the József Antall buildings in Brussels. The journalist had also criticized missing public tenders for the construction of the Altiero Spinelli building in Brussels. After OLAF opened and later closed an investigation of the case, stating that there is no need for an in-depth investigation, the journalist turned to the European Ombudsman and claimed that OLAF had failed to examine the case properly. The Ombudsman then asked the EP to provide the journalist with access to all requested documents or to give convinc-

ing explanations for not doing so and called on OLAF to reconsider the results of the Spinelli investigation.

Following the Ombudsman’s recommendations, the EP eventually agreed to release the requested documents and clarified the legal framework for the financing of these buildings. OLAF has now also accepted the Ombudsman’s recommendation and agreed to launch a reevaluation of the case. (ST)

►eucrim ID=1004009

Europol

Draft Operational Agreement with Monaco

At its last meeting on 7-8 October 2010, the JHA Council approved a draft agreement on operational and strategic cooperation between Europol and the government of the Sovereign Prince of Monaco.

Cooperation would provide for the exchange of information – including personal data – related to specific investigations as well as all other tasks of Europol, such as the exchange of specialist knowledge, general situation reports, results of strategic analysis, information on criminal investigation procedures, information on crime prevention methods, and participation in training activity. Furthermore, the Principality of Monaco would designate a national contact point to act between its competent authorities and Europol, and it would station an agreed number of liaison officers at Europol. Under the draft agreement, the *Direction de la Sûreté Publique* is foreseen as the national contact point. If required for further enhancement of the cooperation, the agreement would also pave the way to station one or more Europol liaison officer(s) with the said *Direction de la Sûreté Publique* in the Principality of Monaco.

In order for Europol to conclude operational agreements that allow for the exchange of personal data, approval of

the Council is required under Art. 23(2) of the Council Decision of 6 April 2009 establishing Europol. (CR)

► eucrim ID=1004010

Operational Agreement with Columbia

On 21 September 2010, Europol and Columbia signed an operational agreement. While cooperation between Columbia and Europol was already begun in February 2004 with the signature of a strategic agreement, Columbia is now the first Latin American country to sign an operational agreement with Europol. The agreement will allow Europol and Columbia to exchange strategic and operational information, including personal data on known and suspected criminals.

Other States with which Europol has signed operational agreements include Australia, Canada, Croatia, Iceland, Norway, Switzerland, and the USA. (CR)

► eucrim ID=1004011

Eurojust

EU Grant for Joint Investigation Teams

For the second time, Eurojust was awarded a grant by the European Commission to provide financial and logistical support to Joint Investigation Teams (JITs). Hence, Eurojust will continue to award grants for the financing of JITs for two common types of expenses, namely travel and accommodation costs and translation and interpretation costs (for details regarding JIT funding by Eurojust, see eucrim 3/2009, p. 81 and eucrim 1/2010, p. 8).

The project was launched on 1 October 2010 and will end in September 2013. The grant awarded to this project amounts to €2,159,160. (CR)

► eucrim ID=1004012

National Member for Denmark

On 1 September 2010, Mr. Jesper Hjørttenberg was appointed as National Member for Denmark at Eurojust.

Throughout his professional career, Mr. Hjørttenberg has served on the Bureau of the Council of Europe Steering Committee on Crime Problems (CDPC) and at the Office of the Danish Director of Public Prosecutions where he has been Deputy Director since 2007.

The former National Member for Denmark, Mr. Lennart Lindblom, has returned to Copenhagen to work as a Deputy Director of Public Prosecutions. (CR)

► eucrim ID=1004013

Strategic Seminar: Eurojust and the Lisbon Treaty

At the heart of this strategic seminar stood the question of the establishment of a European Public Prosecutor's Office from Eurojust as foreseen under Art. 86 of the Lisbon Treaty. The support of the European Commission for such a development was emphasised by Ms. Le Bail, Director-General for Justice, who represented Commissioner Reding at the seminar. She reiterated the Commissioner's pledge to put forward a proposal to establish the European Public Prosecutor's Office during her mandate. Among the Member States strongly in favour of the idea is Belgium, whose Minister of Justice Stefaan De Clerck stressed the need to give Eurojust all possible support to continue working in this direction.

The seminar was organised by Eurojust in cooperation with the Belgian Presidency at the College of Europe in Bruges from 21 to 22 September 2010. (CR)

► eucrim ID=1004014

European Judicial Network (EJN)

New Website Section on Implementation of Mutual Recognition Instruments

With the increasing amount of EU mutual recognition instruments and their different states of implementation in the

Member States, defining which instrument has become applicable in which Member State has confronted practitioners with serious problems.

To respond to the need to quickly find information on the state of implementation, the EJN has now begun to offer a list of these instruments (e.g., the Framework Decision on the principle of mutual recognition to financial penalties) and their practical application in the Member States on its website. (CR)

► eucrim ID=1004015

Second National Correspondents Meeting

On 12 October 2010, the newly created meeting of National Correspondents (NCs) of the EJN took place in The Hague (for further details on NCs, see eucrim 1/2010, p. 9).

Topics on the agenda included the EJN's guideline, manual, and website as well as its budget for 2010 and work programme for 2011 and 2012. (CR)

► eucrim ID=1004016

35th Plenary Meeting

The 35th EJN Plenary Meeting was held in Kortrijk, Belgium from 28-30 November 2010.

The theme of this meeting was international cooperation in the border regions within Europe. In five workshops, different aspects of judicial cooperation and police cooperation for judicial purposes in the border regions between the Member States were discussed. (CR)

► eucrim ID=1004017

Frontex

Emergency Rapid Border Intervention Teams to Greece

For the first time since the creation of the Agency in 2005, Frontex has deployed Rapid Border Intervention Teams (RABITs) to deal with an emergency situation at the EU's external border.

Distressed by the exceptional increase

in illegal border crossings at Greece's external border with Turkey (Greece today accounts for 90% of all detections of illegal border crossings into the EU), on 24 October 2010, the Greek Minister of Citizen Protection requested Frontex to deploy RABITs as well as provide operational means to increase the control and surveillance levels at the Greek-Turkish land border in the region of Orestiada and neighbouring areas.

Five days later, on 29 October, Frontex finalised arrangements for human and technical resources to be deployed to the area. In total, 175 border-control specialists as well as technical equipment and other logistical and administrative support (including 1 helicopter, 19 patrol cars, 9 thermo-vision vans, etc.) were made available by 26 Member States and Schengen-Associated Countries. Specialists and equipment arrived in the region by 3 November 2010.

The costs incurred by Member States in relation to the deployment will be reimbursed by Frontex.

The legal basis for RABITs was established in 2007 with Regulation (EC) No. 863/2007. (CR)

► eucrim ID=1004018

Working Arrangement with Canada

On 21 October 2010, Frontex signed a working arrangement with the Canadian Border Services Agency.

Under the arrangement, cooperation shall be promoted in the following areas: exchange of best practices and strategic information; training of officers; capacity-building; participation in joint operations; collaboration on relevant technologies and joint reports on smuggling of human beings and trafficking in human beings.

Until today, Frontex has set up formal cooperation with border management authorities of Albania, Belarus, Croatia, FYROM, Serbia, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, the Russian Federation, Ukraine, and the USA. (CR)

► eucrim ID=1004019

Agency for Fundamental Rights (FRA)

EU Minority Groups Show Serious Lack of Trust in Police

On 11 October 2010, the Fundamental Rights Agency (FRA) published results from its EU-MIDIS survey on police stops and minorities. They are the results of the specific chapters of the wider "European Union Minorities and Discrimination (EU-MIDIS) Survey" (see eucrim 4/2009, p. 133). Some 23,500 individuals of an ethnic minority or with an immigrant background were interviewed and asked about their experiences with respect to discrimination and criminal victimisation in everyday life.

The results show that in some European countries (Belgium, Germany, Greece, Spain, France, and Hungary), minorities feel that they are being stopped by the police more often than majority groups living in the same neighbourhoods. Some minority groups, such as the Roma, seem to be stopped even more often than other minority groups; respondents reported an average of nearly six stops in a 12-month period. Also, a large number of the minority groups' respondents indicated disrespectful behaviour on the part of police authorities. It is alarming that almost half of the minority groups' respondents stated that they had experienced situations, in which they did not report assaults, threats, or serious harassment to the police due to a lack of trust in police authorities. (ST)

► eucrim ID=1004020

Specific Areas of Crime / Substantive Criminal Law

VAT/Tax Fraud

Regulation on Cooperation in VAT Fraud Adopted

On 7 October 2010, the Council adopted a Regulation on administrative coop-

eration and combating fraud in the field of value added tax (904/2010). As previously reported (see eucrim 2/2010, p. 44), the main innovation is the creation of Eurofisc, a common operational structure of national officials, to detect and combat new cases of VAT fraud. All Member States will participate in the Eurofisc network, which will enable the Member States to much more efficiently combat VAT fraud, e.g., by establishing a multilateral early warning mechanism or by coordinating the information exchange between the respective authorities. Furthermore, the regulation specifies the cases in which Member States must exchange information spontaneously. It also outlines the procedures for providing feedback on information and situations in which Member States must conduct multilateral controls. (ST)

► eucrim ID=1004021

Corruption

Commissioner Malmström Plans Roadmap for EU Anti-Corruption Policy

In a public hearing before the EP on 15 September 2010, EU Home Affairs Commissioner Cecilia Malmström presented the results of a study, conducted by the Commission services, on how to best implement the Stockholm Programme and step up the fight against corruption. The study identifies five main problems in EU anti-corruption policies:

- Despite existing EU legislation and (international) monitoring mechanisms, corruption remains a serious problem in the EU;
- Corruption creates high costs for the economy;
- Anti-corruption policies greatly vary among Member States;
- EU and international anti-corruption legislation is not fully implemented in the Member States;
- Corruption undermines the confidence of EU citizens in public institutions and in the fair functioning of the

internal market. The study is intended to serve as a basis for an impact assessment to be completed by the Commission by the end of the year. In early 2011, the Commissioner plans to present an anti-corruption “package,” containing an update on the Communication of 2003 on a comprehensive EU anti-corruption policy, an implementation report of the Framework Decision on corruption in the private sector, a roadmap for the EU’s accession to GRECO, and a new Commission reporting mechanism on fighting corruption. (ST)

► [eucrim ID=1004022](#)

Counterfeiting & Piracy

Anti-Counterfeiting Trade Agreement – State of Play

Another round of negotiations about the Anti-Counterfeiting Trade Agreement (ACTA) was held in Tokyo, Japan in September 2010. The participants of the now 11th – and apparently final – round of negotiations published a joint statement on 2 October 2010. According to the joint statement, the negotiations were successful and “nearly” all substantive issues could be resolved. Although a consolidated and “largely” finalized text of the future agreement was published after the meeting in Tokyo, some outstanding issues remain that the participants have agreed to work on.

If these problems can be resolved, the ACTA shows great promise as an effective framework for combating the infringement of intellectual property rights. It will include provisions on civil, criminal, and border enforcement measures and provide for cooperation mechanisms among ACTA parties to support their enforcement efforts. (ST)

► [eucrim ID=1004023](#)

Success for Joint Customs Operation “Sirocco”

On 1 October 2010, the results of the Joint Customs Operation “Sirocco,” co-

ordinated by OLAF, were made public at a meeting in Amman, Jordan. 40 million cigarettes, 1243 kg of hand-rolled tobacco, 7038 litres of alcohol, and 8 million other counterfeit items were seized during the operation, which was conducted in June 2010. Operation “Sirocco” aimed at identifying consignments suspected of containing counterfeit goods or smuggled cigarettes. It geographically focused on deep sea containers loaded in China or the United Arab Emirates designated for EU countries. (ST)

► [eucrim ID=1004024](#)

Another New Agreement on Combating Illegal Trade of Tobacco Products Signed

Similar to the recent EU-British American Tobacco Agreement (see [eucrim 3/2010](#), p. 90), the Commission signed a new agreement on jointly combating illicit trade in tobacco products with Imperial Tobacco (ITL) on 27 September 2010. ITL is a leading international tobacco company based in the UK.

The agreement provides for information sharing between the respective EU authorities and ITL and obliges ITL, *inter alia*, to improve its supply chain controls and enhance its capabilities to track and trace its products. ITL has also committed to paying a total of €207,000,000 to the EU over 20 years for the fight against illegal trade in tobacco products. The company has guaranteed to make additional payments in the event of future seizures of its genuine products on EU territory. (ST)

► [eucrim ID=1004025](#)

Stepping up EU-US Cooperation in the Fight against Cigarette Smuggling

On 29 September 2010, Commissioner Šemeta opened a high-level conference in Dublin on EU-US cooperation in tackling the illicit trade of genuine tobacco products. For the first time, a conference brought together EU and US experts and law enforcement authorities working in the field of cigarette smuggling in order to further enhance the already close EU-

Annual Forum on Combating Corruption in the EU 2011 – How best to ensure the protection of whistleblowers

Trier, 10-11 February 2011

This seminar follows the pattern of “Combating Corruption in the EU – Annual Fora”, seminars co-financed by OLAF, implemented by the ERA in 2007-2010 and attended on average by approximately one hundred lawyers.

In the general context of the EU anti-corruption policy, the specific objective of the 2011 annual forum will be to debate how best to ensure effective protection of whistleblowers, victims, and witnesses.

As per previous fora, the first morning session will be dedicated to an overview of the European and international legal framework for combating corruption and protecting the EC’s financial interests, highlighting recent issues and comparing the UN rules and European legislation. This session will also assess the progress made by the International Anti-Corruption Academy in Vienna, already presented at the 2010 annual forum.

The afternoon session will focus on the protection of whistleblowers against victimisation and retaliation (loss of job, personal threats, etc.) and witness protection instruments from the perspective of criminal law.

Examples of rules on “whistleblowing” (i.e., procedures to follow if an employee becomes aware of corrupt behaviour inside the company or the institution) established in both the public and private sector will be presented and discussed.

During the second day, concrete examples of best practices and concrete experiences related to the protection of whistleblowers, victims, and witnesses will be shared. The role and contribution of OLAF will be outlined via the presentation of case studies.

The conference will end with a final closing debate.

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

The conference will be held in English, French, and German. Simultaneous interpretation will be provided.

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

US cooperation in this area. One example of the success of this cooperation is the so-called “Miami case” (see p. 132). (ST)

►eucrim ID=1004026

Organised Crime

Council and Commission Tackle Access to and Manufacturing of Explosives

At the JHA Council on 7-8 October 2010, the Council adopted conclusions on enhancing the security of explosives by entering into public-private partnerships. The Council noted that some Member States already exchange information with private enterprises on suspicious behaviour and have established partnerships with the private sector to ensure the security of explosives manufacturing plants. Following this approach, the Council invited the Member States to further develop these public-private partnerships to combat the acquisition, production, and use of explosives as well as to enhance cooperation and information exchange between explosives distributors and the public authorities.

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On 20 September 2010, shortly before the Council meeting, the Commission proposed a new Regulation against the use of home-made explosives. Seeing that certain chemicals can easily be turned into home-made explosives and that existing EU legislation does not fully cover this security risk, the Commission sees the need to ensure the same level of control over access to certain chemicals across the EU.

The proposed Regulation foresees completely banning the sale of products containing certain chemicals if the listed chemicals exceed a certain concentration. Other products will still be sold, but their sales will be more closely controlled, e.g., by means of a mechanism for reporting suspicious transactions. (ST)

►eucrim ID=1004028

Cybercrime

EU Digital Agenda: Enhancing Internet Trust and Security

In line with one of the priorities of the EU Digital Agenda, the European Commission came out with two proposals for strengthening Europe’s information systems on 30 September 2010. The presented measures offer a legal and administrative approach towards tackling the increase in cybercrime against public and private IT systems across Europe.

The Commission proposed a Directive on attacks against information systems, repealing Framework Decision 2005/222/JHA. While the proposed Directive retains many of the provisions of the present legislation, such as the penalisation of illegal access, illegal system interference, and illegal data interference, it also extends the scope of punishable acts to include the use of tools such as “botnets” (a network of computers that have been infected by malicious software) or unrightfully obtained computer passwords for commission of the offences. The proposal also introduces the illegal interception of information systems as a criminal offence.

The Directive further aims at enhancing the rapid response system to cyber attacks by strengthening the currently operational structure of 24/7 contact points and including an obligation to respond to urgent requests within eight hours. Through the implementation of this provision as well as the duty introduced to collect basic statistical data on cybercrime, the Commission hopes to enhance European justice and police cooperation in this area.

The Directive not only broadens the scope of criminalised activities but also raises the level of criminal penalties to a maximum term of imprisonment of at least two years or five years in the case of specific aggravating circumstances.

Through the newly proposed legislation, the Commission also addresses the increase in cybercrime on an administrative basis. To complement the presented

Directive, it is also putting forward a proposal for a Regulation to strengthen and modernise the European Network and Information Security Agency (ENISA). One of the main objectives of this proposal is to improve the capability and preparedness of the EU, Member States, and stakeholders to prevent, detect, and respond to network and information security problems. Within this framework, ENISA will play a decisive role by bringing together the judiciary, law enforcers, and privacy protection authorities, thus increasing the coordination and efficiency of these actors. For this purpose, more broadly formulated tasks of the Agency will allow for more flexibility and adaptability in dealing with new security challenges. The proposal extends ENISA’s temporary mandate for another five years and provides for an increase in the Agency’s financial and human resources in order to efficiently meet the tasks set out under its mandate. They include the organisation of joint activities such as cyber security exercises and the exchange of good practice, economic analyses and risk assessment, public private partnerships for network resilience, and awareness raising campaigns.

Both proposals are perceived as an important contribution to ensuring network and information security in Europe. They will be forwarded to the European Parliament and the Council of Ministers for adoption. (NK)

►eucrim ID=1004029

Environmental Crime

EU-Cameroon Agreement on Fighting Illegal Timber Exports

Similar to the recent EU-Republic of Congo Agreement on fighting illegal timber exports (see eucrim 2/2010, p. 47), the EU signed an agreement on jointly combating the illicit trade of timber products with Cameroon on 6 October 2010. From July 2012 on, all

shipments of wood products from Cameroon to the EU will be required to bear a license showing that they contain timber and wood products of a legal origin. Cameroon is one of the main timber exporting countries and exports 80% of its timber to the EU Member States. (ST)

► eucrim ID=1004030

Member States Fail to Comply with EU Environmental Legislation

The Commission has issued a new set of warnings to several Member States for failing to comply with EU legislation.

The warnings include the following:

- Austria, the Czech Republic, Germany, Poland, Slovakia, Hungary, and France have so far failed to comply with EU air quality standards (to effectively tackle excess emissions of tiny airborne particles). Under EU infringement procedures, they have two months from the date of the issuance of the reasoned opinion (for Austria, the Czech Republic, Germany, Poland, and Slovakia starting on 30 September 2010; for Hungary and France starting on 28 October 2010) to comply with the respective provisions or to give satisfactory reasons for not doing so. In cases of non-compliance, it is at the Commission's discretion to refer the cases to the ECJ.

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- Austria, Luxembourg, the Czech Republic, and France have been requested to provide information on the implementation status of EU environmental legislation in the area of flood prevention and risk management (Austria and the Czech Republic have until 30 November 2010 to submit the requested information; Luxembourg's deadline ends on 28 December). If they fail to comply or to give a satisfactory reason for non-implementation, these Member States may face proceedings before the ECJ. France was sent a reasoned opinion in this matter in June and, after examining its response, the Commission came to the conclusion that its flooding regulation still does not comply with the EU provisions and has

Cybercrime: Developing the Legal Framework in Europe

Seminar 2: Child pornography on the Internet and cooperation with Internet service providers

Lisbon, 17-18 March 2011

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

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

Building up on the first seminar held in London in November 2010, the second event of the series is intended as a platform to debate and assess all legal measures to prevent and combat the production, processing, possession, and distribution of child pornography material on the Internet and to promote the effective investigation and prosecution of offences in this area of law.

EU Member States shall take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet. The next step is then the cooperation with Internet service providers (ISPs) such as Google, AOL, Yahoo!, Skype, Facebook, and eBay, which remains key for judges, prosecutors, and law enforcement authorities to prevent, detect, and respond to crimes committed using the ICT facilities.

During this seminar, the most recent European legal acts and complementary measures such as the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) and the current Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, will be debated.

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

This event is organised with the financial support of the Prevention of and Fight against Crime Programme of the European Union, European Commission-Directorate General Home Affairs.

The seminar will be held in English.

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therefore decided to refer the case to the ECJ and take court action against France.

- After receiving reasoned opinions on the matter twice, the latest having been received in June 2010 (see eucrim 2/2010, p. 47), the Commission decided to refer Malta to the ECJ for its failure to establish ambient noise maps and make them available to the public as required by the "Noise Directive" (2002/49/EC).

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- Belgium has failed to comply with EU water legislation and therefore been sent a request by the Commission to do so within two months (from 30 September on). In the absence of a satisfactory response after this period of time, the Commission may refer the case to the European Court of Justice. Belgium has also been requested to fully comply with EU air quality legislation. So far, the "Air Quality Directive" (2008/50/EC) has only been transposed into legislation

in one of Belgium's three regions. Belgium is to respond to the reasoned opinion within two months from 28 October on. (ST)

► [eucrim ID=1004033](#)

Illegal Migration

France and the Roma – State of Play

After a clash in July between French Roma and police authorities, France began dismantling some 300 illegal Roma camps and started sending those found to be illegally staying in France to their home countries (mainly Romania and Bulgaria). After the Vice-President of the Commission and Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, presented her assessment of the situation of the Roma in France on 29 October 2010, the Commission decided to send a formal notice to France asking for full transposition of the Free Movement Directive (2004/38/EC) into national law within two weeks (see [eucrim 3/2010](#), p. 93). Although the Vice-President has expressed her irritation over the situation in France, calling it “a situation (she) had thought Europe would not have to witness again after the Second World War” in a statement released on 14 September 2010, the Commission decided to not take legal action against Paris for discrimination against an ethnic group and instead to only ask for compliance with the Directive and more information. This decision came right on time to de-escalate the situation after French authorities expressed their anger about Reding's statements.

On 30 October 2010, MEPs held an extraordinary joint meeting of the EP Committee on Civil Liberties, Justice and Home Affairs and the Committee on Employment and Social Affairs on the matter. Most MEPs backed the Commission's decision, while others would have liked to see the Commission take more serious action against France and show “zero tolerance” with regard to any fail-

ure to transpose the Directive and called for stricter controls in order to fight discrimination against minority groups, not just in France, but in all Member States.

On 19 October 2010, the Vice-President released a statement on recent developments concerning the situation of Roma in France. In her statement, Reding said that France has responded “positively, constructively and in time to the Commission's request.” The French authorities submitted detailed documentation to the Commission on 15 October 2010, containing draft legislative measures and a calendar for putting the procedural safeguards required under the EU's Free Movement Directive into French legislation by early 2011. The Vice-President called this “proof of the good functioning of the European Union as a Community governed by the rule of law.” Based on this response, the Commission decided to not pursue further infringement procedures against France in this matter.

In the October 19th statement, the Vice-President announced further assessment of the situation of Roma in other European Member States and presented an EU Framework for national Roma integration strategies in April 2011. (ST)

► [eucrim ID=1004034](#)

Sexual Violence

EESC Calls for Rapid Action against Child Abuse

On 15 September 2010, the European Economic and Social Committee (EESC) adopted an opinion on the proposal for a Directive on combating the sexual abuse of children, sexual exploitation of children, and child pornography (see [eucrim 1/2010](#), pp. 12-13). EESC rapporteur Ms. Madi Sharma summarized and presented the opinion at a public hearing on 28-29 September 2010. The EESC urges the EU not only to speed up proceedings in the discus-

sions on the proposed directive, but also points out that several Member States have as yet failed to ratify the CoE Convention on the Protection of Children against Sexual Exploitation and Abuse as well as the UN Convention on the Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Regarding the proposed directive, the EESC opinion makes numerous suggestions as to the wording of the text, mainly in order to expand the scope of the directive or to clarify imprecise phrases. The EESC also recommends the establishment of an international law enforcement body dedicated to investigating child sexual abuse around the world.

The Directive is currently being discussed in the Council. (ST)

► [eucrim ID=1004035](#)

Procedural Criminal Law

Procedural Safeguards

Directive on Right to Interpretation and Translation Adopted

The Directive on the right to interpretation and translation in criminal proceedings was adopted by the Council on 20 October 2010 (see also [eucrim 1/2010](#), pp. 14-15 and [Cras & de Matteis](#) in this issue on pp. 153-162).

Directive 2010/64/EU was published in the Official Journal of 26 October 2010. The Member States have three years to bring their national laws, regulations, and administrative provisions into force as necessary to comply with this Directive.

The right to have certain documents in criminal proceedings translated and to have hearings and interrogations interpreted is the first right in a series of fair trial measures establishing common EU standards in criminal proceedings. It will be followed by the right to information, also known as the “Letter of Rights” that

provides suspects and accused persons with information about their rights and the charges brought against them (see also eucrim 3/2010, pp. 93-94). The proposal on the right to information is currently still being discussed by the Council. (EDB)

►eucrim ID=1004036

Data Protection and Information Exchange

Commission Presents Strategy on Transfers of PNR Data to Third States

As announced in April of this year (see eucrim 1/2010, p. 14), the Commission presented a communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries on 21 September 2010.

For the first time, the Commission has listed general considerations, which are to guide the EU in negotiating PNR agreements with third states. These guidelines should allow for greater coherence between the different PNR agreements whilst ensuring respect for the right to respect for private life and the right to protection of personal data. At the same time, they should be adaptable to each third state's specific security concerns and legal systems.

The considerations should be used to renegotiate the PNR Agreements with the US and Australia. The Agreement between the EU and the US on the processing and transfer of PNR data by air carriers to the US Department of Homeland Security (DHS) of 2007, and the Agreement between the EU and Australia on the processing and transfer of European Union-sourced PNR data by air carriers to the Australian Customs Service of 2008, were both provisionally applied subject to their conclusion at a later moment. Due to the entry into force of the Lisbon Treaty, the EP needs to approve the conclusion of these agreements. The EP's vote on this approval was postponed in anticipation of

the announcement of the Commission's strategy on PNR agreements with third states.

The EU has had a PNR Agreement in force with Canada since 2006. This also has to be replaced by a new agreement due to the expiry of the decision on the adequate protection of personal data contained in the Passenger Name Records of air passengers transferred to the Canada Border Services Agency. Therefore, the Commission's strategy will also apply to the negotiation of this new agreement.

The Commission also presented the Council with (re)negotiation mandates for the PNR Agreements with the US, Australia, and Canada. With regard to these mandates, the Council agreed that the discussions on the draft negotiation mandates should be started by the Council's preparatory bodies as soon as possible and that all three mandates should be identical in content and adopted at the same time. Additionally, the Council would like to have these mandates adopted before the end of 2010 and, once they are adopted, negotiations with all three states should start simultaneously. (EDB)

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The European Data Protection Supervisor (EDPS) published his opinion on the Commission's Strategy on PNR agreements with third states on 19 October 2010. The main concern of the EDPS is the lack of compliance with the requirements of proportionality and necessity of the PNR schemes presented by the Commission. Stricter conditions should apply with regard to the processing of sensitive data, the principles of purpose limitation and data retention, and the onward transfer of data. The EDPS also calls for effective enforcement procedures to be used by data subjects and supervisory bodies.

Additionally, developing data protection considerations for PNR agreements with third states prior to establishing an EU PNR system is not considered logical. Consistency should be guaranteed

for agreements governing the transfer of personal data to third states, including the future general agreement on data protection with the US. (EDB)

►eucrim ID=1004038

New US Legislation Could Render EU-US Agreement on Bank Data Transfer Void

Since 30 September 2010, a new rule proposed by the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) threatens to render invalid the recently concluded Agreement between the EU and the US on the transfer of bank data in the fight against terrorism. The said Agreement between the EU and the US entered into force on 1 August 2010 (see eucrim 2/2010, pp. 48-50) and governs transfers of bank data that have a nexus with terrorist activities. This was done for the purpose of the US Terrorist Finance Tracking Program (TFTP).

On 27 September 2010, *The Washington Post* reported on the Obama administration's plans to expand its running anti-terrorism programs to include all money transfers. Banks would have to report all cross-border electronic transfers, even the smallest ones, making the necessary terrorism link included in the EU-US Agreement void. In accordance with US law, the proposed amendments were duly published in the section on proposed rules of the Federal Register of 30 September 2010. The Federal Register contains announcements to the public of the proposed issuance of rules and regulations.

Members of the EP and the Commission have agreed to ask the US authorities for clarification. (EDB)

►eucrim ID=1004039

UK to Court of Justice for Unlawful Communication Interception

On 30 September 2010, the Commission decided to refer the UK to the Court of Justice for infringing the rules laid down in Directive 2002/58/EC and Directive 95/46/EC.

The Commission sees three breaches of both legal instruments. Firstly, the required independent national supervisory authority has not yet been established. Secondly, UK legislation does not correspond to the EU rules that define when a person consents to an interception of communications. Thirdly, UK legislation on unlawful interception is limited to intentional interception only. (EDB)

►eucrim ID=1004040

UK to Participate in Regulation Establishing Large-Scale IT Agency

By letter of 5 October 2010, the UK has expressed its intention to participate in the adoption of the amended proposal for a Regulation of the EP and the Council on establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. In accordance with Council Decision 2000/365 and Protocol (No. 19) on the Schengen *acquis* integrated into the framework of the EU, the UK can ask to take part in some of the provisions of the Schengen *acquis*.

The UK already participates in Eurodac and partially participates in the second generation of the Schengen Information System (SIS II). Since the future IT Agency will incorporate both these systems as well as the Visa Information System (VIS), the UK envisages being bound by the Regulation after its adoption. The proposed Regulation also contains provisions that the UK did not participate in, such as the VIS and specific parts of SIS II. With its current request, the UK also wants to participate to these provisions in the Regulation. (EDB)

►eucrim ID=1004041

Ne bis in idem

Court of Justice Gives Interpretation of Ne Bis in Idem Principle

On 16 November 2010, the Court of Justice ruled in the so-called Mantello case (case C-261/09).

The *ne bis in idem* principle is the focus of this case that is a referral by the Oberlandesgericht Stuttgart (Higher Regional Court) in Germany for a preliminary ruling on the precise meaning of Art. 3, §2 of the Framework Decision on the European Arrest Warrant (EAW).

In 2005, Gaetano Mantello, an Italian citizen residing in Germany, was convicted in Italy of the possession of cocaine. At the time of the investigation into this offence, police authorities in Catania, Italy already had evidence of Mantello's involvement in cocaine trafficking and trade between Italy and Germany as part of a criminal organisation. For strategic purposes – in order not to interfere with the ongoing investigation into the wider criminal organisation – the Italian police decided not to prosecute Mantello for this particular offence.

The Court in Catania issued an EAW against Mantello on 7 November 2007 based on a national arrest warrant against him and 76 other suspects. Shortly after, Mantello was arrested in Germany based on this EAW. He was charged with two criminal offences: illegal international trade in cocaine as part of a criminal organisation and illegal possession, transport of, and trade in cocaine. The Oberlandesgericht Stuttgart suspended the trial against Mantello in order to refer the questions of application of the *ne bis in idem* principle to the Court of Justice. The Court has been asked to rule on the question of whether the term “the same facts” as used in Art. 3, §2 of the Framework Decision on the EAW is judged according to the national law of the issuing state, the national law of the executing state, or whether this term should be interpreted autonomously. Additionally, the Court has been asked to rule whether Art. 3, §2 of this Framework Decision is applicable despite the fact that the police in Catania was aware of Mantello's involvement in the criminal organisation.

The Advocate General of the Court of Justice, Yves Bot, published his opinion on 7 September 2010. He expressed the

opinion that the term “the same facts” is part of a provision of EC legislation and should thus be interpreted in an autonomous and uniform way. The term should be interpreted in the same way as Art. 54 of the Schengen Implementation Convention (SIC). This means that the relevant criterion for judging the equality of the facts is based on the objective facts with which the defendant has been charged. The strategy of the police authorities is a subjective element and thus irrelevant for decisions on the application of the *ne bis in idem* principle.

The Court followed its Advocate General in the reasoning that the term “the same facts” is an autonomous concept and that its interpretation should be based on Art. 54 SIC.

However, the Court thinks that the questions brought forward by the referring German court are closer related to the term “final judgment” than to the term “the same facts”. The question whether a person has been finally judged for the purposes of Art. 3(2) of the Framework Decision on the EAW is determined by the law of the Member State in which judgment was delivered. Thus, it is Italian law that should be applied to this aspect of the case. As is foreseen in the Framework Decision, the executing Member State can ask the issuing Member State for information on the exact nature of the judgment in order to determine whether this was a final judgment or not. The Oberlandesgericht Stuttgart received the answer from the Court in Catania that Mantello was finally judged for the offence of illegal possession of cocaine but that the EAW was based on other facts. Even though the investigating authorities had information on the offences of organised crime, trade and other forms of illegal possession, Mantello had not been convicted for these acts by a final judgment.

This means that the judgment of the Court of Catania does not oblige the German authorities to refuse execution of the EAW against him. (EDB)

►eucrim ID=1004042

Victim Protection

EP Committees Strongly Support European Protection Order

The proposed Directive for a European Protection Order was supported by a large majority (64 votes to 1 and 6 abstentions) in the joint vote by the EP Committee for Civil Liberties, Justice and Home Affairs and the Committee for Women's Rights and Gender Equality on 29 September 2010 (see also eucrim 2/2010, p. 52). The orientation vote by both Committees on more than 150 amendments to the draft text is meant to guide the EP rapporteurs when they negotiate on the matter with the Council in the coming months.

The Belgian Presidency informed the Member States' Ministers of this vote while also assessing the progress made in the legislative procedure concerning the European Protection Order. (EDB)

➤ eucrim ID=1004043

Freezing of Assets

General Court Annuls Measures Ordering Freezing of Al-Aqsa Funds

By judgment of 9 September 2010, the General Court of the Court of Justice annulled a Council Decision based on a repealed national decision ordering the freezing of funds of the "Stichting Al-Aqsa" foundation (T-348/07).

Stichting Al-Aqsa is a foundation under Dutch law that describes itself as an Islamic social aid institution financially supporting organisations in Israel, the West Bank, and the Gaza Strip involved in humanitarian emergencies. On 3 April 2003, the Dutch Minister of Foreign Affairs issued the "Sanctieregeling terrorisme 2003" (terrorism sanctions order). Based on this regulation, the funds and financial assets of the foundation were frozen, a measure that the foundation tried to suspend by means of interlocutory proceedings. This application was dismissed.

On 27 June 2003, the Council of the EU updated the list of persons and entities involved in terrorist activities whose funds could be frozen. This list is the implementation of a UN Security Council Resolution (see also eucrim 4/2009, pp. 138-139), and inclusion on the list follows a decision by the competent national authority. In this case, the inclusion of Al-Aqsa Stichting on the list was based on the terrorism sanctions order. Following the Council Decision of 27 June 2003, this order was repealed.

However, this Council Decision was annulled by the General Court on 27 June 2003 (case T-327/03). In 2007, the Council adopted a new decision updating the terrorist list, including Al-Aqsa Stichting. This was followed by a number of updates, always maintaining Al-Aqsa's inclusion on the list. The foundation requested the General Court to annul the 2007 Decision and has adapted its action to subsequent Council Decisions up to June 2009.

The General Court ruled that the verification of an action taken at the national level, following a Council Decision to freeze funds, is essential when adopting a subsequent Decision to continue the freezing of funds. Thus, the Court annulled the measures freezing the funds and financial assets of Al-Aqsa Stichting as they were based on the national terrorism sanctions order, which could no longer serve as a valid legal basis since it had been repealed. (EDB)

➤ eucrim ID=1004044

Second Kadi Judgment by General Court Annuls Freezing Regulation

The legal battle of Mr. Yassin Abdullah Kadi against the freezing of his funds and financial assets due to his alleged association with terrorist activities has been reported on in previous issues of eucrim (see eucrim 4/2009, pp. 138-139).

In 2005, the Court of First Instance (now called the General Court) dismissed his action for annulment due to the prevailing nature of UN Security

Council Resolutions over EC Regulations. In 2008, the Court of Justice accepted his appeal against the 2005 judgment stating that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty." The Court ruled that Mr. Kadi's rights to defence and to effective judicial review had been violated.

On 30 September 2010, the General Court ruled on a new action for annulment by Mr. Kadi against a Commission Regulation of 28 November 2008 maintaining the freeze of his funds (T-85/09). This time, Mr. Kadi received the opportunity to comment on a summary of reasons for taking these measures by the UN Sanctions Committee. He took advantage of this opportunity. Nevertheless, his request for disclosure of the evidence against him was denied by the Commission.

In its ruling, the General Court acknowledged the criticism that had been voiced regarding the consistency of the Court of Justice of 2008's judgment with international law and the EU treaties. The General Court still considers it the task of the Court of Justice to address these points of criticism in future cases. In the Kadi case, the General Court focuses on the review of the contested Regulation, which it believes is its task as long as UN Sanctions Committee procedure does not provide for effective judicial protection of the person concerned.

The General Court states that, in giving Mr. Kadi the opportunity to comment on a summary of reasons without disclosing the evidence against him, the Commission has only "observed" his rights of defence in the most formal and superficial sense. Additionally, his request to be granted access to the evidence was refused, thus not striking the balance between his interests and the need to protect confidential information.

In conclusion, the General Court annulled the Regulation freezing the funds and financial assets of Mr. Kadi based

on the violations of his rights of defence and his right to effective judicial review. Furthermore, the Court ruled that, given the general application and duration of the freezing measures, the regulation also constitutes an unjustified restriction of Mr. Kadi's right to property. (EDB)

► [eucrim ID=1004045](#)

Cooperation

Police Cooperation

Overview on Prüm Implementation

The Belgian Presidency has published an overview on the implementation of the provisions on information exchange of the so-called 'Prüm Decision' (for more details, see [eucrim 1-2/2008](#), pp. 35-36).

By 26 August 2011, Member States have to comply with the provisions of the Prüm Decision relating to automated searching of DNA profiles, dactyloscopic data, and vehicle registration data.

The Belgian paper now offers a brief overview of the formalities to be complied with when implementing these provisions. Information is provided on how to notify the Council Secretariat and which information is needed (for instance, information on the respective national contact points, the maximum search capacities for dactyloscopic data, the readiness to apply the decision as well as lists of national DNA analysis files, a questionnaire on data protection requirements, and reports on the national state of play of implementation). Furthermore, advice is given on the requirements for the national evaluation procedure and on the obligations (e.g., nominating experts, compiling statistics) of those Member States that have become operational.

Finally, the document provides a tabular overview on the declarations made by Member States regarding the state of play of implementation of these provisions. According to this table, the

exchange of DNA data is already operational in Austria, Bulgaria, Finland, France, Germany, Luxemburg, the Netherlands, Romania, Slovenia, and Spain. Concerning dactyloscopic data, only Germany, Luxemburg, Slovenia, and Spain have become operational so far. Finally, it is shown that Austria, Belgium, France, Germany, Luxemburg, the Netherlands, and Spain are operational today regarding vehicle registration data. (CR)

► [eucrim ID=1004046](#)

Decision to Conclude Agreement with Norway and Iceland on Prüm Provisions

On 26 July 2010, the Decision to conclude an Agreement between the European Union and Iceland and Norway on the application of certain provisions of the 'Prüm Decision' entered into force (for further details, see [eucrim 3/2009](#), p. 74). While the UK and Ireland decided to take part in the adoption and application of this Decision, Denmark made use of its right to opt out. (CR)

► [eucrim ID=1004047](#)

CEPOL Strategy

On 30 September 2010, the CEPOL Governing Board adopted the CEPOL Strategy and balanced scorecard.

The strategy presents the comprehensive strategic vision for CEPOL in the next five years, seeing it function as a European law enforcement education centre and knowledge base. The strategy outlines CEPOL's guiding principles with regard to the quality of learning and CEPOL's relationship with EU law enforcement society and stakeholders.

At the heart of the document are CEPOL's strategic goals and objectives for the period 2010-2014. The four main goals outlined in the strategy concern the following:

According to the first goal of the strategy, the CEPOL network shall function as a European law enforcement education platform on the highest level of international excellence. To achieve this

goal, the strategy defines several strategic objectives, e.g., quality training courses on specific subjects as well as for senior leaders in order to enhance their European competence; the development of exchange programmes as an essential element of learning; the development of common curricula that would contribute to the preparation of harmonised training programmes in accordance with EU standards; and the development of further and easier access to e-learning systems. Finally, quality learning shall be the acknowledged ethos of CEPOL's reputation and prestige.

The second goal envisaged by the strategy is to develop CEPOL into a European law enforcement knowledge base. To achieve this goal, its knowledge base shall be broadened by continued development of the e-library; research shall be facilitated and support provided to researchers and scientists; forums for debate, sharing of research findings, and interaction between senior practitioners and researchers shall be ensured; a European database of law enforcement researchers, scientists, and research shall be founded and maintained; finally, communities and individuals with outstanding performance, excellent work in assisting or promoting European police education and science under CEPOL's umbrella shall be honoured and acknowledged.

The third goal requires external relations to be considered and dealt with as a cornerstone of partnership. To achieve this goal, cooperation with EU agencies and bodies (Europol, Frontex, Eurojust, European Monitoring Centre for Drugs and Drugs Addiction, European Training Foundation, Centre for the Development of Vocational Training, and European Crime Prevention Network) shall remain a priority. Furthermore, associated States (Iceland, Norway, and Switzerland) shall be considered the closest partners. Assistance shall also be given to candidate and accession countries, countries that are part of the EU neighbourhood policy and eastern partner-

ship. Cooperation with globally significant partners, such as North-America, Russia, China, the Association of European Police Colleges, and others shall be enhanced. Finally, the multiple roles and interests of the private sector shall be factored in to intensify cooperation with civil society.

The fourth and last goal is geared towards having CEPOL led and managed as a top-ranking innovative EU agency. To this end, a corporate leadership and management structure shall be applied by the Governing Board and devolved leadership and management shall be applied between the Director and the Secretariat team. In order to ensure functional discipline, an effective internal control system, including an audit panel, shall be created and maintained. Human resources shall be managed as the greatest assets of CEPOL. Budget management shall ensure the implementation of its annual work programme and contribute to CEPOL's future innovation; the Secretariat shall provide appropriate administrative support for the proper function of all CEPOL components, and stakeholder relations and internal communication shall be enhanced. Finally, enhanced public relations and cooperation with civil society (NGOs, think-thanks, civil foundations, and the private sector) shall help to increase CEPO's visibility and social acceptance. (CR)

► eucrim ID=1004048

European Parliament Refuses to Discharge 2008 Budget

On 6-7 October 2010, the European Parliament's Budgetary Control Committee made the recommendation not to discharge CEPOL's budget for the financial year 2008 due to inadequacy and ineffectiveness in the areas of budget, procurement, and human resources management that also led to investigations by OLAF against CEPOL's former director.

On its website, the newly appointed Director of CEPOL accepted the expected decision but also distanced to-

day's college from the "old" CEPOL. He emphasised that, since then, CEPOL has implemented a transformation programme, marked by the appointment of its new leadership in February 2010. He also stressed that CEPOL will now concentrate on the implementation of its recently approved strategy. (CR)

► eucrim ID=1004049

Judicial Cooperation

Council Conclusions on Follow-Up of Mutual Recognition Instruments

At the beginning of its Presidency on 1 July 2010, Belgium issued a discussion paper addressing the need to ensure effective implementation of mutual recognition instruments. The paper suggested the development of a methodology and standard procedure in order to monitor legislative implementation and to develop practical measures at the EU level in order to guarantee an efficient and consistent process of implementation (for further details, see eucrim 2/2010, p. 53).

In its Conclusions of 7-8 October 2010, the JHA Council welcomed the initiative and endorsed the above-mentioned methodology. It invited future presidencies and the Commission to provide venues for discussion (e.g., expert meetings or seminars) at which Member States can debate specific questions related to the implementation, practical application, or evaluation of the instruments.

The JHA Council also requested that the EJM give priority to its assigned tasks within this methodology and procedures (e.g., to provide information on notifications of implementation on its website). However, in its Conclusions, the Council also acknowledged the need, in future legislative work at the EU level, to take into account the capacities available at the national level to implement the successive instruments concerned. (CR)

► eucrim ID=1004050

Germany and Bulgaria Implement Framework Decision on Confiscation Orders

On 7 October 2010, Germany notified the Council of its implementation of Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Bulgaria notified the Council of its implementation on 25 October 2010.

Competent authorities for the issuing and execution of a confiscation order in Germany are the prosecution services at the district courts (*Landgerichte*), except in the city state of Berlin, where the Senate Department for Justice (*Senatsverwaltung für Justiz*) is responsible. Bulgaria has determined the provincial courts and Sofia City Court as competent.

Furthermore, both Germany and Bulgaria have made a declaration under Art. 7(5) of the Framework Decision not to recognise and execute confiscation orders under circumstances in which confiscation was ordered under the extended powers of confiscation under the law of the issuing State (Art. 2 (d)(iv)).

Bulgaria has also made a declaration under Art. 19(2) of the Framework Decision, declaring that the certificate (i.e., the standard form for the order) must be accompanied by a translation into Bulgarian. (CR)

► eucrim ID=1004051

EU-Japan MLA Agreement Adopted

On 7 October 2010, the Council adopted an Agreement between the European Union and Japan on mutual legal assistance in criminal matters (for details, see eucrim 3/2009, p. 76). The agreement was already signed on 30 November and 15 December 2009 subject to its conclusion at a later date. The European Parliament gave its consent on 7 September 2010.

Given that no EU Member State has a bilateral mutual legal assistance treaty in place with Japan, this agreement will form the common basis for mutual legal

assistance between all 27 Member States (opt-ins for the UK and Ireland) and Japan. Consultations for the agreement were begun in 2007. (CR)

►eucrim ID=1004052

European Arrest Warrant

Judgment of the European Court of Justice in *I.B.* Case

On 21 October 2010, the European Court of Justice (ECJ) delivered its judgment in case C-306/09 *I.B.*

The reference for a preliminary ruling from the Belgian Constitutional Court (*court constitutionnelle*) concerned the interpretation of Articles 3, 4(6), 5(1) and 5(3) as well as the validity of Articles 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant (FD).

In this case, *I.B.*, a Romanian national, was sentenced to four years imprisonment by the Romanian Court of Appeal. However, the Romanian Court held that he could serve his sentence at his workplace rather than in custody. In the following proceedings, the Romanian Supreme Court overruled this judgment and held that the sentence had to be served in custody. According to the statements of the Supreme Court, this decision was made *in absentia* and without having informed *I.B.* of the date or place of the hearing in person. *I.B.* moved to Belgium after allegedly having been the victim of serious breaches of his right to a fair trial. His wife and two children joined him there. After several years, *I.B.* was taken into custody by the Belgian authorities following a European Arrest Warrant (EAW) issued by Romania. The question of the enforceability of this EAW led to the question for preliminary ruling by the Belgian Constitutional Court concerning the interpretation of Articles 4(6) and 5(3) FD.

Art. 4(6) FD gives the executing authority the right to refuse the execution

of a EAW if it was issued for the purpose of execution of a custodial sentence or detention order, and if the requested person is staying in or is a national or a resident of the executing Member State, and if that State undertakes to execute the sentence or detention order in accordance with its domestic law. According to Art. 5(3) FD, national law can subject the surrender of a person, who is the subject of a EAW for the purpose of prosecution and who is a national or resident of the executing Member State, to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him by the issuing Member State.

The Belgian court asked whether a EAW issued for the purpose of the execution of a sentence imposed *in absentia*, and against which that person still has a legal remedy, can be considered a EAW issued for the purpose of the execution of a custodial sentence or detention order within the meaning of Art. 4(6) FD or whether it needs to be considered a EAW issued for the purpose of prosecution within the meaning of Art. 5(3) FD.

In its reply, the Court pointed out that the EAW basically applied to two situations: on the one hand, it may be issued for the purpose of conducting a criminal prosecution; on the other hand, it may be issued for the purpose of executing a custodial sentence or detention order. However, there would be no absolute obligation to execute a EAW. In specific situations, it may be expedient to decide that a sentence must be executed on the territory of the executing Member State if this decision serves the objective of increasing the requested person's chances of reintegrating into society (as supported by Articles 4(6) and 5(3)). According to the Court, there were no reasons that persons requested on the basis of a sentence imposed *in absentia* should be excluded from this objective.

On the one hand, a judicial decision rendered *in absentia* falls within

the scope of the Framework Decision which, specifically in Art. 5(1) FD, provides that the execution of a EAW issued following such a decision may be subject to the guarantee that the person concerned has the opportunity to apply for retrial of the case. On the other hand, the mere fact that Art. 5(1) FD makes the execution of a EAW issued following a decision rendered *in absentia* subject to such a guarantee cannot have the effect of rendering inapplicable the ground or condition laid down in Art. 4(6) or Art. 5(3). If the sentence imposed *in absentia* is not yet enforceable, surrender would effectively serve the purpose of criminal prosecution, which was the situation envisaged by Art. 5(3).

Hence, the Court argued that, given that the situation of a person sentenced *in absentia*, and for whom it is still possible to apply for a retrial, is comparable to that of a person who is the subject of a EAW for the purpose of prosecution, there is no objective reason precluding an executing judicial authority that has applied Art. 5(1) FD from applying the condition contained in Art. 5(3) FD. In the end and only in this way, would a realistic possibility of reintegration into society be offered. Only this interpretation would prevent the person sentenced *in absentia* from waiving a retrial in the issuing Member State in order to ensure that his sentence may, pursuant to Art. 4(6) FD, be executed in the Member State where he is located.

Therefore, the Court held that Articles 4(6) and 5(3) FD must be interpreted as meaning that, where the executing Member State has implemented Articles 5(1) and Art. 5(3) FD in its domestic legal system, the execution of a EAW for the purpose of execution of a sentence imposed *in absentia* within the meaning of Art. 5(1) FD may be subject to the following condition: the person concerned, either a national or resident of the executing Member State, should be returned to that State in order to serve the sentence passed against him, follow-

ing a new trial held in his presence in the issuing Member State. (CR)

► eucrim ID=1004053

European Investigation Order (EIO)

Response to Questionnaire on Issuing Authorities

According to Art. 2(a)(ii) of the proposal for the so-called European Investigation Order (EIO), the issuing authority must not necessarily be a judge, a court, an investigating magistrate, or a public prosecutor. For the specific case, Member States also have the possibility to define any other judicial authority which would act as an investigating authority in criminal proceedings, with competence to order the gathering of evidence in accordance with national law.

In order to assess whether Member States can make use of this possibility under their national systems and, if yes, which authorities would be concerned and what competences they would have (i.e., to order all kinds of investigative measures or only specific measures; to deal with all types of offences or only specific ones), the Belgian Presidency distributed a questionnaire to the Member States.

24 Member States replied to the questionnaire (Bulgaria, Cyprus, and Malta missing), of which 19 Member States stated not having such a possibility under Art. 2(a)(ii) of the proposal. A positive answer was only given by Austria, Finland, Latvia, Sweden, and Slovenia.

Judicial authorities competent to issue a EIO in Austria could, for instance, be various administrative authorities, such as tax authorities, the Financial Market Authority, or the Agricultural District Authorities, all of which can, however, only apply a limited number of investigative measures.

In Latvia, Finland, Sweden, and Slovenia, judicial authorities responsible for issuing a EIO include police authorities. In Finland, customs authorities are also

included as well as border guard officers in their capacity as preliminary criminal investigation authorities. In Sweden, the Swedish Coast Guard and Swedish Customs Administration are also considered competent. In all four Member States, the competences of these authorities vary with regard to investigative measures and they depend on the measures in question. (CR)

► eucrim ID=1004054

Response to Questionnaire on Interception of Telecommunication

In August 2010, the Belgian Presidency distributed a questionnaire investigating the scope of the EIO with regard to the question of telecommunications (for details, see eucrim 3/2010, p. 99).

The questionnaire asked for four types of situations, of which only the first is currently covered by the proposal:

- The ordinary interception of telecommunications without immediate transmission (type 1);
- The ordinary interception of telecommunications with immediate transmission (type 2);
- Interception of satellite telecommunications (type 3);
- Interception of telecommunications in cases where the requesting State does not require the technical assistance of the Member State where the target is located (type 4).

Of the 27 Member States, 17 replied to the questionnaire.

Regarding the types of situations, the main findings of the questionnaire show the following:

- The ordinary interception of telecommunications without immediate transmission is legally and technically possible in the majority of Member States.
- The ordinary interception of telecommunications with immediate transmission already differs vastly from the first option, with the majority of Member States – despite having the legal possibility – indicating technical difficulties, lacking case experience, and lacking statistics.

■ A terrestrial station for satellite telecommunications is only hosted by Denmark, Italy, and Slovakia, but Denmark and Slovakia have had no cases so far.

As regards the interception of telecommunications in cases where the requesting State does not require the technical assistance of the Member State in which the target is located, all Member States replied in the questionnaire that either no statistics were available or no experience with cases for this situation. (CR)

► eucrim ID=1004055

Commission Comments on the EIO Initiative

The Commission has published a set of comments on the proposed initiative to set up the EIO. On a positive note, according to the Commission, the EIO initiative would give added value to the existing legal regime on obtaining evidence from another Member State, as it would replace the fragmented regime with a single instrument, introduce standard forms and fixed deadlines, abolish verification of dual criminality, and limit the grounds for refusal. Nevertheless, in its comment on the initiative, the Commission considers the objections with regard to the practical application of the European Evidence Warrant (EEW) to be premature, given that the EEW has not even been implemented yet by most Member States.

While the Commission announces cooperation with the Member States in favour of the proposal as well as negotiations in Council, it also emphasises its intention to continue preparatory work on its own proposals concerning issues that go beyond the initiative and are in line with the Action Plan implementing the Stockholm Programme.

Looking at the legal form of the proposal, the Commission deems a Regulation more appropriate, as Directives are not directly applicable and need to be transposed into national law.

Strong criticism has been voiced with regard to recital 17, which claims that the Directive respects fundamental

rights and observes the principles recognised by Art. 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union. The Commission argues that, in the absence of a proper impact assessment or explanatory memorandum, there is not enough material proving that the draft Directive respects the Charter.

Additional recitals that the Commission recommends including concern the prevention of forum shopping and a reference to the data protection principles of the Council of Europe Convention 108/1981 as well as its additional protocol and Framework Decision 2008/977. Furthermore, an additional article on data protection should be included.

With regard to the individual provisions of the proposal, the Commission views most provisions as acceptable. However, it considers it necessary to add a definition of the term “investigative measure” that complies with the requirements of legal certainty and legal clarity.

Although it supports the limited number of grounds for refusal, it suggests including two additional grounds for refusal: first, infringement of the *ne bis in idem* principle by the execution of a EIO; second, indication of substantial grounds that the person to be transferred would face the genuine risk of being subjected to inhuman or degrading treatment or punishment.

As for the provision on legal remedies for persons affected by a EIO, the Commission recommends describing these remedies in more detail, as was done in the Framework Decision on the EEW.

Concerning grounds for postponement, according to the Commission, they should not relate to the recognition of a EIO.

Regarding the provision for hearings by means of video and telephone conferences, the Commission notes that no thought has been given to the rights of the defence in the respective Articles, which would, however, be expedient in order to respect the principle of fair trial and equality of arms in criminal pro-

ceedings. In addition, it might be wise to examine whether specific requirements are necessary to ensure respect for the rights of children in light of their special needs and vulnerabilities as witnesses in criminal proceedings.

Finally, with respect to the provisions regarding information on and monitoring of banking transactions as well as controlled deliveries, the Commission recommends examining the need for more specific rules. (CR)

►eucrim ID=1004056

EDPS Opinion on the EIO Initiative

On 5 October 2010, the EDPS published his opinion on the initiative for the EIO.

According to the EDPS, the EIO has a significant impact on the right to data protection, given that the evidence collected on the basis of a EIO may contain personal data, as in the case of information on bank accounts, as well as information on and monitoring of banking transactions. It may also cover the communication of personal data, as in the case of video or telephone conferences.

Therefore, the EDPS regrets that the original initiative did not address the protection of personal data. As a first step, it recommends including a recital as well as a specific provision that refer to Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. As a second step, general and specific safeguards for data protection need to be included.

General safeguards to be included shall aim at improving the accuracy of the data, as well as their security and confidentiality. To achieve this aim, the EDPS recommends including provisions that address the issue of translations. To ensure security, awareness, and accountability, Member States should be required to ensure that their competent authorities have the necessary resources to apply the proposed Directive. Their competent officials should observe professional standards and are subject to

appropriate internal procedures that ensure, in particular, the protection of individuals with regard to the processing of personal data, procedural fairness, and the proper observance of the confidentiality and professional secrecy provisions. Furthermore, the EDPS asks for provisions to be inserted to ensure that substantive data protection principles are actually observed when processing personal data. Examples of such provisions could be: authentication systems that allow only authorized individuals to have access both to databases containing personal data and the premises where evidence are located; the tracking of accesses and operations that are performed; and the implementation of audits.

With regard to specific safeguards, the EDPS sees the need to include a provision that prevents the use of evidence for purposes other than the prevention, investigation, detection, or prosecution of crime or for the enforcement of criminal sanctions and the exercise of the right of defence, as an exception to Art. 11(1)(d) of the draft proposal. Another recommended specific safeguard would be an evaluation clause specific to the EIO initiative, requiring the Member States to report on a regular basis on the application of the instrument and requiring the Commission to analyze these reports and issue appropriate proposals for amendments.

Finally, on a more general note, the EDPS recommends that the Council establish a procedure in which consultation with the EDPS takes place should an initiative introduced by Member States be related to the processing of personal data. He reiterates the need for a comprehensive data protection legal framework covering all areas of EU competence, including police and justice, to be applied both to personal data transmitted or made available by competent authorities of other Member States and to domestic processing in the area of freedom, security and justice. (CR)

►eucrim ID=1004057

Taking Account of Convictions

UK Implementation of Framework Decision

The UK has given notice of its implementation of Council FD 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Legislation entered into force on 15 August 2010 for England and Wales and by the end of September 2010 for Northern Ireland. Entry into force in Scotland will be achieved by December 2010 (for further details, see eucrim 1-2/2008, p. 44). Legal effect is given to the Framework Decision in England, Wales and Northern Ireland by the Coroners and Justice Act 2009. For Scotland, provisions giving effect to the Framework Decision are contained within section 52A and Schedule 2A of the Criminal Justice and Licensing (Scotland) Bill. (CR)

►eucrim ID=1004058

Law Enforcement Cooperation

No Access to Eurodac for Law Enforcement Authorities

The latest draft of the amended proposal for a regulation on the establishment of Eurodac, a fingerprint database for asylum seekers, no longer provides Member States' law enforcement authorities with access to the Eurodac central database for the purposes of prevention, detection, and investigation of terrorist offences and other serious criminal offences as foreseen in the September 2009 proposal.

The decision to drop such access for law enforcement authorities in the new draft derives from the entry into force of the Treaty on the Functioning of the EU (TFEU) during the legislative adoption of the proposal. As the issue of access of law enforcement authorities would now fall under new rules of decision-making, keeping the issue in the proposal would

mean that the complete proposal would need to be formally withdrawn and replaced by a new one taking account of the new framework of the TFEU. Hence, in order to avoid prolonging the adoption of the amended proposal, especially with a view to advancing the new asylum package and timely setup of the new Agency for large-scale IT systems, the Commission decided to drop the option of access for law enforcement authorities for the moment. (CR)

►eucrim ID=1004059

Agreement on Joint Approach for Terror Alerts

In their meeting on 7-8 October 2010, JHA Ministers agreed on a joint approach regarding terrorist alerts. In the future, before raising national threat levels, EU Member States shall prenotify the Brussels Joint Situation Centre (SitCen). SitCen is an EU intelligence body forming part of the European External Action Service (EEAS) and is under the authority of the EU's High Representative.

This avoids Member States from learning of upcoming alerts of other Member States via the press or other means only. This had been the case at the end of September 2010, when several Member States published different alerts following a warning published in the USA. However, the idea of establishing a common EU alert system based on common codes met with modest support. (CR)

►eucrim ID=1004060

UK Law Enforcement Participation in VIS Dismissed

In this action for annulment (C-482/08), the UK asked the Court to annul Council Decision 2008/633/JHA of 23 June 2008 concerning access to the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection, and investigation of terrorist offences and of other serious criminal offences (Decision 2008/633/JHA). The

effects of that Decision should be maintained except in so far as it excludes the United Kingdom from participation in its application. Alternatively, the UK proposed that, if Decision 2008/633 is considered a development of the common visa policy, it should nevertheless be annulled on the grounds that it had been wrongly adopted on the basis of Articles 30(1)(b) EU and 34(2)(c) EU which, in Title VI of the EU Treaty, govern common action in the field of police cooperation.

Preceding the action was a dispute between the Commission and the UK on the UK's right to participate in Council Decision 2008/633/JHA and its classification as a measure building upon the Schengen *acquis*.

In its judgment, the Court dismissed the first plea for the following reasons:

Although the UK would take part in the development of provisions of the Schengen *acquis* concerning police cooperation, it would not take part in the development of provisions concerning the abolition of border checks and movement of persons, including the common visa policy, and, in particular, the VIS.

According to the Court, however, Council Decision 2008/633/JHA must be classified as a measure falling within the area of the Schengen *acquis* concerning the common visa policy in which the UK had not taken part.

Although it was true that the aim of the Decision was to permit access to the VIS by the Member State authorities responsible for internal security and by Europol, the Decision pursues objectives which, as such, fall within the scope of police cooperation. The Court underlined the common ground that it nevertheless contained conditions restricting access to the VIS. Hence, in essence, the Decision would organise the ancillary use of a database concerning visas, the principal purpose of which is linked to the control of borders and entry to the territory. Its availability for police cooperation purposes would take place on a secondary basis only. The sole extension

of use for police purposes would not call into question its principal use. Another supporting argument for this interpretation, as brought forward by the Court, reasons that the cooperation established by Decision 2008/633 is only functional and practically possible for those authorities that have central access points to the VIS, which is to say, for authorities of those Member States taking part in the provisions of the Schengen *acquis* concerning the common visa policy.

In reply to the second, alternative plea – also dismissed by the Court – the Court held that the question of whether

a measure constituted a development of the Schengen *acquis* or not was separate from that of the legal basis on which that development was founded.

As the Council sought to develop the Schengen *acquis* by permitting, under well-defined circumstances, the use of the VIS for police cooperation purposes, it was obliged to act on the basis of the provisions of the EU Treaty. The provisions entitle the Council to legislate in this field of police cooperation and therefore, base the Decision on the correct legal footing. (CR)

► eucrim ID=1004061

Court Launches Thematic Factsheets on Its Cases

A series of factsheets on the Court's case law were put on the website of the ECtHR. They deal with various topics, such as: the situation of the Roma, the rights of homosexuals, prison conditions, and the environment. They include both cases in which a decision has been rendered and pending applications. The factsheets are part of the implementation of the action plan adopted at the Interlaken Conference in Switzerland (18-19 February 2010; for a detailed summary, see eucrim 4/2009, pp. 145-147) in order to find ways to help the Court cope with its growing volume of applications and over 130,000 outstanding cases. The factsheets are intended to make the Court's case law more well known. They will be revised to keep up with case law developments and more sheets will be added in the future.

► eucrim ID=1004063



Council of Europe

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

60th Anniversary of the ECHR, 50th Anniversary of the ECtHR

The 4th of November 2010 marked the 60th anniversary of the adoption of the European Convention on Human Rights (ECHR), which has since been supplemented by several Protocols. The rights and freedoms have been further defined through the case law and interpretations of the European Court of Human Rights (ECtHR). As a result, the Convention has become a living instrument, as it is capable of applying to situations that did not yet exist or were inconceivable at the time it was drafted. The Court's interpretation has further helped the Convention

to become a significant modern treaty that can adapt to contemporary social issues. On 6 October 2010, the Council of Europe's Parliamentary Assembly (PACE) paid tribute to the anniversary of the ECHR, the document which served as the basis for the establishment of the ECtHR. To further mark this anniversary, the Council of Europe (CoE) is launching a website dedicated to this key instrument. The website offers regularly updated contents, available in French and English, and will remain operational after 2010. In other related news, a book entitled "The Conscience of Europe: 50 Years of the European Court of Human Rights" will be published in English and French to coincide with the opening of the ECtHR's next judicial year. The book is designed to mark the ECtHR's 50th and the ECHR's 60th anniversaries.

► eucrim ID=1004062

HUDOC: Searching Made Easier

Amongst other things, the HUDOC database contains the judgments of the ECtHR. To make its use easier, a list of keywords by Convention and Protocol Articles was made available in the "Lookup" search functions. Tips on searching the database were also given in the user manuals (see also eucrim 1/2010, pp. 19-20).

► eucrim ID=1004064

New Priority Policy of the Court Regarding the Order of Cases

In June 2009 the ECtHR amended its Rules of Court concerning the order in which it deals with cases. Up until that point, cases had been processed and adjudicated principally on a chronological basis, though it was possible to give priority to particularly urgent cases. This approach, along with the Court's increasing case-load, meant that cer-

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

tain serious allegations of human rights violations were taking too long (several years in some cases), particularly from countries with the highest volume of complaints. Consequently, the applicants were unsatisfied, the violations and their causes remained undetected and, in turn, could lead to more victims and potentially even more applications to the Court.

According to the amended Rule 41 of the Rules of Court, the Court shall consider the importance and urgency of the issues, which should be determined on the basis of criteria fixed by the Court itself. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application. The aim of the policy is to ensure that the most serious cases, as well as cases which reveal widespread problems capable of generating large numbers of additional cases, are dealt with more rapidly. By contrast, low priority is given to repetitive cases, and the lowest priority are cases which are identified as clearly failing to satisfy the admissibility conditions. The amended Rule 41 required that a new policy be developed by the Court. To implement this policy, the Court has drawn up the following different categories:

Firstly, urgent applications are particularly those in which the life or health of the applicant is in risk or other circumstances are linked to the personal or family situation of the applicant, especially where the well-being of a child is at issue.

Secondly come applications raising issues capable of having an impact on the effectiveness of the Convention system, in particular a structural or endemic situation that the Court has not yet examined (pilot-judgment procedure) or applications raising an important question of general interest (capable of having major implications for domestic legal systems or for the European system). Next are applications regarding “core rights” (issues under Arts. 2, 3, 4 or 5 § 1 ECHR), irrespective of repetitiveness, and which have given rise to

direct threats to the physical integrity and dignity of human beings. Potentially well-founded applications are examined based on other articles of the Convention. Next are repetitive cases whose substance was already dealt with in a pilot/leading judgment. They are followed by applications identified as giving rise to a problem of admissibility and finally applications which are manifestly inadmissible. Art. 35 of the ECHR states that clearly inadmissible cases must nevertheless be dealt with and rejected by the Court’s judges.

In practice, this means, e.g. for the same country, that a plausible allegation of torture (Art. 3 of the Convention – category III) will normally be dealt with before an allegation of a violation of the right to freedom of speech (Art. 10 – category IV). The Court has set up a special Working Party to follow the implementation of this policy as well as to review its effect.

►eucrim ID=1004065

Other Human Rights Issues

Draft Recommendation on Profiling

The CoE has been preparing a broadly based Recommendation on profiling. The draft tries to cover both public and private sector profiling as well as online and offline environments. The document states, *inter alia*, that profiling could expose individuals to particularly high risks of discrimination and attacks on their personal rights and dignity. The CoE identifies dangers to fundamental rights and lists them in the text in addition to previous positions taken by the CoE. The draft has been under consultation and consequently criticised for having solely adopted several definitions from the Convention on Data Protection. For instance, it does not give clear answers to what is understood by informed consent, access to and correction of data, and the “right to be forgotten.”

The CoE also made available the replies received on the Draft from del-

egations of the European Committee on Legal Co-operation (CDCJ). Seven delegations expressed their opinion mainly regarding the following definition concerns.

- The term “collection” was suggested (by Germany);
- Non-consistency of the term “sensitive data” with the Convention itself was criticised;
- The rather strict definition of the “child” was questioned;
- The exact meaning of “profiling” was requested (by the Netherlands).

►eucrim ID=1004066

Specific Areas of Crime

Corruption

GRECO: Exchange of Views with Global Organisation of Parliamentarians Against Corruption

On 30 September 2010, representatives of the CoE’s Group of States against Corruption (hereinafter: GRECO) and the Global Organization of Parliamentarians against Corruption (GOPAC) held an exchange of views on Corruption Prevention in Parliamentary Assemblies. Possible ways to intensify cooperation with GOPAC will be explored in the future, notably within the framework of the preparatory work for GRECO’s Fourth Evaluation Round.

►eucrim ID=1004067

GRECO: Third Round Evaluation Report on Bulgaria

GRECO published its Third Round Evaluation Report on Bulgaria on 10 November 2010. As usual, the report focused on two distinct matters: the criminalisation of corruption and the transparency of party funding. A total of 20 recommendations were made. The findings stressed the urgent need to increase the consistency and effective implementation of the rules on party fi-

nancing, and it identified some desirable legal improvements in the criminalisation of corruption.

Regarding the criminalisation of corruption, GRECO stated that Bulgaria has ratified the Criminal Law Convention on Corruption (hereinafter: the Convention) and its Additional Protocol (ETS 191) as well as made obvious efforts to implement these measures and to keep the legal framework on incriminations consistent. Nevertheless, the report stressed the need to clearly incriminate bribery and trading in influence in the various situations in which the beneficiary of the undue advantage is a third person (either a natural person or a legal entity). Despite the changes introduced in 2002, there is discrepancy between the legal framework and actual practice, as the latter interprets the concept of undue advantage too narrowly so as to imply a material benefit that has a discernible market value.

Concerning party financing, the report states that – with the adoption of the 2005 Political Parties Act and other acts regulating parliamentary, European Parliament, local, and presidential elections – Bulgaria has managed to introduce essential measures for the transparency and supervision of party financing and election campaigns. Nonetheless, improvements are required as regards a comprehensive harmonisation of legislation to ensure that the financial statements of parties and candidates adequately reflect their financial activities and become accessible to the public in a timely manner. The report further stresses the need for clear criteria to avoid misuse of public facilities for party activity and election campaign purposes. The range of sanctions on financial irregularities also needs to be complemented with more proportionate and dissuasive ones. Furthermore, GRECO calls for more support for the National Audit Office, which has the lead responsibility in controlling political financing, as it is widely assumed that the financial statements of political

parties and campaign participants generally do not reflect reality. Moreover, the report expresses concerns about the way relevant legislation is drafted and prepared, which suggests political influence. The report mentions, e.g., that the Local Elections Act has been amended 24 times since its adoption in 1995 and that even these amendments were often too late to be fully applicable to upcoming elections. Therefore, it comes as no surprise that the sanctions available were used until recently to address exclusively formal requirements of the law (such as the late submission of financial statements).

►eucrim ID=1004068

GRECO: Joint First and Second Round Evaluation Compliance Report on Monaco

On 14 November 2010 GRECO published its Joint First and Second Round Evaluation Compliance Report on Monaco, issuing a total of 28 Recommendations to Monaco. Since the principality ratified the Convention in 2007, the report is intended to serve as a basis for further discussion and new initiatives in this area. The phenomenon of corruption is considered to be underdeveloped. That, combined with the country's interest in preserving its image, could result in cases not reaching the justice system. Consequently, Monaco has no record of a conviction or court decision in this area. Nevertheless, the report states that some sectors are considered at risk, and that there are considerable gaps in anti-corruption measures and internal/external control mechanisms regarding public administration and public officials. In addition to the identified deficiencies, the few preventive measures that already exist are often ignored. The report stresses that, despite the fact that the principality faces a non-negligible economic and financial delinquency, the recently introduced mechanisms in the area of detection, seizure, and confiscation of proceeds from crime do not fully apply to the fight against corrup-

tion and remain limited to the scope of organised crime and drug trafficking. Furthermore, the non-tax deductibility of bribery-related expenditures is not clearly provided for and, in parallel, the tax administration does not feel involved in the detection and reporting of possible criminal offences including corruption. Finally, improvements are required regarding the status of the prosecutors and judges, including the protection of the prosecutorial work in criminal matters.

►eucrim ID=1004069

Money Laundering

MONEYVAL: Reference Guide on How the FATF Recommendations Help Combat Corruption

On 20-22 October 2010, MONEYVAL participated in the first Plenary of the Financial Action Task Force (FATF) under the Mexican Presidency. In connection with that, the G20 leaders have asked the FATF to help detect the proceeds of corruption and to help deter corruption offences by strengthening the FATF Recommendations, taking corruption issues into account in the process. FATF has therefore developed a reference guide and information notice to raise public awareness on how FATF Recommendations can help combat corruption. The reference guide recognises the link between corruption and money laundering and stresses that effectively implemented anti-money laundering/combating the financing of terrorism (AML/CFT) measures create an environment, which makes it more difficult for corruption to thrive or makes it easier to track down. The reference guide analyses in greater detail how the FATF Recommendations help:

- To better safeguard the integrity of the public sector;
- To protect designated private sector institutions from abuse;
- To increase transparency of the financial system;

■ To facilitate the detection, investigation, and prosecution of corruption and money laundering.

The FATF plenary also addressed money laundering through the use of new payment methods, based on the 2006 Typologies Report on New Payment Methods (NPM). Since 2006, the number of transactions and the volume of funds moving through NPM have significantly increased and, in connection with this, the number of discovered cases in which NPM were misused for money laundering/terrorism financing (ML/TF) purposes has also increased. The soon-to-be-published New Payment Methods Report compares the “potential risks” described in the 2006 report to the “actual risks,” based on new case studies and typologies. Eucrium will report on the findings of the new report.

➤ [eucrium ID=1004070](#)

MONEYVAL: Money Laundering Through Private Pension Funds and the Insurance Sector

On 15 October 2010, Moneyval published its typology report on Money Laundering (ML) through private pension funds and the insurance sector. The primary goal of this typology report was to consider and raise awareness of the vulnerability of the insurance industry in MONEYVAL countries to ML and TF. With the help of the MONEYVAL countries that participated in the typology, a comprehensive overview of vulnerabilities, red flags, and indicators as well as relevant case studies has been compiled. Nevertheless, such studies, by their very nature, are limited by the number of practical examples that have been identified by the participants, and some threats remain theoretical rather than actual. MONEYVAL recognises that the insurance industry, along with the banking and securities sectors, is one of the core industries in which persons and entities can access the financial system and which consequently provides opportunities for criminals to engage in ML and TF. The study therefore provides

an outline of the insurance industry in MONEYVAL Member States, examines specific vulnerabilities, and identifies and includes a number of typologies and case studies regarding life insurance and pensions, insurance companies, and re-insurance.

The very fact that the insurance sector is not considered to be vulnerable to money laundering may possibly make it more attractive to money launderers. Furthermore, the fact that the sector of non-life insurances has been excluded from the scope of the FATF methodology means that a number of MONEYVAL countries have excluded it from the scope of their mandatory AML/CFT regimes. The study does, however, give an indication of the fact that non-life insurance products are clearly being used for the purpose of money laundering. Furthermore, even if there was overall little indication that the insurance industry is being utilised for terrorist financing, suspicion arose in two of the case studies. Therefore, the study identified non-life commercial insurance as a possible serious risk for TF, mainly because of its international nature. Updated lists of red flags and indicators have been annexed to the study.

In sum, the report considers both non-life and life insurances as vulnerable. It points out that independent intermediary marketing insurance products may present a weakness in AML/CFT controls and further indicates that the development of the Internet may give rise to new areas of vulnerability. MONEYVAL also hopes that the information provided by the report will be of great value and use in those MONEYVAL countries where the insurance market is still relatively new and in the process of being developed.

➤ [eucrium ID=1004071](#)

MONEYVAL: Adoption of the Statute of MONEYVAL by the Committee of Ministers

On 13 October 2010, the Committee of Ministers adopted the Resolution CM/

Res(2010)12 on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). As a result, MONEYVAL has been elevated to an independent monitoring mechanism within the Council of Europe, answerable directly to the Committee of Ministers, as from 1 January 2011.

➤ [eucrium ID=1004072](#)

MONEYVAL: 33rd Plenary Meeting

On 27 September to 1 October 2010, at its 33rd plenary meeting, MONEYVAL accomplished the following:

- Discussed and adopted the mutual evaluation report on the fourth assessment visit to Hungary;
- Examined and adopted the first progress reports submitted by Armenia and Ukraine;
- Examined and adopted the second progress report submitted by Poland;
- Adopted the report on typologies elaborated within the framework of the typologies project on money laundering through private pensions funds and the insurance sector;
- Endorsed the key principles for Mutual Evaluations and Assessments prepared by FATF in collaboration with FATF-style regional bodies, the IMF, and the World Bank.

➤ [eucrium ID=1004073](#)

Procedural Criminal Law

CEPEJ: Publication of 4th Evaluation Report on European Judicial Systems

The European Commission on the Efficiency of Justice (CEPEJ) presented the 2010 edition of its report on the Efficiency and Quality of Justice in Europe. The study is based on the 2008 quantitative and qualitative data from 45 Member States. Among other topics, the report analyses the public expenditure devoted to the judicial system, the legal

aid system, mediation, the organisation of jurisdictions and the court network, judicial staff, case-flow management in courts, and the length of procedures. The document does not intend to provide the synthesis of a voluminous report, but to highlight, in an easily readable format, some of its elements and to incite readers to taking the time “to go further.” The report was adopted by CEPEJ during its 15th plenary meeting (9-10 September 2010) and published on 25 October 2010.

CEPEJ members also pursued the implementation of a European Observatory of judicial timeframes through the Study and Analysis of Judicial Time Use Research Network (SATURN) Centre. The CEPEJ Working group on European judicial systems (CEPEJ-GT-EVAL) took stock of the 2008-2010 evaluation cycle at its 16th meeting in Strasbourg (4-5 November 2010) and decided on in-depth studies that could be carried out on the basis of this report. The group further decided on the launching of the new 2010-2012 evaluation cycle (for a summary of previous evaluation reports, see also [eucrim 1-2/2008 p. 58](#) and [3-4/2006 pp. 85-86](#)).

➤ [eucrim ID=1004074](#)

CEPEJ: Sixteenth Meeting of the Bureau

The 2010 evaluation report of European judicial systems was finalised during the 16th meeting of the Bureau (29 September 2010) in view of its approaching official publication. The Bureau also discussed the setting up of a Court

coaching programme for interested pilot courts as well as the role of CEPEJ in the follow-up to the Interlaken Conference on the future of the ECtHR.

➤ [eucrim ID=1004075](#)

Legislation

GRETA: Seventh Meeting of the Group of Experts on Action against Trafficking in Human Beings

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its 7th meeting on 14-17 September 2010 in Strasbourg.

At the meeting, GRETA finalised its internal guidelines for the preparation of GRETA reports, country visits, and requests for information addressed to civil society, which it will use during the first round of evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (the Convention).

At the meeting, GRETA shared the concerns expressed earlier at a thematic debate on partnerships among international organisations active in fighting trafficking in human beings (at which GRETA participated and held within the framework of the 4th meeting of the Committee of the Parties in Strasbourg on 13 September 2010). This debate concentrated on the fact that other international organisations active in the fight against trafficking in human beings were considering setting up monitoring

mechanisms and that this could lead to inconsistent or contradictory conclusions and recommendations. GRETA welcomed the fact that, with Azerbaijan and Ireland, two further CoE Member States have ratified the Convention, but also issued a reminder that 13 Member States still have not ratified the Convention, despite having signed it. GRETA once again urged the CoE Member States which had not already done so and the non-member states which had participated in the preparation of the Convention, as well as the EU to sign and/or ratify the Convention.

GRETA welcomed the COMPACT Project (European Action for Compensation for Trafficked Persons) and the Pan-European Campaign on Compensation for Trafficked Persons, launched by Anti-Slavery International and La Strada International, together with partners in 14 countries (see also [eucrim 3/2010, p. 103](#)). This important pan-European initiative has the CoE’s institutional support as well as the support of the European Commission and the Organization for Security and Co-operation in Europe (OSCE). GRETA particularly pointed out the close link of the project and the campaign to Art. 15 of the Council of Europe Convention, which is the first and only international binding provision explicitly recognising (a) the right of victims of trafficking in human beings to be compensated for the damage suffered and (b) the obligation of States to guarantee this compensation in their national law.

➤ [eucrim ID=1004076](#)

The Directive on the Right to Interpretation and Translation in Criminal Proceedings

Genesis and Description

Steven Cras / Luca De Matteis*

I. Introduction

On 20 October 2010, the European Parliament and the Council adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.¹ The Directive is the first legislative instrument in the field of criminal law that has been adopted under the rules of the Lisbon Treaty, and it is the first measure of the Council's "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".²

The adoption of the Directive provides interesting insight into the concrete application of the Lisbon Treaty, and it marks a significant step in the process of strengthening the procedural rights of suspected and accused persons.³ This article describes the genesis of the Directive and provides a description of its main elements.

II. Genesis of the Directive

1. Background

In the past two decades, the European Union has established various legislative instruments in the field of criminal law. Often, the aim of these instruments is to facilitate the prosecution of crime and the execution of sentences, notably by promoting cooperation between judicial authorities in the Member States. Since the European Council of Tampere (1999), such cooperation is based on the principle of mutual recognition. The Framework Decision on the European arrest warrant⁴ is probably the most well known of these instruments.

While substantial progress has been made as a result of these instruments with the aim of combating crime, no such progress had been made, at least until recently, regarding measures that aim at protecting the procedural rights of suspected and accused persons in criminal proceedings. In order to address this imbalance, the European Commission submitted, in 2004, a proposal for a Framework Decision on certain proce-

dural rights in criminal proceedings throughout the European Union.⁵ This proposal aimed at introducing a comprehensive set of procedural rights by establishing common minimum standards.⁶ However, due to opposition by six Member States,⁷ the Council was unable to reach unanimous agreement on this proposal, as required under the rules of the Amsterdam Treaty. In 2007, the work on the proposal was abandoned.⁸

Eager to relaunch work on the issue of procedural rights, the Swedish Presidency, which held office in the second term of 2009, decided to take a step-by-step approach.⁹ Having ensured the support of the United Kingdom,¹⁰ which was the biggest opponent of the 2004 Commission proposal, it proposed a "roadmap" on 1 July 2009, with a view to fostering the protection of suspected and accused persons in criminal proceedings.¹¹ Contrary to the 2004 Commission proposal, which envisaged creating a comprehensive set of rights, the proposed roadmap took the view that action should be addressed one area at a time. The underlying idea was that it would be easier to reach agreement on various "small" measures on a step-by-step basis, instead of trying to reach agreement on one "big" measure containing various rights. The step-by-step approach would also allow focused attention to be paid to each individual measure, and it would avoid tradeoffs between different procedural rights in negotiations.

The roadmap contains a non-exhaustive list of five measures that the Commission is invited to submit proposals on: (a) translation and interpretation; (b) information on the rights for suspected and accused persons in criminal proceedings and information about the charges; (c) legal advice and legal aid; (d) communication with relatives, employers, and consular authorities; (e) special safeguards for suspected or accused persons who are vulnerable owing, for example, to age, mental, or physical condition. The Commission is also invited to consider presenting a green paper on pre-trial detention. The order of the measures, which is indicative, has been chosen in such a way that the measures on which it is likely that agreement could be reached "easily" are set out at the beginning: when agreement is reached on an "easy" measure, the work on the

other measures will most likely be made easier as well (power of precedents).

The proposal for a roadmap did not encounter much opposition in the Council, which can be explained by the non-binding nature of the instrument (which ultimately got the form of a resolution). In fact, the roadmap merely calls for action in some fields, without setting itself binding rules. Despite its non-binding nature, the roadmap constitutes a real landmark, since, for the first time in history, the 27 Member States unanimously agreed that action should be taken at the level of the European Union in order to strengthen the rights of suspected and accused persons in criminal proceedings, and that the roadmap should constitute the basis for such action. The Council formally adopted the roadmap on 30 November 2009, the day before the entry into force of the Lisbon Treaty.

In the Stockholm programme of December 2009,¹² the European Council welcomed the adoption of the roadmap and made it part of the Stockholm programme.¹³ The European Council invited the Commission to put forward the proposals foreseen in the roadmap for swift implementation. It also invited the Commission to examine further elements of minimum procedural rights for suspected and accused persons and to assess whether other issues, for instance the presumption of innocence,¹⁴ need to be addressed.

2. The Commission Proposal on Interpretation and Translation

The first measure identified in the roadmap relates to translation and interpretation.¹⁵ The Commission, which had been involved in the preparation of the roadmap, submitted on 9 July 2009 a proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings.¹⁶ The Council dealt with this proposal in a quick way, reaching unanimous agreement in the form of a “general approach” on 23 October 2009.

However, because of the obligatory consultation of the European Parliament and the customary finalisation work (in particular by the jurists-linguists), it turned out to be impossible to adopt the Framework Decision before entry into force of the Lisbon Treaty on 1 December 2009. In view of the new rules set out in the Treaty on the Functioning of the European Union (TFEU), notably in Art. 82(2) under b), it therefore became necessary to restart the decision-making procedure by replacing the proposal for a Framework Decision with a new draft Directive to be adopted under the ordinary legislative procedure of Art. 294 TFEU (co-decision with the European Parliament, qualified majority voting in the Council).

3. The Member States’ Initiative

The question arose as to who should submit such a new draft Directive: the Commission or the Member States, acting respectively in accordance with Art. 76(a) and (b) TFEU. One could argue that it was primarily for the Commission to submit a new proposal for a Directive, since such a new proposal had to replace the original Commission proposal of July 2009. Also, the roadmap calls in the first place on the Commission to submit proposals regarding the measures set out in the roadmap, although it is generally acknowledged that this cannot replace the possibility provided in the Treaty for Member States to table legislative initiatives.

However, the Commission that was in office at the end of 2009 only had a “caretaker” task; the term of the Barroso-1 Commission had expired, and the Barroso-2 Commission had not yet been appointed (it did not take office until 9 February 2010). In particular, in November 2009, it was not yet known who the new responsible Commissioner for the procedural rights portfolio would be. Hence, it was not known if and when the new Commission would submit a new legislative proposal for a Directive on the right to interpretation and translation in criminal proceedings.

Under these circumstances, the Swedish Presidency, eager to keep up the momentum after the positive results of 23 October 2009, decided to explore the possibility of submitting a Member States’ initiative. The reaction to this call was positive, and, on 8 December 2009, a total of 13 Member States submitted an initiative for a Directive on the right to interpretation and translation in criminal proceedings.¹⁷

The text of the initiative was a copy-paste of the text of the “general approach”, which was unanimously agreed upon by the 27 Member States in October 2009 in respect of the Commission proposal of July 2009. The initiative was communicated to the European Parliament and to the Commission within the framework of the ordinary legislative procedure of Art. 294 TFEU. The initiative was also communicated to the national parliaments, so as to allow them to appraise compliance of the proposed Directive with the principle of subsidiarity, in accordance with Protocols No. 1 and 2 annexed to the Lisbon Treaty.

4. The “Competing” Commission Proposal

After having taken office in February 2010, Commissioner Viviane Reding decided that the Commission should also present a proposal for a Directive on the right to interpretation and translation in criminal proceedings. When it became known that the Commission was preparing such a proposal, the Span-

ish Presidency, which held office in the first term of 2010, and several Member States voiced concerns, e.g. through the Permanent Representatives Committee (Coreper) and at the JHA Council of 26 February 2010. It was argued that the presentation of a proposal by the Commission, which would “compete” with the Member States’ initiative, would create confusion, that it could slow down the decision making process, and that the existence of two proposals on the same subject matter would give an odd impression to the “outside world”, including the national Parliaments that would be asked to assess the compliance of two similar texts with the principle of subsidiarity.

Commissioner Reding, however, pressed ahead with her proposal, which was finally presented on 9 March 2010.¹⁸ The text of this proposal for a Directive extensively copied the text of the original Commission proposal for a Framework Decision of July 2009. The Council, not amused, immediately sent a letter to the Commissioner, stating that it regretted the adoption by the Commission of this new proposal.¹⁹ According to the Council, the citizens in the European Union would be better served by continuation of the work on the Directive on the basis of the Member States’ initiative.

It is understandable that the Commission wanted to present its own proposal, not only for reasons of “image building” (e.g. by issuing press releases, such as “European Commission acts to ensure fair trial rights in the EU”), but also since the rules of the game vary, depending on the author of the proposal or initiative. If the Commission presents a proposal, the Council has to act unanimously regarding amendments by the European Parliament on which the Commission has delivered a negative opinion.²⁰ In case of a Member States’ initiative, there is no such requirement.²¹

Nevertheless, and although there is no express provision in the Treaty opposing the presentation of a proposal by the Commission regarding a matter on which a Member States’ initiative already exists (and vice versa), one could argue that such a practice is precluded by the principle of sincere cooperation between the EU institutions and the Member States, as laid down in Art. 4 of the Treaty on European Union. Indeed, where a Member States’ initiative already exists, it seems that the Commission can merely submit one or more opinions on the basis of Art. 294(15) TFEU, where appropriate with (substantive) drafting suggestions, and not an entirely new proposal.

5. Choice of the European Parliament

In the European Parliament, the file was attributed to the Committee on Civil Liberties, Justice and Home Affairs (LIBE

Committee); Baroness Sarah Ludford (Alliance of Liberals and Democrats for Europe, ALDE), who had also been involved in the work on the 2004 Commission proposal, was appointed first responsible member (“rapporteur”).

When starting her work, rapporteur Ludford was immediately confronted with the fact that two draft texts for a Directive on the right to interpretation and translation in criminal proceedings existed: one in the form of an initiative by Member States and one in the form of a proposal from the Commission. Both the Member States and the Commission invited the rapporteur and other members of the LIBE Committee to work on their own text.

The ensuing fight over competencies pointed out a matter of principle: the Council wanted to preserve the right of Member States to present legislative initiatives, as laid down in the TFEU, while the Commission wanted to make the statement that, under the Lisbon Treaty, it should be the institution that plays the leading role in formulating European Union policy in the field of criminal law.

At this stage of the procedure, the LIBE Committee became the master of the game. In accordance with Art. 44(4) of the European Parliament’s rules of procedure, the Committee was in fact required to deal with both proposals in a single report, but it had to choose either the Member States’ initiative or the Commission proposal as the basis for its amendments.²²

Upon the suggestion of rapporteur Ludford, the LIBE Committee decided to choose the Member States’ initiative as the basis for its work. The main reasons for this choice were that it would save time, and that both the United Kingdom and Ireland had decided to opt-in regarding the adoption of the Directive on the basis of the Member States’ initiative;²³ it was not clear whether these Member States would also opt-in with regard to the Commission proposal. It was also appealing for the LIBE Committee to work on the Member States’ initiative, since the Council had expressed a clear preference to work on the basis of that text: this could lead to a quick agreement between the two legislative institutions. Finally, it was attractive for the Committee to work on the basis of the Member States’ initiative, since this text contained lower standards of protection than those set out in the Commission proposal, thus making it easier for the European Parliament to provide added value.

6. Work in the Council Bodies and Negotiations with the European Parliament and the Commission

Having made the choice to carry out the work on the basis of the Member States’ initiative, the LIBE Committee adopted its

amendments on 8 April 2010 in an orientation vote. This provisional vote provided the negotiating team of the European Parliament – consisting of the rapporteur and representatives of other political parties (“shadow rapporteurs”) – with a mandate for conducting negotiations with the Council.

On 16 April 2010, Coreper instructed the Spanish Presidency to conduct negotiations on behalf of the Council and provided guidelines for such negotiations. Subsequently, the European Parliament, Council, and Commission met during three tripartite meetings (“trilogues”) in Strasbourg and Brussels. There was also some informal exchange of ideas. Between the trilogues, the Spanish Presidency kept the representatives of the Member States up-to-date, and the negotiating guidelines were regularly refined.

The Commission was present at all trilogues, participating actively in the discussions. Although the negotiations were conducted on the basis of the Member States’ initiative, reference was sometimes made to the Commission proposal for a Directive, in particular by the Members of the European Parliament, for whom the Commission proposal appeared to be a helpful instrument in shaping their thinking. On some points, this proposal provided inspiration for a solution to outstanding problems.

With regard to the contents of the negotiations, the European Parliament, supported by the Commission, took a more idealistic approach by aiming at higher standards of protection, whereas the Council had a more pragmatic approach by looking at the practical consequences of the implementation of the Directive, including costs. The perspective of qualified majority voting in the Council and the involvement of the European Parliament, which had an excellent negotiator in the person of Sarah Ludford, led to compromise solutions between these two approaches.

At the last trilogue on 17/18 May 2010, the negotiating parties reached a provisional agreement on the text of the Directive. On 26 May 2010, Coreper approved this agreement by qualified majority,²⁴ subject to an amendment regarding the period of implementation, which was prolonged by 12 months to 36 months. The Council confirmed this position at its meeting on 3/4 June 2010.

The LIBE Committee voted on amendments in line with the (modified) agreement on 10 June 2010, and the plenary of the European Parliament adopted these amendments on 16 June 2010. After revision by the jurists-linguists, the Council adopted the text without discussion at its meeting on 7 October 2010. The Directive was signed in Strasbourg on 20 October 2010 and published in the Official Journal on 26 October 2010.

7. Particular Attention to the European Convention

During the negotiations for the adoption of the Directive, particular attention was paid to the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights in Strasbourg (ECtHR). Indeed, it was generally felt that the Directive in its final form should be “Strasbourg-proof”, meaning that the text should, as a minimum, meet the standards of the ECHR, as interpreted in the case law of the ECtHR.

In the light of this objective, the Presidency of the Council invited the Secretariat of the Council of Europe to present observations on the conformity of the text of the Member States’ initiative with the ECHR, as interpreted according to the case law of the ECtHR. Similar demands had been made in respect of the 2004 and 2009 proposals of the Commission. The Secretariat of the Council of Europe presented the requested observations in January 2010,²⁵ and they were regularly referred to during the negotiations. It did not, however, always appear easy to take full account of these observations and, more generally, of the case law of the ECtHR: its casuistic character sometimes made it difficult to extract general rules.

8. Resolution on Best Practice

In July 2009, when the Commission presented its proposal for a Framework Decision, the Swedish Presidency presented an accompanying draft Resolution on “best practice”.²⁶ This Resolution fell within the scope of the roadmap, according to which action to strengthen the rights of suspected and accused persons could comprise legislation “as well as other measures”. The proposed Resolution encouraged the Member States to actively promote some measures, notably relating to the involvement of bodies representing interpreters and translators, qualification of interpreters and translators, training, registration of qualified interpreters and translators, remote access to interpretation, and codes of conduct and guidelines on best practice. Since not all aspects of the Resolution, such as training, were explicitly covered by the scope of the Amsterdam Treaty, it was agreed that the instrument should be adopted not only by the Council, but also by the “Governments of the Member States meeting within the Council”. On 23 October 2009, unanimous agreement was reached on the text.²⁷ The Resolution was not formally adopted, however, since it was linked to the draft Framework Decision, which had to be “abandoned” after the entry into force of the Lisbon Treaty.

When the LIBE Committee of the European Parliament presented its amendments in respect of the draft Directive, which had replaced the draft Framework Decision, it requested incor-

poration of substantial parts of the text of the Resolution into the text of the Directive, so as to give them (more) binding force. With regard to some requests, agreement with the Council was reached – usually after redrafting of the text concerned – and therefore the Directive now contains in some points wording that was formerly contained in the Resolution.

After agreement was reached on the Directive, the Council preparatory bodies held a discussion on “what to do” with the remainder of the Resolution. According to various Member States, the text still contained some useful elements and would continue to provide added value to the Directive. In order to avoid a new debate on competencies, it was decided to invite the Commission to submit a proposal for a recommendation (which seemed to be the most appropriate instrument for this objective under the TFEU).²⁸ Up to now, however, the Commission has regrettably not come forward with such a proposal; perhaps the possibility of launching a Member States’ initiative will be explored again.

III. Short Description of the Main Elements of the Directive

1. Scope (Art. 1)

Art. 1 of the Directive deals with the scope of application of the instrument, both from the objective point of view (types of proceedings covered) and from the temporal point of view (moment in time from which the rights apply). Both aspects have undergone developments in the course of the negotiations.

a) Objective scope

According to Art. 1(1), the Directive applies to criminal proceedings as well as to proceedings for the execution of a European arrest warrant (EAW). The Directive does not give a definition of “criminal proceedings”: it is understood that this legal notion should be interpreted in the light of the case law of the ECtHR with respect to the field of application of Art. 6 ECHR.²⁹ Taking this into account, the addition of the reference to the EAW proceedings was necessary in view of the fact that extradition procedures do not fall within the scope of application of this Convention provision.³⁰

In the course of the negotiations within the Council, certain Member States³¹ observed that the Directive should not constitute a disproportionate procedural aggravation in situations in which sanctions are imposed for relatively minor offences by an authority other than a court having jurisdiction in criminal matters. This could be the case, for example, for offences

that are committed on a large scale and that are immediately responded to, e.g. traffic offences following roadside checks, where (provisional) sanctions are imposed “on the spot” by police authorities. In such a situation, it would be unreasonable to require full-fledged application of the Directive, notably implying that interpreters should be available at such roadside checks. In order to address this concern, Art. 1(3) of the Directive provides that “where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal”. This provision has been further explained in recital 16.

b) Temporal scope

The question of the temporal scope of the Directive has been the subject of lengthy debate in the Council. The original Commission proposal provided in Art. 1(2) that the rights should apply “to any person from the time that person is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until the conclusion of the proceedings”.

In the course of the negotiations, a number of Member States pointed out that this formulation (containing the words “is informed”) did not meet the standards set out by the jurisprudence of the ECtHR. The Secretariat of the Council of Europe voiced the same opinion. Indeed, the case law of the Court of Strasbourg has elaborated a temporal parameter for the application of Art. 6 rights to a suspected person: such application does not depend upon the proceeding authorities officially notifying or informing the suspected person of the fact that a criminal investigation is launched against him. On the contrary, the definition of “criminal charge” within the meaning of Art. 6(2) and (3) ECHR has been construed in a substantive, rather than in a formal manner. Consequently, the knowledge of an ongoing investigation can implicitly result from acts of the procedure, such as the arrest of the person, a house search, a seizure or even, according to a leading case in such matters, the closure of a business pending investigation.³²

As a consequence, in the text of the Member States’ initiative, the wording of the Commission proposal had been considerably redrafted. In the adopted Directive, the wording has been refined even more, and it now reads that the rights provided for under the Directive shall apply from the time that the persons concerned “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, “until the conclusion of the proceedings, which

is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal”.

This latter reference (“until the conclusion of the proceedings ...”) implies that the right to translation and interpretation, according to this Directive, does not apply to the execution phase of criminal proceedings. In this respect, it is interesting to point out that several amendments proposed by the European Parliament aimed at ensuring translation of prison rules or, generically, to the exercise of rights under the various prison rules of Member States. These suggestions were not taken up by the Council: the more restricted scope was correctly motivated with respect to the fact that Art. 6(3) ECHR rights do not apply per se to procedures, even contentious court procedures, which might take place after final determination of a criminal charge and during the enforcement of a penalty.³³

2. Right to Interpretation (Art. 2)

The right of the suspected or accused person to benefit from the services of an interpreter is set out in Art. 6(3) letter e) ECHR and is known, in one form or another, in the legislation of all EU Member States. However, various studies have shown a dramatic divergence among the Member States in the legal and practical implementation of this principle.

The greatest divergence relates to client-lawyer communication. Whereas in some Member States, interpretation of such communication is provided almost without limitation, in other Member States, such communication is not interpreted at all or only with substantial restrictions.³⁴

The challenge, therefore, was to find a compromise. The starting point of the negotiations was Art. 2(1) of the original Commission proposal, which stated that there should be free interpretation of “all necessary meetings between the suspect and his lawyer”. This proposal met with strong opposition from a number of Member States, which maintained that this obligation entailed excessive costs for Member States and that such a right could be subject to abuse, since the condition laid out in the provision (“all necessary meetings”) was exceedingly vague.

Some Member States, on the contrary, defended this proposal as one of the truly progressive aspects of the instrument. In their opinion, while it is true that, until today, the ECtHR has not expressly ruled that there exists a right to free interpretation of client-lawyer communication, such a principle comes directly from an effective application of the right to defence, and particularly the right to be assisted by a lawyer. Indeed,

how could this right be ensured if the suspected or accused person and his lawyer are unable to understand each other?

Member States opposing the extension of the right to interpretation objected that the suspected or accused person could bear the costs for interpretation himself; at most, they could concede to providing interpretation free of charge to those suspected or accused persons that could benefit from legal aid under their national laws. Member States in favour of a broader scope of the right to interpretation countered by replying that this would introduce discrimination based on nationality: a national of the Member State where the proceedings take place would be in a better position than a non-national since the latter, while possibly having (just) enough money to pay his own lawyer, would often be obliged to pay for an interpreter as well in order to be able to communicate with his lawyer.

A compromise between these two conflicting views was reached in the Council’s general approach to the Framework Decision of October 2009. In this text, interpretation of communication between the suspected or accused person and his legal counsel should be provided during official acts of the investigation or court procedure and might (optionally) be provided “in other situations”.³⁵ This vague text was a result of the pre-Lisbon voting rule requiring unanimity of all Member States to pass legislation in criminal matters; during the negotiations it had turned out to be impossible to achieve a clearer text with a broader scope. The agreed compromise text was inserted into the text of the Member States’ initiative for a Directive.

The battle was relaunched in the context of the negotiations on the Directive, following an amendment proposed by the European Parliament, which requested the introduction in the text of a right to interpretation of client-lawyer communication “throughout the proceedings”, including outside official acts of the procedure.

The new institutional framework within which the negotiations proceeded after the entry into force of the Lisbon Treaty, based on qualified majority voting, helped overcome the opposition of those Member States that continued to advocate a restricted scope of the right to interpretation. A new compromise was reached in which these situations were made the object of a specific provision (Art. 2(2) of the Directive).

According to this paragraph, “where necessary for the purpose of safeguarding the fairness of the proceedings”, Member States shall provide free interpretation of client-lawyer communication. In order to address the concerns of Member States regarding possible abuses of this right, the condition was made that the communication should be “in direct connection with

any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application”.

This final text calls for three observations. Firstly, starting from the last part of the mentioned paragraph, it is clear that the competent authorities are in a position to refuse free interpretation for meetings between the lawyer and the suspected or accused person which solely serve dilatory purposes (to prolong the proceedings). Secondly, the reference to the necessity of safeguarding the fairness of the proceedings implies that the decision on whether to grant free interpretation lies exclusively with the competent authorities (investigative authorities or judicial authorities, depending on the phase of the procedure); indeed, according to the constant case law of the ECtHR, they are the only authorities ultimately responsible for the protection of the rights of suspected or accused persons under the ECHR. Thirdly, it will be interesting to note how the term “other procedural application” will be applied in practice. In the absence of clear agreement on this point between the negotiating parties, this term has been left vague; recital 20 refers, however, to the example of an “application for bail”. As for other terms in Art. 2, such as “direct connection”, it is likely that lawyers will seek to explore the scope of this term and that national judges and, in particular, the European Court of Justice, will be asked for clarification.

Lastly, regarding the issue of interpretation, it is worth noting that Art. 2(6) provides the possibility of “remote interpretation”. In order to allow for the prompt assistance of an interpreter in situations where there is no interpreter at hand at short notice, interpretation can be facilitated via videoconference, telephone, or Internet. This possibility, which is already being successfully employed in several Member States, could prove extremely useful, e.g. in cases of rare languages if an available interpreter cannot – for reasons of time or distance – be brought to the location of the proceedings.³⁶ The possibility may, however, only be employed if the physical presence of the interpreter is not required “to safeguard the fairness of the proceedings”.

3. Right to Translation (Art. 3)

Art. 3 provides for the right to translation of essential documents. This right is not expressly included in the text of Art. 6 ECHR. However, it has been derived by way of interpretation by the ECtHR as a corollary of the various fair trials rights laid out in Art. 6(1) and (3) ECHR. These rights, in order to have an effective and not merely formal meaning, imply that the suspected or accused person is able to understand the content of the trial, even if it does not take place in a language with which he is familiar.³⁷

Art. 3(1) of the adopted Directive states that suspected or accused persons who do not understand the language of the criminal proceedings shall be provided with a written translation of “all” documents that are “essential” to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

As general as this draft may appear, two important indications may be derived from it. Firstly, the reference to the suspected person clarifies that the right to translation of documents extends to the pre-trial phase. As mentioned above, this is a logical consequence of the fact that certain aspects of the right of defence provided for in Art. 6(3) ECHR also apply prior to the charge/indictment: the person against whom the case is being investigated must be put in a condition to understand the acts and materials of the case. It should be noted, however, that when applying Art. 1(4), second part, the right to translation only applies to those documents contained in the case file that, under national law, are already available to the suspected or accused person, or to his lawyer.

Secondly, the reference to the ability of persons to “exercise their right of defence” sheds light on the nature of the documents that must be translated. In this context, it should be observed that paragraph 2 of Art. 3 indicates three types of essential documents that must always be translated, namely “any decision depriving a person of his liberty, any charge or indictment, and any judgment”. During the negotiations within the Council, the reference to “essential documentary evidence”, was lost, although it had been contained in the original Commission proposal. The latter point was not included in the Member States’ initiative, since it met with the firm opposition of a number of national delegations who were concerned about the financial impact of the need to proceed with translation of such material, which can be rather voluminous. In the co-decision process, the point was again strongly supported by the European Parliament, but, in the negotiations with the Council, it was excluded from the final text of the Directive.

Despite its exclusion from paragraph 2, however, one could argue that “essential documentary evidence” must always be translated, since it is more “essential” than any other material in order to allow suspected and accused persons to exercise the right of defence. This conclusion indeed seems to impose itself if the right to translation is taken seriously and is linked to an effective – and not abstract – implementation of the right to be informed about the “nature and cause of the accusation” or implementation of the right to “have adequate time and facilities for the preparation of [the] defence” (see Art. 6(3) a) and b) ECHR). With respect to these rights, it seems that it is first and foremost the evidentiary material upon which the case rests that are essential to safeguarding the right to a fair trial

as enshrined in Art. 6 ECHR.³⁸ Two provisions provide for a limitation of the right to translation of essential documents, even those explicitly listed in Art. 3(2).

Firstly, Art. 3(4) excludes from the scope of the right to translation “passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them”. This provision could prove particularly useful in cutting down the obligation to translate voluminous documents, such as judgments involving multiple parties: the passages of the judgment relating to persons other than the person concerned in the case at hand do not have to be translated. Indeed, such passages are not “essential” in order to ensure that the latter is able to exercise his right of defence and to safeguard the fairness of the proceedings.

Secondly, Art. 3(7) allows “an oral translation or oral summary” of essential documents. Various Member States argued that inserting this possibility in the text would be very important for daily (court) practice: often, suspected and accused persons would be better served with an oral translation “on the spot”, than with a written translation that could require several days to produce. More importantly, however, providing this possibility in the text would enable a considerable reduction in translation costs. In support of their position, the Member States concerned relied on case law of the ECtHR,³⁹ which allows an oral translation or oral summary to be provided instead of a written translation. The Commission, however, contested this interpretation of the case law and pointed to the conditions that were made by the Court of Strasbourg.⁴⁰ The debate on this point in the Council’s preparatory bodies was very lively and led to some brilliant exchanges.

Although the European Parliament was reluctant to insert the possibility of oral translations in the text, fearing that it could undermine the very principle of the right to translation, it finally accepted this insertion, subject to two conditions: the oral translation or oral summary should not prejudice the fairness of the proceedings, and it should be an “exception” to the general rule of providing a written translation. Again, it will be interesting to see how national courts, and in particular the European Court of Justice, will interpret this provision.

The “competent authorities” of the Member States will be responsible for applying the above provisions. According to Art. 3(3), it is for them to decide which documents are to be considered essential (apart from those listed in paragraph 2) as well as which documents may be translated in part (paragraph 4) or orally (paragraph 7). Although rather self-evident, the Directive also provides for the right of the suspected or accused person and his lawyer to submit reasoned requests in this sense.

Lastly, Art. 3(7) concerns the possibility that a suspected or accused person waives the right to translation. The European Parliament insisted that this could only be allowed under strict conditions. The agreed text of the Directive states that the persons concerned must “have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily”. It is clear from this provision, which has been inspired by the case law of the ECtHR,⁴¹ that a waiver is also possible when the suspected or accused person does not have a legal counsel but has otherwise obtained full knowledge of the consequences of the waiver, for example when the competent authorities themselves have informed him about any consequences.

4. Other Provisions: A Selection

a) Quality of translation and interpretation

With respect to the text of the Member States’ initiative, the European Parliament requested stricter provisions addressing the need to ensure proper quality of the translation or interpretation provided to the suspected or accused person. Indeed, the Member States’ initiative only contained a general provision (Art. 5) requesting Member States to “take concrete measures” to ensure that the interpretation and translation provided would be of “adequate quality” in order to allow that the suspected or accused person be “fully able to exercise his rights”.

The final text has been greatly improved in this respect. The level of adequacy of the translation and interpretation has been made the object of specific provisions in Arts. 2(8) and 3(9), which require a “quality sufficient” to ensure “that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”. Furthermore, the quality of the service provided may be the object of a specific review procedure according to Arts. 2(5) and 3(5).

The Directive also addresses the question of practical availability of qualified legal interpreters and translators. Art. 5(2) invites Member States to set up “a register of independent translators and interpreters who are appropriately qualified”, which, where appropriate, should be made available to legal counsel and relevant authorities.⁴² This provision was “imported” from the former Resolution at the initiative of the European Parliament.

b) Links with the ECHR and the Charter of Fundamental Rights

Although recognising the importance of the Directive in the process of strengthening procedural rights, the Member States

were anxious not to diminish the role of the ECHR in any way whatsoever. For its part, the European Parliament placed great emphasis on the role of the Charter of Fundamental Rights of the European Union, which gained binding force through the Lisbon Treaty. As a consequence, the importance of the Convention and of the Charter, and of the relevant case law of the ECtHR and the European Court of Justice, were underlined in various sections in the text:

- Recital 32 provides that the level of protection of the Directive should never fall below the standards stipulated by the ECHR and by the Charter. Indeed, the Directive is supposed to be “Strasbourg- and Charter-proof” and should be interpreted and applied in such a way;

- Recital 33 provides that the provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights. Although this provision is to be commended for its attempt to ensure consistency between the various procedural rights instruments, it is hoped that it will not keep the national courts and, notably, the European Court of Justice, from providing a more progressive interpretation of the Directive;

- Art. 8 contains an important non-regression clause: nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the ECHR, the Charter, other relevant provisions of international law, or the law of any Member State that provides a higher level of protection.

c) Transposition

In conformity with Art. 9(1), Member States have to transpose the Directive in their internal legal orders by 27 October 2013. Since the Directive was adopted after 1 December 2009, it does

not fall within the transitory regime provided for by Art. 10 of Protocol 36 to the Treaty of Lisbon.⁴³ Therefore, when the period for implementation expires, Member States that have failed to adapt their national laws and regulations to the provisions of the Directive could be subject to an infringement procedure by the Commission under Art. 258 TFEU, including the possible imposition of executive measures and penalties by the European Court of Justice under Art. 260 TFEU.

IV. Conclusion

The Directive on the right to interpretation and translation in criminal proceedings marks a significant step in the process of strengthening the procedural rights of suspected and accused persons in the European Union. Qualified majority voting in the Council and the involvement of the European Parliament has led to higher standards of protection, which is promising for the future of European criminal law. The genesis of the Directive is also an interesting example of the application of the Lisbon Treaty, in respect of which the institutions and Member States are testing their competencies and marking their territory.

In the light of the subject matter of the Directive, and given that some elements are open to more than one interpretation, it is likely that the Directive will lead to litigation. In view of the generalised post-Lisbon jurisdiction of the European Court of Justice in respect of this instrument – as opposed to the limited jurisdiction that the Court had under the Treaty of Amsterdam – the Directive will probably be the “proving ground” for the interpretative activity of national and European judges with respect to this area of EU law. It will be highly interesting to follow future developments related to this Directive.

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1 O.J. L 280, 26.10.2010, 1.

2 Resolution of the Council of 30 November 2009, O.J. C 295, 4.12.2009, p. 1. For details on this topic, see Prof. Dr. *Mar Jimeno-Bulnes*, The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, *eucri* 4/2009, p. 157.

3 Since a person cannot have at the same time both the status of being suspected and of being accused of having committed a criminal offence, the Directive uses systematically the expression “suspected or accused persons”. However, it seems that only when the person concerned is the subject of a sentence, putting the word “or” between “suspected” and “accused” is required; in other cases, the word “and” would also be permissible or even preferable (e.g. in “the rights of suspected and accused persons”).

4 Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest

Warrant and the surrender procedures between Member States, O.J. L 190, 18.7.2002, p. 1.

5 COM(2004) 328 final. Council doc 9318/04, inter-institutional file no 2004/0113 (CNS).

6 These rights included the right to free legal advice, the right to free interpretation, the right to free translation of relevant documents, the right of vulnerable persons to specific attention, the right to communicate (with relatives, consular authorities), and the duty to inform a suspected person of his rights in writing (letter of rights).

7 Six Member States opposed the adoption of the Framework Decision: United Kingdom, Ireland, Cyprus, Malta, Slovakia and the Czech Republic.

8 For a historic overview, see *Daniel Flore*, *Droit pénal européen*, Larcier 2010, pp. 297-305.

9 For details on this topic, see the article by Prof. Dr. *Mar Jimeno-Bulnes*, *op. cit.*

10 It appears that a personal switch in the United Kingdom administration has contributed to a U-turn in the policy of this Member State concerning procedural rights.



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11 Council doc. 11457/09.
 12 O.J. C 115, 4.5.2010, p. 1.
 13 Unfortunately, the Stockholm programme does not quote the measures set out in the roadmap, nor does it make a reference to the place where the roadmap can be found.
 14 The explicit reference in the text of the Stockholm programme to the “presumption of innocence” is a nice victory for the Member State that pleaded to have this measure inserted in the roadmap, but could not get the approval of the other Member States, see e.g. 12531/09.
 15 In respect of this measure A, the roadmap provides the following short explanation: “The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments”.
 16 COM(2009) 338 final; Council doc. 11917/09.
 17 The initiative was made “official” in January 2010 and was published in O.J. C 69, 18.3.2010, p. 1; inter-institutional file no 2010/0801 (COD).
 18 COM(2010) 82 final.
 19 Council doc. 7598/10.
 20 Article 294 (9) TFEU.
 21 Article 294 (9) and (15) TFEU. In practice, the difference is not very substantial, because the Commission can usually accept amendments presented by the European Parliament and by the Council. In such cases, the Commission presents a modified proposal.
 22 Article 44(4) of the rules of procedure of the European Parliament reads as follows: “When two or more proposals originating from the Commission and/or the Member States with the same legislative objective have been submitted to Parliament simultaneously or within a short period of time, Parliament shall deal with them in a single report. In its report, the committee responsible shall indicate to which text it has proposed amendments and it shall refer to all other texts in the legislative resolution”.

23 Application of Article 3 of Protocol No. 21 to the Lisbon Treaty.
 24 In Coreper on 26 May 2010 and at the JHA Council on 3/4 June 2010, all Member States indicated that they would vote in favour, except the Czech Republic, which stated that it would abstain from voting (which has the same effect as a negative vote). However, on the occasion of the adoption of the Directive in the Council on 7 October 2010, the Czech Republic also voted in favour.
 25 Council doc. 5928/10.
 26 Council doc. 12116/09.
 27 Council doc. 14793/09.
 28 Council doc. 11471/10.
 29 See e.g. *Engel and others v. the Netherlands*, 8 June 1976, par. 70-81; *Öztürk v. Germany*, 21 February 1984, par. 53; *Campbell and Fell v. the United Kingdom*, 28 June 1984, par. 70; *Garyfallou AEBE v. Greece*, 24 September 1997, par. 33.
 30 See e.g. *H. v. Spain*, 15 December 1983.
 31 Notably, Finland and Sweden.
 32 *De Weer v. Belgium*, Commission decision of 10 March 1977.
 33 See e.g. *Ganci v. Italy*, 30 October 2003, par. 22.
 34 There may be various reasons for such restrictions: the most important reason is a reduction in costs, but the restrictions may also be put in place, for example, in order to keep the defence from using the interpretation facilities to slow down the proceedings. In some Member States, the interpreters are at the service of the court and not at the service of the suspected or accused person, implying that the object of translation is exclusively the content of direct communication between the court and that person.
 35 This provision of the general approach of 23 October 2009 was accompanied by recital 10, which was inserted in order to satisfy the Member States’ calls for a broad scope of the right to interpretation and which contained wording taken almost literally from the ECtHR judgment in *Timergaliyev v. Russia*, 14 October 2008, par. 51: “The suspected or accused person should be able, inter alia, to explain to his/her legal counsel his/her version of the events, point out any statements to which he/she disagrees and make his/her legal counsel aware of any facts that should be put forward in his/her defence”.
 36 See also recital 28.
 37 See *Kamasinski v. Austria*, 19 December 1989, in particular par. 74.
 38 The conclusion appears to be supported by the case law of the ECtHR (*Kamasinski v. Austria*, cit., par. 74), notably the words “Article 6(3) e) does not go so far as to require a written translation of all item of written evidence or official documents of the procedure”, interpreted a contrario.
 39 Member States relied notably on *Hermi v. Italy*, 18 October 2006, par. 70, notably the words “This suggests that oral linguistic assistance may satisfy the requirements of the Convention”.
 40 *Hermi v. Italy*, cit., par. 70, the passage following the words cited in the previous footnote: “The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself”.
 41 See e.g. *Poitrimol v. France*, 23 November 1993, par. 31; *Hermi v. Italy*, cit., par. 73; *Scoppola v. Italy* (No. 2) (Grand Chamber), 17 September 2009, par. 135.
 42 See also recital 31, which encourages Member States to provide wider access to the registers by exploiting the future potentialities of the e-Justice portal.
 43 According to Article 10 of Protocol 36 to the Treaty of Lisbon, the Commission’s powers under Article 258 TFEU with respect to legal acts approved under the former Title VI of the TEU (police cooperation and judicial cooperation in criminal matters) shall not be applicable for a 5-year period following the entry into force of the Treaty of Lisbon. The same provision applies to the European Court of Justice’s jurisdiction on the same acts.

The Procedural Rights Debate

A Bridge Too Far or Still Not Far Enough?

Wendy De Bondt/Gert Vermeulen

The establishment of the area of freedom, security and justice has undeniably led to an increase in people becoming involved not only in criminal proceedings in a Member State other than that of their residence, but, even moreso, in criminal proceedings that involve investigative and/or prosecutorial acts in multiple Member States. These so-called “multi-Member State criminal proceedings” have sparked awareness of the need to take measures to ensure adequate procedural rights in such situations. Without a doubt, criminal proceedings spread over multiple Member States run the risk of jeopardizing those procedural rights. It explains the origin of the current procedural rights debate in the European Union.

With this contribution, the authors wish to present a threefold critique related to the boundaries of the current procedural rights debate:

- First, paradoxically, the current procedural rights debate has, to a large extent, lost the link with cross-border situations and multi-Member State criminal proceedings;
- Second, there is an apparent over-focus on “traditional fair trial rights,” whereas the most important focus should be on the rights during the pre-trial investigative stage;
- Third, there is a clear inconsistency between the expectations and requirements EU Member States have with respect to other EU Member States compared to non-EU Member States.

Before discussing this threefold critique, the main developments leading up to the current debate will be reviewed to the extent deemed necessary to follow our line of argumentation.

I. The Current Procedural Rights Debate

The establishment of the area of freedom, security and justice constitutes an important turning point for the status of procedural rights in European criminal policy making. Even though all 27 Member States are party to the European Convention on Human Rights (hereafter ECHR), many scholars and policy makers considered it problematic that the European Union itself had no binding texts on the protection of human rights in criminal proceedings. This lacunae had gained attention, es-

pecially in light of increased cooperation in criminal matters. Both the introduction of the area of freedom, security and justice and the principle of mutual recognition have contributed to this heightened awareness.

First, the 1998 Commission communication on the area of freedom, security and justice voiced a general feeling: EU action to establish minimum standards to protect individual rights in criminal proceedings was deemed necessary to counterbalance judicial cooperation measures that significantly enhanced the powers of prosecutors, courts, and investigative officers.¹ Only the establishment of such minimum standards would be able to neutralise the negative effects of having multiple Member States involved in investigative and prosecutorial acts.

Second, the importance of a debate on procedural rights was intensified following the 1999 Tampere conclusions, in which it was established that mutual recognition would be the cornerstone of judicial cooperation in the EU.² Recognising the possible impact of mutual recognition on procedural rights, the 2000 Programme of Measures stated the following: “It must be ensured that the treatment of suspects and the rights of the defence would not suffer from the implementation of the principle of mutual recognition.”³ Furthermore, it stated that procedural rights “should not only not suffer from the implementation of the principle of mutual recognition but also that the rights would even be improved through the process”. This baseline is key to our line of argumentation.

The impact of the last clause of the baseline can easily be misinterpreted. It should be emphasised that the improvement of procedural rights in pure domestic situations can never be a goal in itself.⁴ The EU has neither the intention nor the competence to interfere with domestic regulations. The scope of EU legislative intervention is limited to ensuring a high level of procedural rights in cross-border situations. Only in such cross-border situations, where procedural rights cannot otherwise be guaranteed, is EU intervention justified.

Therefore the EU’s objective is to develop common minimum standards and a set of best practices that can ensure a high

level of procedural rights with respect to multi-Member State criminal proceedings.

The following two clarifications make clear that this development of minimum standards should not be interpreted as a race to the bottom. Firstly, it is not desirable that minimum standards are limited to the smallest common denominator in procedural rights. On the contrary, it might very well be that several Member States change their national legislation in light of agreed minimum standards. Secondly, there is no need to fear that common standards will lead to a lowering of standards, as Member States remain free to implement the highest level of rights they consider appropriate as long as they comply with the agreed minimum. Therefore, it is correct to argue that the entire process of accommodating the problems of cross-border cooperation will lead to the improvement of rights, even though such improvement in a mere domestic situation is not a goal in itself.

This balanced interpretation of the improvement of procedural rights explains our mixed feelings with respect to the formulation of the goals in the 2003 Commission Green Paper on “Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.”⁵ The Green Paper states that European citizens and residents can reasonably expect to encounter equivalent standards in respect of procedural rights throughout the EU, regardless of any cross-border aspect. In doing so, it loses the link with cross-border multi-Member State criminal proceedings and thus exceeds the scope of justified EU intervention. Furthermore, the Green Paper presents a very narrow interpretation of what procedural safeguards are, clearly inspired by and limited to the rights listed in Article 6 ECHR.

Considering this focus on ECHR, it comes as no surprise that the 2004 proposal for a Framework Decision on procedural rights translated this narrow interpretation into a focus on traditional fair trial rights, such as the right to legal advice, the right to interpretation, and the right to communication. As some Member States were not convinced of the added value of this proposal in relation to the ECHR, the proposal was not adopted.⁶ Recently, the discussion on procedural rights flared up again. In spite of the critique on the lack of added value, the focus on ECHR has not changed. The current 2009 Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings calls for the adoption of five measures in a step-by-step approach.⁷ The focus is once more on very traditional fair trial rights, fully in line with the failed 2004 proposed Framework Decision.

The boundaries of the current procedural rights debate are elaborated on in the following threefold critique.

II. A Threefold Critique

1. Losing the Link with Cross-Border Situations

The first critique is centred around the observation that the current procedural rights debate has lost the link with cross-border situations.

As explained in the opening paragraphs, cross-border situations that involve multiple Member States in investigative and prosecutorial acts give reason to start the procedural rights debate and reflect on the necessity for EU intervention. The baseline for the debate is that the level of procedural rights should not be affected by whether or not multiple Member States are involved. Any debate on the necessity for EU intervention should be viewed from an EU perspective, which means that only problems arising from cross-border and multi-Member State criminal proceedings should be discussed.

The direction taken with the 2009 Roadmap on procedural rights, as the sequel to the failed 2004 proposed Framework Decision, has clearly lost the link with cross-border situations. The Roadmap calls for strengthening a list of traditional fair trial rights, such as the right to translation and interpretation, the right to information on the charges, and the right to legal aid and advice. Even though we do not intend to minimise the importance of these rights, we consider the structure of this Roadmap “a bridge too far” in that it insufficiently clarifies why these rights are the most important concerns in cross-border multi-Member State criminal proceedings. The strengthening of these rights is first and foremost inspired by pragmatic and ideological concerns aimed at establishing an area of freedom, security and justice in which European citizens and residents can reasonably expect to encounter equivalent standards of procedural rights throughout the EU. This is, however, beyond the scope of justified EU intervention to facilitate cross-border judicial cooperation and is incompatible with the statement that the diversity between the Member States’ criminal justice systems should be respected unless differences hinder cross-border judicial cooperation.

Even if the measures listed in the Roadmap were to be limited and warrant justification in light of cross-border and multi-Member State criminal proceedings, the authors’ concern remains that the interpretation of the concept of “procedural rights” is too narrow.

2. Too Narrow Interpretation of Procedural Rights

The second critique relates to the scope of the current procedural rights debate. There is a lot more to procedural rights

than the traditional fair trial rights that dominate the current debate.

We strongly believe that the criminal justice system in its entirety is one big cluster of procedural rights, in which traditional fair trial rights represent only a small fraction. The criminal procedure should not be limited to the trial phase in front of a judge. Procedural rights incompatibilities are far more significant when pre-trial evidence gathering is spread over multiple Member States.

Even though it should be commended that the 2003 Green Paper argued that a discussion of the right to have evidence handled fairly was equally important,⁸ it is regrettable that no clear link was made to specific evidence gathering techniques and even more regrettable that the issue was shelved indefinitely. Separating the debates on procedural rights and evidence gathering is a lost opportunity to look at evidence gathering techniques from a procedural rights perspective as opposed to an effective prosecution perspective. Two new elements should be introduced to the procedural rights debate:

- Firstly, the feasibility of establishing minimum standards beyond traditional fair trial rights;
- Secondly, the feasibility of *lex mitior* discussions and “best of both world” scenarios.

Firstly, from the argumentation above, it is clear that minimum standards are needed that go beyond traditional fair trial rights. The feasibility thereof should be scrutinised for each domain of judicial cooperation. For example, in a mutual legal assistance context, minimum standards could be established for a series of investigative techniques. The introduction of such minimum standards would support the further roll out of mutual recognition for evidence gathering. Even though the adoption of these kinds of minimum standards is, to a certain extent, subject to debate in the context of the European Investigation Order, it should be stressed that the focus of this debate is on an effective prosecution and ensuring the admissibility of evidence. The debate would additionally benefit from a procedural rights perspective.

Similarly, the possibility of introducing minimum procedural rights standards should be scrutinised, e.g., in the context of pre-trial supervision and extradition as well as in the context of transfer of proceedings or execution.

Furthermore the adoption of these kinds of minimum standards could also contribute to a more transparent and strict interpretation of the mutual recognition principle. The current instrumentarium is anything but transparent and does not adhere to a strict interpretation of the mutual recognition principle. Such a strict interpretation has implications for the positions of both

the issuing and the executing Member States: the executing Member State is to accept the validity of a decision if taken in accordance with the law of the issuing Member State; and the issuing Member State is to accept the execution of its decision if executed in accordance with the law of the executing Member State.

However, the current instrumentarium often deviates from a strict interpretation of the mutual recognition principle. At times, it is possible for the issuing Member State to request that the executing Member State take certain procedural requirements into account, to the extent that these requirements do not violate the fundamental principles of the law of the executing Member State. The possibility to request formalities to be taken into account is incompatible with a strict interpretation of mutual recognition. Analysis in previous studies has revealed that the adoption of minimum standards with respect to procedural rights for certain investigative techniques would significantly reduce the perceived need for Member States to request formalities. It thus has the potential to bring logic and transparency back to the interpretation of the mutual recognition principle.⁹

It should, however, be recognised that the suggested minimum standards also have their limits. The adoption of minimum standards can never do away with all problems arising from the differences in criminal justice systems. Furthermore, minimum standards will not harmonise the criminal justice systems, as Member States will always be allowed to maintain a higher level of procedural safeguards.¹⁰

Therefore, secondly, an in-depth debate is necessary to assess the possibility of introducing a binding *lex mitior* principle into cooperation. Problems and differences will remain, which is why looking into the *lex mitior* principle is recommended. Such a principle would ensure that the persons involved can always enjoy the best of both worlds, meaning that questions of applicable law will be resolved based on what is best for the persons involved. The application of a *lex mitior* principle is the only way in which Member States can uphold the baseline set in the 2000 Programme of Measures, namely that the involvement of multiple Member States in a criminal proceeding may never negatively impact the procedural rights of the persons involved. Previous research has shown that Member States are open for a such debate on the potential of a *lex mitior* principle.¹¹ The following examples illustrate what a *lex mitior* principle would mean in concrete situations.

Some instruments already imply a *lex mitior* principle. In cases where transfer of the execution relates to a sanction involving deprivation of liberty, the executing Member State has the right to adapt the nature or duration of a sanction if it is incom-

patible with its own criminal justice system. The possibility of adapting the sanction is limited by the stipulation that such an adaptation may never aggravate the sentence passed in the issuing state in terms of its nature or duration.¹²

More interestingly, for the procedural rights debate, questions also arise as to the applicable early release regime. It is unclear whether the regime of the sentencing Member State should apply or whether early release possibilities are solely governed by the regime of the executing Member State. Despite the general rule that execution is governed by the law of the executing Member State, there is much to recommend in entitling the person concerned to claim application of the early release regime in the sentencing state if that regime is more beneficial. In addition, not only is the regime in the sentencing state taken into account by the sentencing judge when deliberating on the duration of the sanction, but the baseline agreed in the 2000 Programme of Measures clearly states that involvement of multiple Member States may never negatively impact the rights of the persons involved. The introduction of a *lex mitior* principle would provide an answer to these questions of which law is applicable. Even though, in practice, it will be extremely difficult to determine how early release conditions would have influenced the execution of a sentence if a person has served his sentence in another Member State, it is a viable point for discussion.

The complexity of applying the *lex mitior* principle is even clearer in the context of pre-trial supervision measures.¹³ At first glance, application of a *lex mitior* principle would mean that an executing Member State cannot impose supervision measures for a longer period than that allowed by its own national law, even if the issuing Member State requests a longer period of supervision. However, it is questionable whether such a limitation would indeed amount to a true *lex mitior*. After all, a shorter period of pre-trial supervision in the executing Member State would most likely trigger an earlier use of a surrender request by the issuing Member State. Interpreting the *lex mitior* principle in such a way leads to the perverse effect of people being surrendered sooner than if the executing Member State would have imposed pre-trial supervision measures for the period requested by the issuing Member State – regardless of the limitations in its own national law. This example illustrates that analysis of the potential of a *lex mitior* principle should include the net effect of its application and should be exercised with the greatest caution.

In sum, for the reasons elaborated above, the current procedural rights debate is considered to be a bridge that does not extend far enough. The tunnel vision caused by the focus on traditional “Article 6 ECHR”-like fair trial rights has led to a debate that neglects the impact differences in pre-trial proce-

dures have for procedural rights. The scope of minimum standards should be extended, and a feasibility study is needed to assess the potential of the introduction of a *lex mitior* principle.

3. Inconsistent Expectations and Requirements

The third and final critique reveals an inconsistency in expectations and requirements with respect to procedural rights. EU Member States are more demanding towards other EU Member States, compared to the demands with respect to non-EU Member States, even though cooperation has the same consequences for the persons involved. It should be underlined that differences in expectations and requirements with respect to procedural rights are only justified to the extent that cooperation between EU Member States is more far-reaching than cooperation with non-EU Member States. This constitutes an important limit for the procedural rights debate. The current distortion gives way to more distrust and reticence in relations between EU Member States when compared to relations with non-EU Member States. This situation is clearly incompatible with the EU’s objective to evolve towards facilitating cooperation based on more trust and respect for each other’s criminal justice systems.

The adoption of the European Arrest Warrant (hereafter EAW) has been the irrefutable catalyst. Even though the transition from the former extradition-scene to the current surrender-scene did not negatively impact the rights of the persons involved – in that the consequences of cooperation remained the same – the adoption of the EAW was used to launch the debate on ensuring procedural rights. Strangely enough, situations that had never provoked debate in the past were suddenly considered highly problematic in an EAW context. Suddenly, a surrender to Poland creates more suspicion than an extradition to Azerbaijan: Even though we welcome the general increased attention paid to procedural rights, it is unacceptable to increase the expectations and requirements in EAW surrender cases between EU Member States, if no parallel increase is introduced in extradition to non-EU Member States.

Of course, we agree that EU citizens may expect their EU Member States to maintain a high level of procedural rights in relation to other states. However, this policy should not be dependent on the states involved. If EU policy requires a certain level of procedural rights to be maintained, this EU policy should stand in relation to other EU Member States no more and no less than it should stand in relation to non-EU Member States. It is inconsistent to have a different set of procedural rights requirements in relation to EU and non-EU Member States if the nature and consequences of the cooperation are the same.

Therefore, the current course of the procedural rights debate is either a bridge too far or a bridge not far enough. It is a bridge too far in that Member States are to limit expectations and requirements with respect to procedural rights in mere EU multi-Member State situations to the level maintained in relation to non-EU Member States. It is a bridge not far enough in that Member States should also increase expectations and requirements in relation to non-EU Member States.

III. Conclusion

The current procedural rights debate is clearly heading in the wrong direction. Not only is the debate often off-topic in that it has lost the link with cross-border multi-Member State criminal proceedings, but the subject of the debate is also too narrow and inconsistent in light of relations with non-EU Member States. Adjustments are needed to get the debate back on track.

The procedural rights debate would benefit from a broad interpretation of the concept of procedural rights, reflecting the entirety of the criminal justice procedure to assess the impact of multi-Member State criminal proceedings and the necessity of introducing minimum standards as flanking measures for the functioning of mutual recognition. Furthermore, it is important to find a way to ensure that the involvement of multiple Member States never compromises the position of the persons involved. It is most encouraging that Member States have expressed their willingness to assess the feasibility of introducing a *lex mitior* principle. This may well be a straightforward solution to cases involving conflicting systems of procedural rights.

A proper balance should be struck between individual debates on procedural rights and integrated debates combining both procedural rights and specific cooperation mechanisms. The current debate on the European Investigation Order would benefit from a stronger procedural rights perspective.

1 European Commission "Communication from the Commission. Towards an Area of Freedom, Security and Justice." COM (1998) 459 final, 14.07.1998.

2 European Council "Conclusions of the Presidency." SN 200/1/99 REV 1 15-16 October 1999.

3 Council of the European Union "Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters." O.J. C 12, 15.1.2001.

4 Vermeulen, G., "Mutual recognition, harmonisation and fundamental (procedural) rights protection," in Martin, M., *Crime, Rights and the EU. The future of police and judicial cooperation*, Londen, JUSTICE – advancing access to justice, human rights and the rule of law, 2008, pp. 89-104.

5 European Commission "Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union." COM(2003) 75 final, 19.02.2003.

6 Spronken, T./Vermeulen, G./de Vocht, D./van Puyenbroeck, L., *EU Procedural Rights in Criminal Proceedings*. Antwerp-Apeldoorn-Portland, Maklu, 2009, 116 p.

7 Council of the European Union "Resolution of the council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" O.J. C 295, 4.12.2009.

8 European Commission "Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union." COM(2003) 75 final, 19.02.2003.

9 Vermeulen, G./De Bondt, W./Van Damme, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010.

10 Spronken, T./Vermeulen, G./de Vocht, D./van Puyenbroeck, L., *EU Procedural Rights in Criminal Proceedings*. Antwerp-Apeldoorn-Portland, Maklu, 2009, 116 p.

11 Vermeulen, G./De Bondt, W./Van Damme, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010.

12 Council of the European Union "Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union." O.J. L 327, 5.12.2008.

13 Council of the European Union "Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention" O.J. L 294, 11.11.2009.

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Effective Remedies for the Violation of the Right to Trial Within a Reasonable Time in Criminal Proceedings

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I. Introduction

Concerns about the excessive length of proceedings, especially in criminal cases, are not new, although they are still, unfortunately, very current. Already in the Roman law of Justinian, a two-year limit for the duration of criminal cases was established.¹ However, it was not until the mid-twentieth century when trial within a reasonable time was established as a fundamental right in Europe. As is well-known, Article 6.1 of the European Convention on Human Rights (ECHR) enshrined the right to trial within a reasonable time as part of the right to a “fair trial” and, according to Article 13, Member States are obliged to provide an effective remedy for anyone with an arguable complaint of a Convention violation, including the aforementioned right. However, the violation of the right to trial within a reasonable time and the lack of an effective remedy for it at the domestic level have generated thousands of applications to the European Court of Human Rights (ECtHR). These contribute, together with other reasons, to a massive volume of applications which reduce the Court’s efficiency in fulfilling its task to protect human rights within a reasonable time.

The problem has nowadays become an absolute priority for the Council of Europe, as shown by the initiatives taken to tackle the problem.² On 24 February 2010, the Committee of Ministers adopted a Recommendation on effective remedies for excessive length of proceedings which gives guidance to Member States in order to guarantee the right to a trial in a reasonable time and to offer effective remedies in cases of violation. The Recommendation proposes specific forms of non-monetary redress for undue delays in criminal proceedings, such as the discontinuance of proceedings or the reduction of sanctions.

This last remedy, particularly important in criminal proceedings, has been implemented by the Spanish Criminal Code Reform Act, adopted on 23 June 2010, which stipulates that “the fact of undue delays in the proceedings is now considered as a mitigating factor of the penalty” (Article 21.6 Penal Code (CP)). It is therefore interesting to examine to what extent the

Spanish law and this new legal provision to compensate for delays in particular reflect the Recommendation of the Council of Europe of 24 February 2010.

Finally, at a time when the European Union is developing minimum standards as set out in Article 6 ECHR for the rights of individuals in criminal procedures as a prerequisite for the implementation of the principle of mutual recognition of judicial decisions in criminal matters,³ it may be convenient to think about the development of the right to trial within a reasonable time as a procedural guarantee since different standards of protection by Member States may make the mutual recognition of criminal judgments in the European Union difficult.

II. The Assessment of a Reasonable Time

The ECtHR constantly states in its case law that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities, and what is at stake for the applicant.⁴ In criminal proceedings, the last criterion is of particular importance because of the special values affected when a person is submitted to a criminal trial.

When determining the relevant period for assessing the overall duration of criminal proceedings, the Court has established a “material criteria”, stating that criminal proceedings commence not only at the moment that a formal charge is brought against the applicant but also when the person has been substantially affected by actions taken by the prosecuting authorities as a result of the suspicion towards him (this includes pre-trial proceedings).⁵ In the case of an appeal against a conviction or a sentence, criminal proceedings are terminated upon judgment given in the final instance.

The jurisprudence of the ECtHR has been followed by state constitutional courts. In particular, the Spanish Constitutional Court has fully integrated the criteria of the Strasbourg Court

on what is a “reasonable time” into its case law concerning Article 24.2 of the Spanish Constitution. Although the term “right to trial without undue delay” used by Article 24.2 may give the idea that it is enshrining a right more stringent than that covered by the ECHR, the Constitutional Court has said that this expression is not to be interpreted as ensuring the observation of deadlines established by the rules that organise the procedure, but as the right of everyone to have their case resolved within a reasonable time within the meaning of Article 6.1 of the ECHR.⁶

III. Compensatory Remedies for Violations of the Right in Criminal Proceedings

The Court has often stressed that effective remedies must be provided against excessively lengthy proceedings. These remedies can be either preventive (to avoid the undue prolongation of proceedings) or compensatory (to seek redress, if possible, for the consequences of undue delay).⁷

The Court has constantly indicated that “the most effective solution” is a remedy designed to expedite the proceedings. In criminal proceedings, especially at a pre-trial stage, this may be done by allowing complaints or requests of acceleration to be lodged with the superior prosecution or judicial authority.⁸ However, where remedies to expedite proceedings do not exist or have failed, the only effective remedy is to provide the litigant with adequate redress for delays that have already occurred. The remedies to offer redress for excessive length of proceedings may be “compensatory redress” or other forms of non-monetary redress. The Recommendation of the Council of Ministers considers two kinds of compensatory remedies: monetary redress and non-monetary redress.

1. Monetary Compensation

Financial reparation is, obviously, an appropriate redress for damage (pecuniary and non pecuniary) suffered due to the excess length of the proceeding. Therefore, an action to establish non-contractual liability of the state may be sufficient. However, the ECtHR has declared that an effective remedy for delays in criminal proceedings must, inter alia, operate without excessive delay and provide an adequate level of compensation.⁹ In Spain, financial reparation is provided for by the Constitution, which establishes the liability of the state for the abnormal functioning of the Administration of Justice (Article 121 Spanish Constitution). The procedure for claiming this compensation is to submit a request to the Ministry of Justice combined with an appeal against refusal before the administrative courts.¹⁰

Although this compensation mechanism has been considered to be an effective remedy for undue delays by the ECtHR¹¹, there may be more effective remedies that allow for immediate non-monetary compensation for the harm suffered without having to go through a long administrative process before the Ministry of Justice which bears the risk of further delays.

2. Non-Monetary Redress: Discontinuance of Proceedings or Reduction of Sanction

In criminal proceedings, other non-monetary remedial measures taken by the Court itself is of special relevance. These measures may be the completion of the trial or the reduction of the sentence. The Committee of Ministers expressly recommends that both measures should be considered by the Member States as appropriate in criminal proceedings that have been excessively lengthy.¹²

As to the discontinuance of the proceeding, the effects of the compensation can be anticipated by discontinuing the proceedings on the grounds of delay before the case is brought to the court that decides on its merits.¹³ In fact, rather than compensation, it would be adequate if a violation of the right to trial within a reasonable time would constitute a procedural bar for continuing the process. It might be considered to include a presupposition in procedural law that is based on not holding the trial when there has been too long a delay, which in fact would be a procedural requirement.¹⁴ However, following the considerations of the Venice Commission, this remedy should be used very cautiously in view of the public interests at stake in criminal proceedings.¹⁵ It could be seen as an exceptional remedy in cases of proceedings on minor offences, since suspension of the sentence is generally foreseen for these offences and discontinuing the case before it is brought before the court can be considered as a way of anticipating this decision. Of course, a specific legal basis should be provided for it. As to the mitigation of the sentence, the ECtHR has considered it to be an effective remedy within the meaning of Article 13 on several occasions after the judgment in the *Eckle* case.¹⁶ In order to be seen as an effective remedy, the national authorities must have either expressly or in substance acknowledged and then offer redress for the breach of the Convention.¹⁷ Therefore, this remedy must complete two criteria: the acknowledgement of a violation of the Convention and sufficient redress

In some countries, this remedy has been implemented into legislation whereas in others, it has been set or developed through case-law.¹⁸ In Spain, the recent Criminal Code Reform of June 2010 has introduced a specific legal basis for the mitigation of the sentence.

IV. The New “Mitigating Circumstance” of “Undue Delays” in Spain (Article 21.6 Spanish Criminal Code)

1. The Situation Before the Reform of 2010

The Spanish Penal Code of 1995 contained no explicit provision regarding the effects of undue delays on punishment. It merely alluded to the problem with respect to the option of a pardon, stating that if the reason for the pardon request was the existence of undue delay, the execution of the sentence will be suspended pending the outcome of the request (Article 4.4 CP). In the absence of an explicit legal provision, the answers given by the Spanish Supreme Court to the question of whether the existence of an undue delay in criminal proceedings must have any impact on the punishment has varied:

a) The non-judicial Agreement for the unification of doctrine of 29 April 1997 stated that the answer to the allegation of an undue delay should be to file a petition for clemency and a deferment from the execution of the sentence pending the issue of a pardon, as provided for in Article 4.4 CP. The possibility of accepting delays as an analogous mitigating factor was again ruled out for a lack of legal grounds. According to Article 66 CP, the judges or courts must impose the penalty within the lower or upper half within the legal framework of punishment, a decision which depends on the Court’s assessment of circumstances related to the individual’s responsibility as listed in Article 21 CP (mitigating circumstances) and 22 CP (aggravating circumstances).

Article 21 CP did not include undue delay in the list of mitigating factors, although in the sixth and final section, it allowed for consideration of “any other circumstance that is analogous to the above.” The moot question was whether undue delay was similar to the other mitigating circumstances (especially compared to repentance and lessening or repairing the damage caused) and therefore could be analogously included in the list of attenuating circumstances. At that time, the Supreme Court denied the possibility of considering it as a mitigating factor by analogy.

b) A new non-judicial agreement of 21 May 1999 found that the solution of requesting pardon meant transferring the function of imposing the penalty from the courts to the government and that the criminal courts should be responsible for compensating the person affected by an undue delay by reducing the sentence since “by the damage caused to the condemned person by the excessive length of proceedings, he has, in part, been punished.” The Supreme Court now considered the undue delays as being part of the “analogous mitigation” under Article 21.6 CP. The decision gave reasons for discussions within the Spanish criminal doctrine. On the one hand,

it established a suitable way to provide a substantive solution for the courts to acknowledge the existence of an undue delay. On the other hand, this interpretation had no legal basis because the undue delay suffered by the accused does not bear any analogy with the other mitigating circumstances listed in Article 21 CP.¹⁹

This jurisprudential solution for undue delays has been applied very often in the courts, which shows the frequency with which a violation of the right to trial without undue delay is judged and condemned.²⁰

2. The Situation After the Criminal Code Reform Law 5/2010

With the Criminal Code Reform Law 5/2010 of 23 June 2010, a new mitigating circumstance has been envisaged in the reformed Article 21.6 CP: “Extraordinary and undue delay in processing the procedure, provided that it is not attributable to the defendant and that it has no relation to the complexity of the case”. The new section must necessarily be interpreted as taking into account the Spanish Constitutional Court’s jurisprudence on the concept of “undue delay” which, as mentioned, is considered to be equivalent to “reasonable time” and in so far follows the ECtHR’s jurisprudence on the right to trial within a reasonable time.

Nevertheless, the possibilities for the judge to reduce the sentence taking into account the delays in the trial are limited. Due to the Spanish system for the assessment of the punishment, the judges are not allowed to impose a penalty below the legal range of punishment foreseen for the crime concerned (except when they acknowledge two or more mitigating circumstances or a highly qualified mitigating circumstance without the presence of any aggravating circumstance, according to Article 66.1 CP). The acknowledgement of the mitigating circumstance implies that the punishment must be assessed as being within the “lower half” of the legal range or that an aggravating circumstance can be compensated for.

In my opinion, the mitigation of the penalty for having suffered undue delay is an appropriate and effective remedy to compensate for the breach of fundamental rights. It is not that the existence of the delay diminishes the guilt of the accused, as also stated in the Spanish Supreme Court cases, nor that the delay in any way affects the criminal responsibility of the individual for the crime committed. It is because of the need to compensate the convicted person for the harm done due to the excessive length of proceedings. The new Article 21.6 CP is based on the state’s obligation to provide an effective remedy for a violation of fundamental right to a trial in a reasonable time.

V. Other Possible Effects of Undue Delays in Criminal Proceedings: Non-Execution of the Sentence

Following the argument used to justify the reduction of the sentence in cases of undue delay, one might argue that, if the duration of the process has been so excessive that it is a “*pena naturalis*” of the same severity as the penalty imposed in the sentence, the sentence might as well not be executed at all. In this case, the sentence can be regarded as already been served by the defendant and that therefore the judicial sentence should not be executed. This approach has already been taken in several appeal proceedings in Spain. After declaring the breach of the right to fair trial without undue delay, the Constitutional Court has been asked to order the non-execution of the sentence imposed in the criminal proceedings. The Court has forcefully denied the feasibility of this proposal, saying that the delay in concluding the trial in no way influences any of the grounds on which the sentence has been based and therefore cannot determine the non-execution of the sentence.²¹

In my opinion, the Constitutional Court is correct in stating that there is no connection between the undue delay and the grounds on which the conviction has been founded. Indeed, the validity of the sentence, in terms of a decision based on law, cannot be affected by the excessive length of proceedings. A breach of the right to a trial within a reasonable time does not “pollute” the legitimacy of the sentence as the violations of certain procedural guarantees do (right to trial, defence, etc). However, it is also true that an excessive length of criminal proceedings can make the penalty imposed on the offender disproportionate in comparison to the seriousness of the crime by adding the penalty to the harm already caused by the breach of his right to a trial without undue delay. Also, if the sentence is imposed many years after the crime was committed, it may lack any preventive purpose and be a needless punishment.²² Hence, in some cases, the only effective remedy for a violation of the right to trial without undue delay is the non-execution of the sentence and states should provide legal mechanisms that allow for it.

VI. Relevance of the Question for the Principle of Mutual Recognition in the European Union

The principle of mutual recognition of judicial decisions is the cornerstone of judicial cooperation within the European Union. The implementation of that principle presupposes that Member States have trust in each other’s legal systems, which relies on common minimum standards. Therefore, strengthening mutual trust which allows for the recognition of judicial criminal proceedings requires a more consistent implementation of the rights and guarantees set out in Article 6 ECHR.

Procedural rights are crucial for ensuring mutual confidence in judicial cooperation among the Member States and the right to a trial within a reasonable time is one of these rights.

Section 82 (2) of the Treaty on the Functioning of the EU refers to “the rights of individuals in criminal procedures as one of the areas in which minimum rules may be established”. It would be appropriate to establish such minimum rules with respect to the right to trial without undue delays and the remedies for its violation. Currently, the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, approved by Council Resolution of 30 November 2009,²³ does not mention this right. The roadmap has a non-exhaustive character though. Therefore, it may be considered to lay down rules concerning the right to a trial within a reasonable time as a presupposition of the fairness of the proceedings and as a necessary step for a harmonisation of the remedies for unreasonable procedural delays provided by Member States within the EU. It would be of high relevance to establish minimum rules regarding the effects of undue delays in the assessment of the penalty.

Within the Council of Europe, a large diversity of remedies for undue delays can exist as long as they are considered to be effective according to Article 13 of the Convention. However, this diversity may difficult the development of the principle of mutual recognition within the EU because the violation of this right in a criminal proceeding may be a ground for non-recognition and non-enforcement of a judgment imposing a sentence. Also, the authority of the executing state may find the sentence to be incompatible with its law because it has been passed without taking into account the existence of undue delays in the proceedings. It may also decide that the sentence needs to be adapted to the law of the executing state. If, for instance, the criminal law of the executing state envisages a reduction of the penalty for cases of undue delays, as is now the case of Spain, but the issuing state gave no effect to it, the sentence may need to be adapted to the law of the executing state.²⁴

VII. Conclusion

The provision covering the mitigation of the sentence for undue delay set out in the new Article 21.6 of the Spanish Criminal Code is in line with the Recommendation of the Committee of Ministers of the Council of Europe when it comes to providing a remedy for the breach of concluding a trial within a reasonable time. However, it should not be forgotten that, as the Committee itself has stressed, “the creation of new domestic remedies does not in any way relieve states from their general obligation to solve the structural problems underlying violations”.²⁵

In the case of Spain, where cases of undue delays are all too frequent, the emphasis put on a compensatory mechanism can have the counterproductive effect of making the state slowing down on its obligation to adopt the necessary measures to ensure that criminal proceedings are carried out within a reasonable time.²⁶ It must be kept in mind that the best way for

states to do this is to organise the judicial system in such a way that proceedings are processed in the optimum time²⁷ and to take measures for expediting cases that risk becoming excessively lengthy or have already become so. As the ECtHR has declared: The best solution in absolute terms is indisputably, as in many spheres, prevention".²⁸



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1 See these historical references in *D.R. Pastor*, *El plazo razonable en el proceso del Estado de Derecho*, Buenos Aires, 2002, pp. 49-50.

2 See *European Commission for Democracy through Law (Venice Commission)*, *Can excessive length of proceedings be remedied?*, Council of Europe, Strasbourg, 2007. In this publication, the Venice Commission compiled an up-to-date inventory of the existing legislation of 47 states, a guide to the relevant case law of the European Court of Human Rights, and its own assessment of as well as its far-reaching conclusions as to what would effectively remedy breaches of the reasonable length requirement.

3 As a first result of that work, see the very recent approval of the Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, O.J. L 219, 26.10.2010.

4 See, recently *McFarlane v. Ireland* judgment of 10 September 2010 [GC], par. 142.

5 *Lavents v. Latvia* judgment of 28 November 2002, par. 85.

6 Spanish Constitutional Court, Judgments 82/2006, of 13 March 2006 and 4/2007, of 15 January 2007.

7 Jurisprudence of the ECtHR. See, recently, *McFarlane v. Ireland* (Fn. 4), par. 142.

8 One of those remedies to expedite the proceedings may be a constitutional complaint. The Strasbourg Court has admitted it as an effective remedy. In Spain, the Constitutional Court admits complaints about undue delays in criminal proceedings which have not been concluded in order to declare the violation of the right and to order the competent court to expedite the proceedings.

9 See *Martins Castro and Alves Correia de Castro v. Portugal*, judgment of 10 June 2008; *McFarlane v. Ireland* (Fn. 4), where the Court considered that the government had not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time (par. 128).

10 The procedure is established in Article 192 Ley Orgánica del Poder Judicial (LO 6/1985 of 1. July 2005).

11 The Court has found the Spanish compensatory remedy to be effective: see *Caldas Ramírez de Arellano v. Spain*, judgment of 28 February 2003.

12 Recommendation n. 10.

13 For example, in Belgium, the decision of discontinuing the proceedings can be taken by the "Chambre du Conseil" or the "Chambre de Mises en Accusation" before the investigative phase is concluded. Example cited in the Venice Commission's Report on the effectiveness of national remedies in respect of excessive length of proceedings, CDL-AD(2006)036rev, para. 85.

14 In this sense, *J.L. Gómez Colomer*, *Constitución y Proceso Penal*, Tecnos, Madrid, 1996, p. 237.

15 See the Venice Commission's Report on the effectiveness of national remedies

in respect of excessive length of proceedings (Fn. 13), par. 169.

16 See *Eckle v. Germany* judgment of 15 July 1982, *Beck v. Norway* judgment of 26 June 2001, *Ohlen v. Denmark* judgment of 24 May 2005 and *Menelaou v. Cyprus* judgment of 12 June 2008.

17 In *Menelaou v. Cyprus* (Fn. 16), the Court accepted that the applicant's sentence had been adequately reduced by the Assize Court because, having established the applicant's guilt, it proceeded to pass a total sentence of ten months imprisonment while the Criminal Code provided for a maximum sentence of seven years' imprisonment for each of the relevant counts "although the sentencing court did not specify the exact reduction of the sentence on account of the length of the proceedings".

18 See European Commission for Democracy through Law, *Can excessive length of proceedings be remedied?* pp. 33-34.

19 For the debate on this matter, see *A. Manjón-Cabeza Olmeda*, *La atenuante analógica de dilaciones indebidas*, Madrid, 2007, pp. 327-340 and *S. Huerta Tocildo*, *La singularidad de la atenuante de dilaciones indebidas en la causa*, in: *Estudios Penales en Homenaje a Enrique Gimbernat*, Vol. I, Madrid, 2008, pp. 1033-1059, who takes a firm position against the doctrine of the Supreme Court.

20 In 2010, there have already been three cases where the Supreme Court, on occasion of appeals, has held that there has been a violation of the right and has newly determined the sentence, taking into account undue delay as analogous mitigation (see SSTS 28/2020, 28 January, 269/2010, 30 March, and 522/2010 of 1 June).

21 See the study of constitutional jurisprudence in *J. Díaz-Maroto/Villarejo*, *La doctrina del Tribunal Constitucional sobre el derecho a un proceso sin dilaciones indebidas y su repercusión en el ámbito penal*, Repertorio Aranzadi del Tribunal Constitucional n. 8/2008.

22 See arguments defending the non-execution of the sentence as a means of redressing the negative consequences of undue delay, *P. Fernández-Viagas Bartolomé*, *Las dilaciones indebidas en el proceso y su incidencia sobre la orientación de las penas hacia la reeducación y reinserción social*, Poder Judicial, n° 24, 1991, pp. 37 and ss. 9).

23 O.J. C 295, 4.12.2009.

24 Such a mechanism of adaptation has been foreseen in the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. Article 8.2. allows the executing state, where the sentence is incompatible with its law in terms of its duration, to decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law.

25 See the Guide to Good Practice accompanying the Recommendation (2010)3, par. 40.

26 In this sense, *S. Huerta Tocildo* (Fn. 19), pp. 1058-1059. Also the European Commission for Efficiency of Justice (CEPEJ) has noted that "mechanisms which are limited to compensation are too weak and do not adequately incite the states to modify their operational process (...) and find a solution for the fundamental problem of excessive delays. See doc CEPEJ (2004) 19rev2, "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe-Framework Programme", available at www.coe.int/cepej, p. 3.

27 See, in this sense, Recommendation No. R (87) 18 concerning the simplification of criminal justice and Recommendation No. R (95) 12 on management of criminal justice.

28 See *Scordino v. Italy* judgment of 29 March 2006 [GC], par. 183.

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