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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: Judicial Cooperation

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Guest Editorial

Carlo Chiaromonte

Transnational Evidence: Towards the Transposition of the Directive 2014/41

Regarding the European Investigation Order in Criminal Matters

Prof. Dr. *Lorena Bachmaier*

Is the EU Ready for Automatic Mutual Recognition ... in the Fight Against Crime?

Jean Albert and Dr. *Jean-Baptiste Merlin*

Information Sharing between OLAF and National Judicial Authorities: The Advantages of a Supra National Structure and the Legislative Limitations Specific to a European Hybrid Body

Dr. *Romana Panait*

Der Rahmenbeschluss zu Abwesenheitsentscheidungen – Brüsseler EU-Justizkooperation als Fall für Straßburg?

Thomas Wahl

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

Contents

News*

European Union

Foundations

- 34 Enlargement of the EU
- 34 Schengen

Institutions

- 35 Court of Justice of the European Union (CJEU)
- 35 OLAF
- 36 Europol
- 37 Eurojust
- 38 European Judicial Network (EJN)
- 38 Agency for Fundamental Rights (FRA)
- 38 Frontex

Specific Areas of Crime / Substantive Criminal Law

- 38 Protection of Financial Interests
- 39 Money Laundering
- 39 Organised Crime
- 40 Cybercrime
- 41 Trafficking in Human Beings

Procedural Criminal Law

- 41 Procedural Safeguards
- 41 Data Protection
- 42 Confiscation and Freezing of Assets

Cooperation

- 42 Police Cooperation

Council of Europe

Foundations

- 42 Reform of the European Court of Human Rights
- 43 Other Human Rights Issues

Specific Areas of Crime

- 43 Corruption
- 45 Money Laundering
- 46 Hercule III Programme – Call for Proposals

Articles

Judicial Cooperation

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

Imprint

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Guest Editorial

Dear Readers,

The European Convention on Extradition was opened for signature in 1957 and came into force in 1960. It laid the foundation for cooperation in criminal matters between Council of Europe Member States. Since then, many international treaties drafted under the auspices of the Council of Europe, the European Union, the United Nations, and other international bodies have been developed.

The question everybody is now asking is: After 60 years of effort and work to strengthen relations between the states, has international cooperation in criminal matters produced meaningful results? An initial look at the long tradition of cooperation in criminal matters shows that there are still shortcomings in international cooperation in spite of all the efforts that have been made. Illegal activities involving transnational organised crime continue to proliferate, spread, and take advantage of the loopholes that remain at the international level. Moreover, both the opening of borders and technological advances have led to new types of crime, which are more lucrative than ever.

Some of the activities concerned have been addressed through Council of Europe instruments. Examples include the Conventions on Cybercrime, Trafficking in Human Beings and, more recently, Counterfeiting of Medical Products and Trafficking in Human Organs. However, criminal ingenuity knows no bounds, and trafficking in migrants and in cultural property are some of the new methods being employed by these networks to fund their illegal activities.

Clearly, effective cooperation to combat such crime requires both a proper legal framework and also, above all, its effective implementation. An entire range of legal instruments exists, covering aspects of procedural and substantial criminal law. The question is whether to draw up new legal instruments or focus instead on improving those that already exist. This issue is raised in the Council of Europe's White Paper on Transnational Organised Crime, and the intensification of international cooperation in criminal matters will be one of the key aspects of the subsequent action plan.

While the existing conventions are effective, we must not hide the problems that states encounter when implementing and applying them. Drafting new legal instruments would

neither resolve the difficulties encountered nor produce better outcomes. On the contrary, it would further complicate the understanding of the various texts and produce the opposite effect. It is absolutely essential that all players involved in international cooperation in criminal matters strengthen the implementation of the existing instruments, as practical obstacles also exist. The most frequent ones are delays in execution, overstretched national systems, and lack of knowledge of the other party's procedures and/or language.

The Council of Europe is currently working actively to improve cooperation in criminal matters, in particular by improving specific existing conventions (cf. the Convention on the Transfer of Sentenced Persons) while also seeking to develop good practices to guide professionals (for instance, the drafting of relevant guidelines). It is also vital to rationalise procedures: We are working on an "e-transfer" project providing for a computerised system enabling rapid exchanges of information and requests for transfers of sentenced persons in order to help states speed up and facilitate procedures.

As we approach 2020, it is unacceptable that criminal networks can carry on operating unheeded and make such profits despite the very powerful range of legal instruments available. International cooperation in criminal matters must no longer just be a goal but must be seen as a necessity to be put into practice as effectively and quickly as possible. The international community already has effective tools at its disposal. They must now be put into effect. Otherwise, the many legal instruments will remain empty promises, and criminals will keep on expanding their operations to the detriment of our shared values.



Carlo Chiaromonte

Carlo Chiaromonte
Head of the Criminal Law and Terrorism Divisions
Council of Europe



European Union*

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

Foundations

Enlargement of the European Union

EU-Turkey Association Council and Progress for Bosnia and Herzegovina

On 18 May 2015, the EU-Turkey Association Council held its 53rd meeting. With illegal migration as the key topic, the EU reiterated its commitment to strengthening cooperation with Turkey on preventing illegal migration flows. With regard to the dramatic increase in irregular sea crossings, the EU encouraged Turkey to develop a genuine cooperation with Greek and Italian authorities with a view to preventing illegal migratory flows in the Aegean Sea and the Mediterranean and to fighting against the smuggling of migrants and trafficking in human beings.

The ongoing reforms in Turkey are welcomed, but the EU highlighted, as areas of concern, the undue interference by the executive in the judiciary, frequent changes to key legislation without due consultation of stakeholders, and restrictions on access to information. Further reforms, including those on a new

constitution, should be prepared in line with European standards.

On 1 June 2015, the Stabilisation and Association Agreement with Bosnia and Herzegovina entered into force. The Council adopted a decision on this agreement on 21 April 2015. The Agreement establishes a close partnership between the EU and Bosnia and Herzegovina. It strengthens the political, economic, and trade ties between the two parties and is now the main framework for preparing the country for future EU membership. The entry into force of the Agreement also means a dedicated institutional framework has been established, including a Stabilisation and Association Council, which will hold its first meeting during the second half of 2015. (EDB)

►eucrim ID=1502001

Schengen

SIS Operational in the UK

On 13 April 2015, the Schengen Information System (SIS) became operational in the UK. This now brings the number of countries that use the SIS to

25 Member States and four associated countries (Switzerland, Norway, Liechtenstein, and Iceland).

Because the UK is not part of the Schengen area, it will only use the SIS within the context of police and judicial cooperation and not in relation to external border policy. (EDB)

►eucrim ID=1502002

Institutions

Luxembourg Presidency – JHA Priorities

From 1 July to 31 December 2015, the Grand Duchy of Luxembourg has taken over the presidency of the Council. In the area of justice and home affairs, the presidency has made managing migration one of its priorities. This includes integrated management of external borders, respecting the Charter, monitoring the implementation of the Common European Asylum System as well as developing the EASO (the European Asylum Support Office), Frontex, and eu-LISA agencies in this respect. After the CJEU's rejection of EU accession to the ECHR, the presidency states that the process of accession must continue; however, a period of reflection and analysis is required.

Increasing the number of judges in the General Court of the CJEU is also a priority for the Luxembourg presidency, aiming at enabling the General Court to deliver judgment within a reasonable time period.

* If not stated otherwise, the news reported in the following sections cover the period April – June 2015.

Finalising the data protection reform is equally an ambition of the presidency, although only data protection for the proper functioning of the single market is mentioned in the programme, along with a response to the annulment of the data retention directive in 2014.

For internal security, the fight against terrorism is the key priority, including a roadmap on foreign terrorist fighters, a global approach to the fight against terrorism, and implementing the EU PNR system. A new EU Internal Security Strategy for 2015-2020 was adopted and should be implemented. In the fight against organised crime, the presidency encourages cross-border police cooperation and aims to adopt a new Europol regulation to maximise Europol's potential.

In the area of justice, the adoption of the EPPO proposals is the flagship project. Ultimately, the follow-up of the roadmap on procedural rights should conclude by adopting the second series of measures: directives on the rights of children, legal aid, and the presumption of innocence. (EDB)

➤eucrim ID=1502003

Court of Justice of the European Union (CJEU)

Reform of the Court of Justice

The General Court of the CJEU has experienced difficulties handling the strong increase in cases brought before it in the past. Compared to 398 cases in 2000, the number went up to 912 in 2014. This rise in the number of cases is accompanied by the increased complexity of cases, resulting in longer periods of time for resolution and possible breaches of the right to have cases heard within a reasonable time. Actions for damages in such cases have so far already amounted to a total of €26.8 million.

A first proposal from the CJEU to increase the number of judges was rejected by the Member States who could not agree on the appointment procedure. A new proposal made in 2014 contained

an improved solution by adding 21 extra judges to the General Court in three steps:

- In 2015: increase of 12 judges;
- In 2016: upon renewal of the mandates of the General Court's members, an additional seven judges will be appointed by merging the Civil Service Tribunal with the General Court. This will bring the number of General Court judges to 47;
- In 2019, at the next renewal of the mandates of the General Court's members, the number of judges will finally increase by nine, bringing the total number of judges to 56.

This three-step approach will allow the budgetary consequences to be spread over several years. The total net cost of the reform for all three phases still amounts to €13,875 million per year.

On 23 June 2015, the Council adopted a first reading position, concluding that the reform would provide "a sustainable and long-term solution to the current challenges faced by the jurisdictions of the Union and enable them to fulfil their functions within the time limits and the quality standards which European citizens and companies are entitled to expect in a Union based on the rule of law." (EDB)

➤eucrim ID=1502004

Theodor Heuss Prize for the Court of Justice

On 16 May 2015, the Court of Justice under its president, Vassilios Skouris, was awarded with the 50th Theodor Heuss Prize in recognition of its promotion of European citizens' rights as the guardian of legal unity and the rule of law in the EU.

The Theodor Heuss Foundation is politically independent and bears the name of the former president of the Federal Republic of Germany. Its aim is "to draw attention to something that needs to be accomplished and organised in our democracy which has not yet been achieved." (EDB)

➤eucrim ID=1502005

OLAF

OLAF Supervisory Committee Activity Report 2014

On 4 May 2015, the OLAF Supervisory Committee presented its Activity Report for 2014. This report is accompanied by opinions and other documents of the Supervisory Committee that have been adopted since the publication of the 2013 Report.

On 8 May 2015, OLAF published a summary of its comments on the report. The full report is available on the OLAF website. The summary contains comments on findings of the Supervisory Committee regarding *inter alia*:

- The calculation of average investigation duration;
- Access to information for the Supervisory Committee;
- Working arrangements between OLAF and the Committee;
- OLAF's implementation of the Committee's recommendations and OLAF's independence. (EDB)

➤eucrim ID=1502006

Investigative Performance in 2014 – Key Results

The results of OLAF's investigations during 2014 were presented on 2 June 2015. The highest amount of financial recoveries to the EU budget in over five years was recommended by OLAF, namely a total of €901 million. Combined with a high number of investigations being opened (234) and OLAF's increased investigation capacity due to its reorganisation, it confirms the agency's increased efficiency in dealing with fraud against the EU budget. Remarkably, the inflow of information also rose, demonstrating the increased confidence of citizens, institutions, and other partners in OLAF's investigative capacities. (EDB)

➤eucrim ID=1502007

Results of the Hercule II Programme

On 27 May 2015, the Commission presented the results of the Hercule II Programme to the EP and the Council. The

report is based on an independent evaluation and an internal analysis. It assesses the extent to which the programme achieved its objectives and had the impact it was intended to have at the national level. The Hercule II Programme made available almost €100 million for anti-fraud actions between 2007 and 2013, a sum that was spent on more than 500 different actions in three different sectors of activities:

- Technical assistance,
- Training,
- IT support, e.g., purchasing forensic software and surveillance devices to be used for operations against cigarette and fuel smuggling.

In all, the report concluded that the programme improved transnational and multidisciplinary cooperation between authorities in activities seeking to protect the EU's budget. It also strengthened the operational and investigative capacity of police forces, customs authorities, and other law enforcement agencies. The Hercule programme is administered by OLAF and is the only instrument specifically dedicated to protecting the EU's financial interests (EDB)

►eucrim ID=1502008

Europol

Memorandum of Understanding Signed with Sportradar

With the aim of stopping match-fixing stakeholders, Europol signed on 3 June 2015 a Memorandum of Understanding (MoU) with Sportradar, a sports data company that captures live play-by-play data and delivers it in real-time to companies. Sportradar also operates a fraud detection system for several federations, including, for instance, the UEFA. Under the terms of the MoU, both parties will engage in the exchange of expertise, statistical data, information, and/or trends relating to sporting integrity. Furthermore, they will develop projects to collaborate or support each other. (CR)

►eucrim ID=1502009

Memorandum of Understanding Signed with the European ATM Security Team

On 10 June 2015, the European Cybercrime Centre (EC3) signed a Memorandum of Understanding with the European ATM Security Team (EAST), a non-profit organisation whose members are committed to gathering information from, and disseminating EAST outputs to, ATM deployers and networks within their countries/regions. The MoU allows Europol and EAST to exchange strategic data and other non-operational information in order to combat all types of payment crime, including card-not-present fraud, card-present fraud, high-technology crime as well as ATM malware and physical attacks. (CR)

►eucrim ID=1502010

First Situation Report Published on Counterfeit Goods in the EU

On 29 April 2015, Europol and the Office for Harmonization in the Internal Market (OHIM) released their first Situation Report on Counterfeiting in the EU. The aim of this report is to inform the public, industry, and other stakeholders, as well as policy makers and practitioners at EU and national levels, about the current situation of criminal networks ac-

tive in the production and distribution of counterfeit goods in the territory of the EU. The report provides information on routes, entry points, criminal *modi operandi*, and current activities on the part of law enforcement and the private sector. Furthermore, it identifies links between counterfeiting and other crime areas, using various case studies provided by EU Member States and private stakeholders.

According to the report, criminals today regard counterfeiting as having lower risks and providing higher returns than drug trafficking. While the majority of source countries still lie outside the EU (e.g., China, Egypt, and Turkey), the report also finds evidence of an emerging new pattern of domestic EU production of counterfeit goods. Apparently, domestic EU production is increasingly seen as a better, more cost-effective option with lower risks of detection by customs and lower transport costs. Looking at the organised criminal networks producing and distributing counterfeit goods, the report finds the networks to be well-organised and well-resourced, developing close ties with each other to create synergy effects. Furthermore, it looks as if their *modi operandi* and routes are adapted to suit the commod-

Common abbreviations

CEPOL	European Police College
CDPC	European Committee on Crime Problems
CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
(M)EP	(Members of the) European Parliament
EPPO	European Public Prosecutor Office
FIU	Financial Intelligence Unit
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
JIT	Joint Investigation Team
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
(A)ML	(Anti-)Money Laundering
MLA	Mutual Legal Assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
PIF	Protection of Financial Interests
SIS	Schengen Information System
THB	Trafficking in Human Beings

ity and law enforcement activity, which demonstrates their awareness of enforcement tactics. According to the report, the Internet is the most significant enabler for the distribution of counterfeit goods. Ultimately, the report calls for more innovative and inclusive global responses from public and private stakeholders to address both the supply and demand sides of this illicit trade. (CR)

➤ [eucrim ID=1502011](#)

Romanian THB Criminal Network Dismantled

Romanian and French law enforcement authorities, supported by Europol and Eurojust, dismantled an organised Romanian network trafficking Romanian women to France for sexual exploitation. The operation, carried out on 19 May 2015, led to the identification of 11 victims and the seizure of €20,000, 12 luxury vehicles, 88 mobile telephones, 79 SIM cards, 25 computers, jewellery, steroids and drugs. The Romanian law enforcement authorities were supported on the spot by French experts and a Europol mobile office. At the same time, searches were carried out in France, leading to the arrest of three suspects. Apparently, the organised criminal network generated proceeds of up to €4 million, heavily invested in real estate in Romania. (CR)

➤ [eucrim ID=1502012](#)

Europe-wide Investigation into Modern Slavery

On 28 April 2015, the Centre for Social Justice, a think-tank seeking effective solutions to the poverty blighting parts of Britain, published a report on how policy makers and law enforcement across the European Union could develop a more adequate response to modern slavery. The report is the outcome of research and contributions from the private and public sectors, think-tanks, academia, NGOs, central governments, and partners in the European law enforcement community, including experts from Europol. It provides 40 recommen-

dations on how authorities can tackle organised criminal groups. (CR)

➤ [eucrim ID=1502013](#)

Eurojust

Michèle Coninx Re-Elected President of Eurojust

On 21 April 2015, the National Members of the College of Eurojust re-elected Ms Michèle Coninx for a second term as President of Eurojust (see also [eucrim 2/2012](#), p. 54). (CR)

➤ [eucrim ID=1502014](#)

JIT Application Update

Eurojust has updated its application form for JIT funding. Since 26 February 2015, the new form can be downloaded from Eurojust's website under the relevant section of the document library. The new version intends to facilitate the completion and submission of funding applications by introducing new functionalities such as automatic calculations and control of ceilings. It shall also

facilitate the processing of JIT applications by Eurojust.

Furthermore, Eurojust published its call for proposals for JIT funding between 16 August and 15 November 2015. The application deadline was 10 July 2015. (CR)

➤ [eucrim ID=1502015](#)

Eurojust Annual Report 2014 Published

On 21 May 2015, Eurojust published its annual report for the year 2014. The six main chapters of the report focus on Eurojust's tools, casework, challenges and best practice, administration, co-operation with practitioners' networks, and the EAW. Compared to the previous year, the number of cases dealt with at Eurojust increased by 14,5%, up from 1576 cases in 2013 to 1804 cases in 2014. Looking at the EAW, Eurojust's assistance was requested on 266 occasions. Crime areas in which Eurojust's casework increased included drug trafficking, fraud, cybercrime, PIF crimes, illegal immigration, corruption, and money laundering. Furthermore, Euro-

Annual Conference on EU Criminal Justice 2015

The Impact of New Technologies in Criminal Proceedings: E-Evidence, Virtual Currencies, and Social Networks

ERA Trier, 22-23 October 2015

The objective of this annual conference is to facilitate the exchange of experiences and ideas among legal practitioners on current developments and future initiatives in the field of EU criminal justice. After a general presentation on the current developments in criminal justice and on the status of defence rights, this event will focus on the impact of new technologies in criminal proceedings. It will assess the role of virtual currencies in the commission of criminal acts and the handling of electronic evidence in criminal proceedings. It will also debate the impact that social networking sites have on the criminal justice system.

Key topics are:

- Update on current and forthcoming developments, including the fight against terrorism at the EU level
- Reinforcing Eurojust and creating the EPPO: expectations and perspectives
- The increasing impact of new technologies in EU criminal justice: e-evidence, virtual currencies, and social networks

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

The conference will be held in English.

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

just was involved in 122 JITs, 45 of them formed in 2014. 67 JITs were financially supported by Eurojust in 2014. 197 coordination meetings and ten coordination centres were held. Another six secure network connections could be set up, bringing the total number of connections 11. In addition, a cooperation agreement was signed with Moldova and Memoranda of Understanding with the EMCDDA and FRA.

Furthermore, in 2014, Eurojust organised several strategic meetings, e.g., on terrorism, one tactical meeting, strategic seminars on the EAW and freezing and confiscation, and published its new Multi-Annual Strategy 2016-2018.

Eurojust's budget for 2014 was €33.6 million. Budget implementation was 99,82%. (CR)

►eucrim ID=1502016

European Judicial Network (EJN)

Information Paper on EJN and Eurojust Published

The EJN and Eurojust have jointly published an information paper to explain how the EJN and Eurojust can be of assistance in international cooperation in criminal matters. The paper shall assist legal practitioners when deciding whether a case should be dealt with by the EJN or by Eurojust. (CR)

►eucrim ID=1502017

Agency for Fundamental Rights (FRA)

Report on Child-Friendly Justice

On 5 May 2015, a FRA report on the respect for children's rights in civil and criminal proceedings was released. The report and annex on national legislation and policies offer perspectives and the experiences of professionals on children's participation in civil and criminal judicial proceedings in ten EU Member States (Bulgaria, Croatia, Estonia, Finland, France, Germany, Poland, Romania, Spain, and UK). Although

all EU Member States have committed themselves to safeguarding children's rights to be heard, to be informed, etc., this is not always the case in practice. In the same context, the EU promotes the Council of Europe's 2010 Guidelines on child-friendly justice.

The full FRA report and annex are available in English; a summary of the report is available in all EU languages. (EDB)

►eucrim ID=1502018

Frontex

Annual Risk Analysis 2015 Published

Frontex has published its Annual Risk Analysis 2015. According to the report, detections of illegal border-crossing in 2014 reached a new record high, at more than 280,000 detections. Fighting in Syria has caused the worst refugee crisis since the Second World War. The report also identifies new challenges for border-control authorities and EU internal security such as new modus operandi (the use of large cargo ships to transport migrants) and the lack of resources to screen the migrants for their basic ID such as nationality. While the profile of detected irregular migrants was confined mostly to adult males, the number of women and children has increased notably.

In 2014, for the first time, more fraudulent documents were detected in intra-EU/Schengen movements than during border checks on passengers arriving from third countries. Detections of clandestine entry in vehicles increased strongly from 599 in 2013 to 3052 in 2014. Detections of facilitators of illegal migration rose to 10,234 in 2014 compared to 7252 in 2013.

114,000 refusals of entry were issued at the external borders, a decrease of 11% compared to 2013. While a total of 252,003 third-country nationals were subjected to an obligation to leave the EU, 161,309 effectively returned to countries outside the EU.

Ultimately, the report sees an underlying threat of terrorism. (CR)

►eucrim ID=1502019

Operations Triton and Poseidon Sea Enlarged

On 26 May 2015, Frontex signed an amended operational plan for the Joint Operation Triton (see eucrim 4/2014, p. 100). Under the amended plan, the operational area of Operation Triton has been expanded and the number of additional experts, vessels, and aircraft increased. Furthermore, the European Commission is expected to provide Frontex with an additional €26.25 million to strengthen Operation Triton in Italy and Poseidon Sea in Greece until the end of the year. Triton's budget for the year 2015 currently stands at €38 million, Poseidon Sea at €18 million. For the year 2016, the European Commission agreed to provide Frontex with an additional €45 million for the two operations. Frontex will also intensify its efforts to dismantle human smuggling networks by deploying nine debriefing teams. Finally, a regional base is being established in Sicily from which Frontex will coordinate the operation and work closely with liaison officers from Europol, Eurojust, and EASO to support the Italian authorities. (CR)

►eucrim ID=1502020

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

EPPO Proposals – State of Play

During the JHA Council of 15-16 June 2015, the Council endorsed the first 16 articles of the proposal on the setting up of an EPPO. These articles cover the rules on the organisation and the functioning of the EPPO, e.g., the powers of European Prosecutors to give instructions to the European Delegated Pros-

ecutors as well as the mechanism of substitution between the European Prosecutors.

With regard to Articles 17 to 33, the Council welcomed progress but recognized that more work needs to be done. These articles concern issues such as the obligation of the Member States to report any criminal conduct that might constitute an offence within the EPPO's competence. They also concern investigative measures and cross-borders investigations and transactions. The Latvian Presidency made progress on some of these issues. Articles 30-33 have only been touched upon briefly and were not modified during the Latvian Presidency. (EDB)

►eucrim ID=1502021

Money Laundering

Fourth Anti-Money Laundering Directive Adopted

On 20 May 2015, the EP approved the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, also known as the fourth anti-money laundering directive (see eucrim 1/2005, p. 7). This is one of the key measures in the new European Security Strategy for 2015-2020.

The main novelty in the text of the directive is the obligation for all Member States to maintain databases of information on the ultimate "beneficial" owners of corporate and other legal entities and trusts. These databases will be accessible for authorities, FIUs, and financial entities within the context of customer due diligence duties and even the public. Access is limited, however, to those who can prove a legitimate interest in suspected money laundering, terrorist financing, and any predicate offences.

Additionally, the directive aims at building a coherent policy towards cooperating with third states that have deficient anti-money laundering and counter-terrorist financing regimes. Lastly,

the directive improves the traceability of funds transfers within, to, and from the EU.

Member States have two years to implement the directive into their national laws. The Commission has announced that it will work with the Member States to speed up this process. (EDB)

►eucrim ID=1502022

Organised Crime

Renewed EU Internal Security Strategy 2015-2020

The European Council of 26-27 June 2014 called for a review and update of the Internal Security Strategy by mid-2015. Considering the need for review and *inter alia* the statements made after the January 2015 attacks in Paris (see eucrim

1/2015, pp. 7-8), the Council adopted a renewed internal security strategy at the JHA Council of 15-16 June 2015. The strategy was based on the Commission's communication entitled "The European Agenda on Security" of 28 April 2015 and identifies three priorities:

- Tackling and preventing terrorism, radicalisation to terrorism, and recruitment as well as financing related to terrorism. It pays special attention to the issue of foreign terrorist fighters, reinforced border security through systematic and coordinated checks against the relevant databases, based on risk assessment, as well as integrating the internal and external aspects of the fight against terrorism;
- Preventing and fighting serious and organised crime, on the basis of the EU policy cycle;

Report

Conference on The Future European Public Prosecutor in Practice

On 16-17 April 2015, the seminar entitled "The future of the European Public Prosecutor in practice: ensuring effective operation" took place in Trier, Germany. It was organised by The Academy of European Law and the European Commission and was financed by the Commission. The seminar aimed to feed the legislative debate by asking experienced public prosecutors from all EU Member States to offer their views on the practical challenges of the latest drafts on the European Public Prosecutor's Office (EPPO). The current negotiations indicate that the Council will diverge from the 2013 Commission Proposal and will instead move toward a collegiate model and a shared competence between the EPPO and the Member States. In her introductory speech, Ms Monica Macovei (MEP – LIBE Committee) underlined that the current system of fighting EU budgetary fraud is not efficient enough and that OLAF's administrative investigations are not sufficiently followed up by the MS' judicial authorities. Ms Macovei emphasized that, as a consequence of fraud against the EU budget, Union citizens also lose out on financial resources. In the sessions that followed, case simulations by Ms Judith Hester (Austrian Federal Ministry of Justice) and by Professor Hans-Holger Herrnfeld (German Federal Ministry of Justice and Consumer Protection) demonstrated how the EPPO might handle cases affecting one or several Member States. Questions concerned how and at what point cases should be allocated, whether the EPPO should be competent if the offence affects only one MS, and which form cooperation should take in cases in which non-EPPO states (EU Member States or third states) are also affected.

On the second day, Péter Csonka (European Commission, DG Justice and Consumers) summarized the EPPO as a single office concept, emphasizing that it will be a "European" institution with a vertical structure. The practitioners generally agreed on the need for a better system of investigating EU budgetary fraud. They disagreed, however, on whether this could be achieved by strengthening the current institutional setting for judicial cooperation in criminal matters (Eurojust, OLAF, JITs) or by introducing a completely new institution: the EPPO. Furthermore, criticism was raised with regard to the EPPO's resources and the complexity of a multi-level structure, which might hinder its efficiency.

Dr. András Csúri, University of Vienna (APART)

■ Preventing and fighting cybercrime as well as enhancing cybersecurity.

Furthermore, the strategy recognises the growing links between internal and external security strategy. This means that an integrative and complementary approach should be followed that is aimed at reducing overlapping and avoids duplication. The COSI should therefore be involved in order to develop joint action plans for operational cooperation with key third states and in coordination with the EU's overall external action. This also means improving coherence between the Common Security and Defence Policy actions and mission and with the relevant actors in the area of freedom, security and justice.

Other points include the strengthening of the EU's firearms legislative

framework and the development of an effective EU PNR system. (EDB)

►eucrim ID=1502023

European Agenda on Security and Counter-Terrorism Follow-Up

After the Council, the Commission, and the EU Counter-Terrorism Coordinator listed policy priorities and measures in the aftermath of the January 2015 attacks (see eucrim 1/2015, pp. 7-8), the implementation of these measures was discussed during the JHA Council of 15-16 June 2015.

A report from the Latvian Presidency and from the EU Counter-Terrorism Coordinator served as a basis for discussion on how to proceed. The Council then reported on the detailed implementation of these priorities to the European Council of 25-26 June 2015.

This European Council concluded that action is required in three interconnected areas:

■ The renewed EU internal security strategy will be implemented as well as the priorities in the fight against terrorism identified after the Paris attacks;

■ The High Representative for Foreign and Security Policy should, in cooperation with the Member States, develop an EU global strategy on foreign and security policy and report to the European Council by June 2016;

■ A more effective, visible, and result-oriented common security and defence policy should be created. (EDB)

►eucrim ID=1502024

Cybercrime

Europol and Eurojust Joint Action against Cybercriminals

On 9 June 2015, a total of 49 suspects were arrested and 58 searches conducted in the context of a massive action against cybercrime called Operation Triangle. Three connected Eurojust cases formed the basis for coordinated action by the Italian, Spanish, and Polish National Desks. Eurojust helped with the execution of letters of request and hosted coordination meetings with representatives from the national authorities of the Member States involved. A coordination centre was set up with the support of the Eurojust Case Analysis Unit, Europol's European Cybercrime Centre (EC3), and the Joint Cybercrime Action Taskforce (J-CAT). Europol also assisted with real-time support to the law enforcement authorities involved.

The leading Member States were Italy, Spain, and Poland, with support from Belgium, Georgia, and the UK. The form of organised crime investigated was Internet fraud using a scheme known as "the man in the middle," a type of Internet fraud using fake emails or websites or even the hacking of passwords in order to access bank accounts. A total of €6 million was acquired by the

Report

European Criminal Procedure Law in Service of Protection of European Union Financial Interests

State of Play and Challenges

On 15-16 May 2015, a conference on "European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges" organised by the Croatian Association of European Criminal Law took place in Dubrovnik, Croatia. The conference was co-financed by the European Commission (OLAF) within the framework of Hercule III (Legal training and studies).

The work at the conference was divided into three sessions. The first session of the conference was dedicated to financial investigations and mechanisms for improving the exchange of information and mutual cooperation in the process of confiscation of criminal assets. The discussion was focused on the legal basis for the implementation of financial investigations, differences in criminal procedures, extended confiscation, and non-conviction based confiscation. In conclusion, further development is needed to enhance mutual cooperation in discovering illegal assets and enacting legislation at the European level.

The second session dealt with the procedural rights of the defense and with strengthening the rights of suspects in criminal proceedings, especially access to a lawyer. The discussion was focused on the issue of free movement of evidence between Member States and models of admissibility of evidence. Concluding remarks highlighted the need for common procedural standards that would not be at a minimum but at the medium level.

The third session of the conference addressed the European institutions (e.g., OLAF, Eurojust, EPPO), with the aim of describing new developments and future prospects. The presentations dealt with the establishment of a European Public Prosecutor's Office, its competences, lack of a unified legal system, the problem of excessive control by many institutions. It also analyzed the structure and authority of Eurojust as well as the importance of coordination meetings between the Member States.

Dr. Željko Karas, Professor, Police College Zagreb

E-mail: zkarak@fkz.hr

suspects who had also set up an intricate system of money laundering to transfer the money outside the EU. (EDB)

►eucrim ID=1502025

Trafficking in Human Beings

EU Naval Operation Launched in the Mediterranean

During the Foreign Affairs Council of 22 June 2015, an EU naval operation was launched to disrupt the activities of human smugglers in the Mediterranean called EUNAVFOR Med. This is part of the EU comprehensive approach to migration.

The operation aims to identify, capture, and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers in several phases:

- The first phase focuses on surveillance and assessment of human smuggling and trafficking networks;
- The second stage will provide for the search and, if necessary, seizure of suspicious vessels;
- A third phase would allow for the disposal of vessels and related assets, preferably before use, and the apprehension of traffickers and smugglers. (EDB)

►eucrim ID=1502026

Procedural Criminal Law

Procedural Safeguards

Proposed Directive on Legal Aid – State of Play

On 6 May 2015, the EP voted on amendments to the proposed directive on legal aid for persons suspected or accused of a crime or persons named in an EAW. After a general approach was reached in March 2015 (see eucrim 1/2015, pp. 8-9) on *inter alia* provisional legal aid, the MEPs have now also included the right to ordinary legal aid. Provisional legal aid is defined as legal aid provided un-

til a final decision on legal aid has been taken and comes into effect; ordinary legal aid refers to funding and assistance in order to exercise the right of access to a lawyer. It should cover defence costs, such as the cost of the lawyer, and other costs of the proceedings, such as court fees. The assistance is to be provided either fully or partially free of charge.

What is also new are the legal aid quality safeguards included in the proposal by the EP and the exceptional recovery of legal aid costs under certain conditions. Additionally, provisions have been added to clarify in which cases minor offences would be excluded from the directive's scope.

After these new elements are introduced and endorsed by the EP, the trilogue discussions on this file will start soon after. (EDB)

►eucrim ID=1502027

Recommendations on Cross-Border Video Conferencing

On 15-16 June 2015, the Council adopted a set of recommendations offering guidelines for the Member States to improve the use of video-conferencing technology in the area of justice. Cross-border videoconferencing can be useful in criminal proceedings when it is impossible or undesirable for a witness, expert, or the accused to travel and appear in court.

An expert group was set up within the framework of the Multiannual European e-Justice Action Plan 2014-2018 in January 2014 to study possibilities for promoting and sharing experiences about the use of video-conferencing facilities in cross-border situations. This expert group presented their final report on 17 March 2015, concluding that there is much room for improvement concerning technology and facilities in cross-border video-conferencing.

The adopted recommendations include organisational, technical, and legal aspects. With regard to the organisational aspects, the issue of language should be highlighted as well as the

idea of agreeing on a common language along with translation and interpretation services. Technically, the use of firewall and encrypted communication should be a minimum standard. Assessing the impact of adopted EU legal instruments, such as the EIO on procedural rules, is the main legal aspect of the recommendations. (EDB)

►eucrim ID=1502028

Data Protection

Data Protection Reform – First Talks with Ministers Started

During the JHA Council of 15-16 June 2015, a general approach was reached on the data protection regulation that is part of the reform of the EU's data protection legal framework (see eucrim 1/2015, p. 9 and eucrim 4/2014, pp. 103-104).

Elements of the data protection regulation include easier access for citizens to their personal data, a right of portability, a right to erasure, and limits to the use of profiling. Further compliance with data protection rules is facilitated and better guarantees for data transfers to third states have been introduced.

The first trilogue meeting (talks between the Council, the Commission, and the EP) already took place on 24 June 2015 with a view to reaching overall agreement on new EU data protection rules. The Luxembourg Presidency has expressed the ambition to conclude the reform on the entire data protection package by the end of 2015. (EDB)

►eucrim ID=1502029

EDPS' Strategic Approach to Legislative Consultation

On 19 May 2015, following his strategy for 2015-2019 (see eucrim 1/2015, p. 9), the EDPS presented his priorities for 2015 in his role as advisor on proposals for EU legislation and related initiatives.

In a non-exhaustive list of key issues, a primary role goes to the currently ongoing data protection reform (general data protection regulation and directive

on data protection in criminal matters); however, the EDPS also mentions upcoming proposals relating to data protection in EU institutions and bodies as well as a review of the “e-Privacy Directive.”

Further priorities include:

- The digital single market;
- International matters, including new PNR Agreements and the EU-US data flows;
- Migration;
- Agencies of the former third pillar;
- Terrorism and extremism;
- The economic and monetary union, including future agreements with third states on the exchange of information on taxation. (EDB)

►eucrim ID=1502030

Confiscation and Freezing of Assets

Conclusions on Confiscation and Freezing of Proceeds of Crime

On 5 May 2015, the conclusions were made public at the 8th Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecution of the EU Member States and the Euro-just Strategic Seminar “Towards Greater Cooperation in Freezing and Confiscation of the Proceeds of Crime: a Practitioners’ Approach.” Both events, held successively on 11-12 December 2014, resulted in a list of conclusions on the freezing and confiscation of proceeds of crime.

The need for greater coherence and simplification of the existing EU legal framework was a key conclusion along with a consideration for further legislative action regarding non-conviction based confiscation. Further specific challenges in judicial cooperation and the need for the training of judges, prosecutors, and law enforcement were highlighted.

In addition, best practices and challenges in investigations were listed regarding trafficking in human beings and illegal migration. (EDB)

►eucrim ID=1502031

Cooperation

Police Cooperation

UN Security Council Calls for Involving INTERPOL in Tackling Foreign Terrorist Fighters

At its meeting on 29 May 2015, the United Nations Security Council ministerial briefing on foreign terrorist fighters discussed the need to share information via INTERPOL. A Security Council Presidential statement issued at the end of the meeting called on Member States to increase the reporting of information to and use of INTERPOL’s databases to help identify, monitor, or prevent the transit of foreign terrorist fighters.

The Security Council also called on the international community to strengthen INTERPOL’s capabilities and to develop capacity-building assistance in order to facilitate broader use of its secure communications network. It also called

for increased reporting to the Stolen and Lost Travel Documents database. (CR)

►eucrim ID=1502032

INTERPOL Notice to Recover Criminal Assets

On 13 May 2015, the INTERPOL Expert Working Group on the Identification, Location and Seizure of Assets met in Berlin with the aim of developing new operational tools to assist law enforcement in tracing and recovering criminal assets. The group came up with several recommendations such as a new INTERPOL notice to target criminal assets. The notice shall assist member countries in locating, identifying, obtaining information about, monitoring, seizing, freezing and/or confiscating assets. Furthermore, the group recommended developing an analysis file and a case-coordination database on asset recovery to facilitate multi-jurisdictional asset tracing investigations and real-time information-sharing. (CR)

►eucrim ID=1502033



Council of Europe*

Reported by Dr. András Csúri

Reform of the European Court of Human Rights

Report on the Impact of the Revised Rule 47 and Guidance on Lodging a Successful Application

On 3 June 2015, the Court published a report on the impact of the revised Rule 47 of the Rules of Court and how it has functioned in practice. The rule introduced stricter conditions for individual applications in order to enhance the

Court’s efficiency (see eucrim 1/2014, p. 15). Accordingly, since 1 January 2014, any form sent to the Court must be duly completed and accompanied by copies of the relevant documents, while incomplete files are no longer taken into consideration for the purpose of interrupting the six-month period (within

* If not stated otherwise, the news reported in the following sections cover the period April – June 2015.

which applications must be submitted following the final decision of the highest domestic court with jurisdiction).

The report concludes that the revised rule has improved efficiency in handling the Court's caseload, in particular by improving the quality and completeness of individual applications. Nevertheless, some applications still fail to include all necessary information or documents or simply fail to use the Court's current application form. To foster successful applications, the Court additionally prepared a guidance document pointing out the common mistakes in filling out the application form and explaining what to do instead.

►eucrim ID=1502034

Other Human Rights Issues

Commissioner Releases Annual 2014 Activity Report

On 23 April 2015, Nils Muižnieks, CoE Commissioner for Human Rights, published his Annual Activity Report for 2014. The Commissioner characterized 2014 as a bad year for human rights in Europe, with thousands of people dying in the Mediterranean Sea and in the Eastern Ukraine conflict. The Commissioner highlighted that, although it would have been preventable, over 3,000 migrants died at sea in 2014 and a further 1,600 persons have already drowned in the first few months of 2015. The report also stressed that the political conflict in Eastern Ukraine has often overshadowed the humanitarian crisis that it caused. Furthermore, the Commissioner emphasized the grave deterioration of the human rights situation in Azerbaijan, where many of the country's prominent human rights defenders have been prosecuted and detained since the summer of 2014 on charges of violating onerous NGO legislation or on charges of serious offences, which defied their credibility. The report underscored that growing pressure against NGOs and the media

will lead to long-term implications in various Member States.

►eucrim ID=1502035

Commissioner Releases 1st Quarterly Report 2015

On 27 May 2015, the Commissioner published his first quarterly activity report of 2015. The main focus of the Commissioner's work was on gender equality, xenophobia, and the human rights of migrants, refugees, and asylum seekers.

Missions and visits took place *inter alia* to Spain (human rights of migrants, refugees, and asylum seekers), to Norway (with regard to the situation of persons with disabilities, of the Roma people, and the human rights protection system in general), to Bulgaria (human rights of people in institutions and migrants as well as media freedom), and to Serbia (issues of transitional justice and media freedom).

The Commissioner also published reports on France (fight against intolerance) and on Armenia (the rights of women and gender equality).

►eucrim ID=1502036

Specific Areas of Crime

Corruption

GRECO: General Activity Report

On 18 June 2015, GRECO published its annual report for 2014. GRECO visited ten countries and adopted ten evaluation reports as well as three follow-up reports on how Member States deal with the conflicts of interest that parliamentarians, judges, and prosecutors might face. It also adopted 30 follow-up reports on the criminalization of corruption and the transparency of funding of political parties.

The report states that, despite the examples of progress made, there is room for improvement. Various European countries still lack regulations dealing

with said conflicts of interest, and the legislative framework of several countries is not clear and stable because of frequent amendments or because of their complexity.

Despite noticeable progress, the implementation of GRECO's recommendations as regards the transparency of political funding is still slow. By the end of 2014, GRECO had adopted 24 evaluation reports on corruption-prevention with regard to parliamentarians, judges, and prosecutors.

With regard to parliamentarians, GRECO found that a comprehensive code of conduct is often lacking or that there are no adequate measures to address a parliamentarian's vulnerability to undue influence by third parties. The report stressed the need to develop the existing systems for the declaration of assets of MPs by including more precise data as well as information on dependent family members. Additionally, these declarations shall be made easily accessible to the public.

With regard to judges, the report underlines once more that judicial independence and impartiality needs to be strengthened. Their peers should elect at least half of the members of the self-governing bodies of judges; the recruitment and evaluation of judges shall be based on more objective and transparent criteria, and clear codes of professional conduct are to be created.

In addition, GRECO stressed in various reports that the Member States should provide for the independence of prosecution services from the executive branch.

►eucrim ID=1502037

GRECO: Fourth Round Evaluation Report on Azerbaijan

On 2 April 2015, GRECO published its Fourth Round Evaluation Report on Azerbaijan. The fourth and latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of MPs, judges, and prosecutors (for further re-

ports, see eucrim 3/2014. p. 83; 4/2014; pp. 104-106; 1/2015. p. 11).

The report raises concerns regarding the discrepancy between the wording of the key laws of Azerbaijan and the institutional set-up. While the law recognizes the principles of independence and grants the separation of powers, the institutional set-up provides the President and members of the executive branch with particularly strong powers that allow for the exertion of considerable influence on the legislature and the judiciary, including the Prosecutor's Office. The report concludes that such an environment lacks transparency and facilitates corruption.

All professional groups under assessment are committed to the executive. The MPs belong to or support the party led by the President; the legislative process is limited by a typically weak opposition and by the restrictions imposed on parliamentary debates of certain legislative proposals. In addition, the President appoints directly or indirectly judges and prosecutors, and the key judicial self-governing body is subordinated to the Ministry of Justice. Such a framework generates significant corruption risks, while creating opportunities for undue influence and political interference of and on the part of judges and prosecutors.

A second alarming factor is the lack of control over accessory activities, asset disclosure, and conflicts of interest. The law on asset disclosure was adopted in 2005 but never came into force, while information on companies' organizational structures and ownership was removed from the public domain in 2012.

The report concludes that there is a need for credible anti-corruption reforms to be introduced, institutionalized, and enforced.

►eucrim ID=1502038

GRECO: Fourth Round Evaluation Report on Bulgaria

On 13 May 2015, GRECO published its Fourth Round Evaluation Report on

Council of Europe Treaty	State	Date of ratification (r), signature (s) or accession (a)
Convention on Cybercrime (ETS No. 185)	Canada Sri Lanka Poland	8 July 2015 (r) 29 May 2015 (a) 20 February 2015 (r)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)	Poland	20 February 2015 (r)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Portugal Hungary Andorra Belarus	12 March 2015 (r) 27 February 2015 (r) 20 February 2015 (r) 02 February 2015 (r)
Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)	Malta	08 July 2015 (r)
Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)	Estonia	05 February 2015 (r)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	United Kingdom	27 April 2015 (r)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Poland Cyprus	20 February 2015 (r) 12 February 2015 (r)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Austria	10 April 2015 (r)
Convention on preventing and combating violence against women and domestic violence (CETS No. 210)	Cyprus Poland Finland Slovenia	16 June 2015 (s) 27 April 2015 (r) 17 April 2015 (a) 05 February 2015 (r)
Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)	Slovenia Russian Federation	03 June 2015 (r) 24 February 2015 (s)
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213)	Hungary Georgia Cyprus Serbia Romania Andorra Finland Germany United Kingdom Switzerland Czech Republic	09 July 2015 (s) 06 July 2015 (r) 16 June 2015 (r) 29 May 2015 (r) 28 May 2015 (r) 27 May 2015 (r) 17 April 2015 (a) 15 April 2015 (r) 10 April 2015 (r) 20 March 2015 (s) 18 March 2015 (r)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or accession (a)
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214)	Albania	22 July 2015 (r)
	Georgia	06 July 2015 (r)
	Slovenia	26 March 2015 (r)
	San Marino	16 February 2015 (r)
Council of Europe Convention against Trafficking in Human Organs (CETS No. 216)	Albania	25 March 2015 (s)
	Austria	25 March 2015 (s)
	Belgium	25 March 2015 (s)
	Czech Republic	25 March 2015 (s)
	Greece	25 March 2015 (s)
	Italy	25 March 2015 (s)
	Luxembourg	25 March 2015 (s)
	Republic of Moldova	25 March 2015 (s)
	Norway	25 March 2015 (s)
	Poland	25 March 2015 (s)
	Portugal	25 March 2015 (s)
	Spain	25 March 2015 (s)
	Turkey	25 March 2015 (s)
	United Kingdom	25 March 2015 (s)

►eucrim ID=1502041

Bulgaria. The report concludes that Bulgaria needs to adopt a more cohesive and thereby more effective system of corruption-prevention. Though the country adopted a reasonably good legislative framework, the regulations' complexity as well as the variety of reporting instruments and oversight bodies hindered the achievement of significant changes in corruption prevention. The report states that independent evaluation of the effectiveness of the system is necessary, combined with corresponding corrective actions.

With regard to MPs, GRECO recommends increasing the transparency of the legislative process by introducing adequate timelines to consider bills. The judicial system remains vulnerable to undue political interference. The report calls for the analysis of the strengths and

weaknesses of the integrity standards within the judiciary and its impact on corruption prevention.

Moreover, the principle of random case allocation in the courts and prosecution offices has to be implemented in practice. The report generally suggests a substantive and regular monitoring of the private interests of judges, MPs, and prosecutors.

►eucrim ID=1502039

Money Laundering

MONEYVAL: Fourth Round Evaluation Report on Azerbaijan

On 31 March 2015, MONEYVAL published its Fourth Round Evaluation Report on Azerbaijan. The report does not provide a full analysis of the country's

compliance with international and European standards on anti-money laundering/combating the financing of terrorism (AML/CFT). Instead it gives an update on major issues in the AML/CFT system and is a follow-up round, in which recommendations are reassessed as to the state having received "non-compliant" or "partially compliant" ratings in the third round (see eucrim 3-4/2008, p. 108).

The financing of terrorism (FT) offence was found to be largely compliant with international standards, but there are deficiencies in the legislative framework regarding the freezing of terrorist assets. The same goes for the confiscation of proceeds of crime and instrumentalities, where the legislative framework is sound, but property deriving from proceeds-generating offences has not been effectively confiscated.

The FIU was identified as a strong factor of the AML/CFT system; nevertheless, additional safeguards might ensure an even greater independence from undue influence or interference. Also, secure channels for the informal exchange of information with foreign counterparts are in place, but activity in this area remains limited.

The report states that the law enforcement agencies are insufficiently trained to conduct financial investigations and that their work is further hindered by limited access to financial information. Except for banks, the level of reporting of ML and FT suspicions by financial institutions remains low. The sanctions available for infringements by financial institutions and the non-financial sector are not effective, proportionate, or dissuasive, and there are no measures to prevent criminals from holding an interest or management function in financial institutions.

►eucrim ID=1502040

Hercule III Programme – Call for Proposals

In view of implementing the 2015 Financing Decision, the Commission has published three “Calls for Proposals” within the framework of the Hercule III programme:

I Legal Training and Studies

Call for Proposals for the following eligible actions:

1. Developing high-profile research activities, including studies in comparative law;
2. Improving the cooperation between practitioners and academics, including the organisation of the annual meeting of the Presidents of the Associations for European Criminal Law and for the Protection of the EU Financial Interests;
3. Raising the awareness of the judiciary and other branches of the legal profession for the protection of the financial interests of the Union, including the publication of scientific knowledge concerning the protection of the financial interests of the Union.

The actions can be achieved through the organisation of: studies in comparative law, conferences, seminars, workshops, periodical publications, etc.

The available budget for this Call is: EUR 500,000.

The **deadline** for submitting applications is: **Tuesday, 22 September 2015.**

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

olaf-fmb-hercule-legal@ec.europa.eu

II Training & Conferences

Call for Proposals for the following eligible actions:

1. Exchanging experience and best practices between the relevant authorities in the participating countries, including specialised law enforcement services, as well as representatives of international organisations;
2. Disseminating knowledge, particularly on better identification of risk for investigative purposes.

These aims can be achieved through the organisation of:

- Conferences, seminars, colloquia, courses, e-learning and symposia, workshops, hands-on training, exchanges of best practices (including on fraud risk assessment), etc.
- Staff exchanges between national and regional administrations in different Member States (in particular neighbouring Member States) are to be encouraged.

The available budget for this Call is: EUR 900,000.

The **deadline** for submitting applications is: **Tuesday, 29 September 2015.**

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

olaf-anti-fraud-training@ec.europa.eu

III Technical Assistance

Call for Proposals for the following eligible actions:

1. The purchase and maintenance of investigation tools and methods, including specialised training needed to operate the investigation tools;
2. The purchase and maintenance of devices (scanners) and animals to carry out inspections of containers, trucks, railway wagons, and vehicles at the Union's internal and external borders order to detect smuggled and counterfeited goods;
3. The purchase, maintenance, and interconnection of systems for the recognition of vehicle number plates or container codes;
4. The purchase of services to support Member States' capacity to store and destroy seized cigarettes and tobacco.

The available budget for this Call is: EUR 8,050,000.

The **deadline** for submitting applications is: **Tuesday, 15 September 2015.**

Questions and/or requests for additional information in relation to this Call can be sent by e-mail to:

olaf-fmb-hercule-ta@ec.europa.eu

Eligible Applicants:

- National or regional administrations of a Member State that promote the strengthening of action at Union level to protect the financial interests of the Union (for all three Calls);
- Research and educational institutes and non-profit-making entities provided that they have been established and have been operating for at least one year, in a Member State, and promote the strengthening of action at Union level to protect the financial interests of the Union (for “Legal Training and Studies” and “Training & Conferences” Calls).

http://ec.europa.eu/anti_fraud/policy/hercule-iii/index_en.htm

Transnational Evidence

Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters

Prof. Dr. Lorena Bachmaier

I. Introduction

On 3 April 2014, Directive 2014/41/EU regarding the European Investigation Order in criminal matters (hereinafter DEIO)¹ was finally approved. Its aim is to facilitate and speed up the gathering and transfer of evidence between the different EU Member States and to harmonize the regulation of these proceedings. This directive will substitute the rules on transnational evidence gathering in the European Evidence Warrant² and in the European Convention on mutual assistance in criminal matters of 29 May 2000,³ among others.⁴

The EIO is a “judicial” resolution requesting – ordering – the gathering of evidence, which already exists or is to be obtained through investigative measures (Article 1 DEIO). The EIO can also include the request to secure or freeze evidence.⁵ As stated in the Explanatory Memorandum (E.M.) of the DEIO, this instrument is based on the principle of mutual recognition, taking into account, however, the flexibility of traditional mutual legal assistance mechanisms.⁶ It will be applied to any “criminal” investigative measure with a European cross-border dimension, save the establishment and functioning of the joint investigation teams. This aims at overcoming the undesirable fragmentation of the legal instruments regarding the collecting and transferring of evidence between the Member States.⁷

It has been long debated to what extent it is convenient to substitute the mutual legal assistance system by the principle of mutual recognition in judicial cooperation in criminal matters and to what extent an EIO was necessary to foster it.⁸ Those discussions, although not completed, shall not be the focal point of this article. The aim of this analysis is to make an assessment of this new legal instrument from the point of view not only of its efficacy but also from the perspective of the protection of the fundamental rights of the defendant as recognized in Article 48 of the European Charter of Fundamental Rights. In particular, the right of defence in a transnational procedural setting will be examined. To this end, I will analyse the most relevant features of this directive in order to assess to what extent this instrument represents a significant advancement towards the establishment of a single Area of Freedom, Security and Justice (hereinafter AFSJ).

II. The Directive on the European Investigation Order

Paragraph 36 of the conclusions of the frequently mentioned European Council of Tampere of 1999 determined that the principle of mutual recognition should allow the rapid gathering of evidence in the European judicial area.⁹ Since then, the Commission and the Council have worked and negotiated intensely – at a varied pace – with the aim of achieving the defined objectives. In 2001, the programme of measures intended to implement the principle of mutual recognition of decisions in criminal matters, in which the gathering and securing of evidence had already been given the highest priority rating.¹⁰ The Hague Programme¹¹ specifically mentions the gathering and admissibility of evidence among the measures to implement the principle of mutual recognition of judicial decisions in criminal matters.¹² The Green Paper of 2009 on obtaining evidence in criminal matters from one Member State to another and securing its admissibility¹³ was followed shortly after by the proposal of a European Investigation Order in criminal matters, presented on April 2010.¹⁴ In the meantime, the Framework Decision on the European Evidence Warrant has been passed,¹⁵ although its limited scope already allowed foreseeing its meagre practical results.¹⁶ After strenuous efforts and long debates, the EIO analysed here was finally approved. A long road travelled until approval of this new legal instrument for the cross-border gathering of evidence in criminal proceedings was reached; thus it is now time to concentrate on the content of this directive.

1. Scope of application

The DEIO is applicable to all kind of investigative measures directed at the gathering of evidence in criminal proceedings, except joint investigation teams and the evidence they may collect. Framework Decision 2002/46¹⁷ continues to regulate the joint investigation teams, and this is appropriate for various reasons. First, because the principles that govern the establishment of an EU joint investigation team are different from those applicable to the issuing of an EIO: while the DEIO is based on the principle of mutual recognition – subject to certain grounds for refusal –, the joint investigation teams are

based on the agreement of the Member States involved.¹⁸ It is for the Member States to agree on a case-by-case basis to create a joint investigation team to coordinate complex cross-border investigations. Moreover, a joint investigation team can also involve third countries that are not members of the EU.¹⁹

It is true that the ultimate objectives of the joint investigation team and the EIO are partially coincident: in both cases, the aim is to carry out investigative measures and obtain evidence in another Member State. However, these cooperation instruments operate in a different way, are based on different principles, and their scope is also different. The channels of communication and the transferring of the evidence also follow different routes, due to the fact that, in the case of a joint investigation team, authorities of the forum State are present at the spot where the evidence is collected. All these features explain why the rules on the joint investigation teams have not been included in the DEIO.

The DEIO applies to “criminal proceedings” and, in order to avoid confusion, the directive defines under Article 4 DEIO the proceedings to which it applies: not only proceedings that take place before a judicial authority but also those proceedings before an administrative authority that can be reviewed by a court with criminal jurisdiction. For example, criminal sanctions are imposed in some Member States by the public prosecutor and will only lead to a criminal procedure before a court if the sanctioned person opposes the sanction (e.g., in The Netherlands).²⁰ Also, proceedings for administrative liability against a legal person that are dealt with through a criminal proceeding, as is the case in Italy,²¹ would fall within the scope of the DEIO.

As to the territorial scope of application, neither Ireland nor Denmark are bound by the DEIO, whilst the UK has expressed interest in *opting-in*.²² The DEIO will apply to all EIOs received after 22 May 2017 (Article 35.1 DEIO), the time limit for the transposition of the directive by the Member States.

Finally, the directive specifies that the EIO can be issued in criminal proceedings (defined under Article 4 DEIO) against a natural person as well as against a legal person, which is clarification that was not strictly necessary but that the EU legislator has considered appropriate to include.

2. Subjects

a) The issuing authority

Article 1.1 DEIO states that the EIO is a judicial decision “issued or validated by a judicial authority” of the issuing State. It is in Article 2 DEIO that the definition of “issuing author-

ity” is found: a court, judge, prosecutor and also any other investigating authority that has powers to order the collecting of evidence according to the relevant national legislation. In the latter case, the EIO shall be validated “by a judge, court, investigating judge or a public prosecutor in the issuing State” and the validating authority “may also be regarded as an issuing authority for the purposes of transmission of the EIO” (Art. 2. c) ii) DEIO).

This concept of “judicial authority” is quite broad, as it encompasses not only any kind of judge – professional and lay judges –, but also members of the public prosecution service.²³ It should be recalled that criminal investigation in most Member States is directed or supervised by the Public Prosecutor and, in most cases, this authority has powers to order investigative measures. Therefore, it is logical that the authority ordering the collecting of evidence in a national criminal procedure may also request such evidence from another Member State. However, when it comes to investigative measures restricting fundamental rights – which are usually subject to judicial warrant –, it would also be logical that the EIO could only be issued by a judge or court. This would have required that the directive identify a different issuing authority, depending on the measure requested. This would have entailed more complexity, because it would first have required reaching a common definition of what is considered a measure that restricts fundamental rights, a coercive measure, or an intrusive measure, as these concepts are not understood in the same way throughout the EU. Additionally, identifying different authorities depending on the intrusiveness of the measure requested through an EIO would have caused the requested authority to check, in each case, whether the issuing authority was the competent authority or not. In sum, such a system would have added complexity and thus negatively affected efficiency.

This is why the DEIO has opted for a broad definition of “issuing authority” but introduced the additional safeguard of the judicial validation of the EIO when such court warrant is required in the issuing or in the executing State. This solution is coherent with the diverse legal systems of the EU Member States as well as the different conceptions of coercive measures and measures restrictive of fundamental rights. In accordance with the DEIO, the requested State cannot refuse the execution of the EIO on the grounds that it has not been issued by a judge where the executing State requires such judicial warrant for the requested measure. Neither Article 9 DEIO, nor Article 11 DEIO provide for a ground for refusal *rationae auctoritatis*, and Article 9.5 DEIO cannot be interpreted in this sense. Only Article 9.3 DEIO²⁴ provides for the devolution of the EIO if it has not been issued by one of the authorities named in Article 2 DEIO, but it does not allow for refusal for the lack of competence of the issuing authority or because the

EIO should have been validated by a judge or court in the issuing State. If the executing State receives a EIO without court validation, while the executing State needs such a judicial warrant to carry out the requested investigative measure, the solution provided in the DEIO is to adopt a validation procedure within the executing State as provided by Article 2.d) DEIO instead of refusing the execution.

In order to comply with its own constitutional provisions, the executing authority can subject the execution of the EIO to a prior validation by a court in the executing State. For instance, if the EIO requesting a DNA test has been issued by a public prosecutor and it has to be executed in a Member State in which such measure needs a judicial warrant, the executing State may subject the measure to authorisation by a national court.

This system attempts to reduce the grounds for refusal to a minimum, while at the same time ensuring that the fundamental principles of a legal order are not infringed in the execution of an EIO. In fact, one of the most criticized aspects of the EIO during the negotiations was that it did not require that the issuing authority be a court in all events,²⁵ which, instead of promoting mutual trust, poses serious problems for the implementation of the principle of mutual recognition, in particular when coercive measures restrictive of fundamental rights are at stake. The solution foreseen in the DEIO – judicial validation in the issuing or in the executing State – seems to strike the right balance between efficiency and respect for the diversity of the different legal orders involved in the judicial cooperation. The solution, being specific, shows a positive pragmatic approach, but its implementation is not devoid of problems.

What shall be the role of the court that “validates” an EIO in the executing State in order to adapt it to national principles? Is this a mere formality or could the judge in the executing State really check the proportionality and necessity of the measure requested, which is the aim of the judicial warrant authorizing measures restrictive of fundamental rights? It appears that the intention of the Commission is that this “validation” ex Article 2 (d) remains a “pro forma” step in the procedure of executing the EIO: allowing the court in the executing State to check the conditions for issuing the EIO would clearly run counter to the principle of mutual recognition. However, establishing a kind of “pro forma” validation in the executing State, at the end does not represent any additional guarantees for safeguarding the constitutional principles of the executing State.

In the face of this dilemma, it would be very useful if the rules transposing Article 2 (d) DEIO could clarify the scope and meaning of this provision.

b) The executing authority

Article 2 (d) DEIO defines the executing authority as the one “having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case.” The only requirement of the DEIO in this regard is that the transmission of the EIO shall be carried out from judicial authority to judicial authority. To this end, the authorities can use the support of the European Judicial Network.

Thus, each Member State shall determine who will have competence as executing authority, opting either to designate a central authority for transmitting and receiving the EIOs or to decide that the requests shall be forwarded directly to the executing authority (Article 7.3 DEIO). When transposing this Directive, which should be the preferred option? Theoretically, direct transmission is the quickest and easiest way of proceeding but in practice it will not always be easy to identify the authority competent to execute the EIO. For example, if the issuing authority requests information via EIO about the bank accounts of the defendant (Article 26 DEIO), not knowing exactly where those banks are located, it would be easier in such a case to send the EIO to a central authority rather than trying to identify which body is territorially competent. However, if one EIO requests the carrying out of several investigative measures and not all of them would take place in the same place, to whom shall the issuing authority send the EIO: to any of them, to the one competent for the majority of measures, or to the one competent to carry out the more urgent one? This is something that shall be determined by the laws transposing the Directive but, as each of the States may adopt different rules on territorial competence, it is clear to the issuing authority that it would be easier to send the EIO to a central authority that would coordinate the distribution among the executing authorities.

However, centralization is not unproblematic and presents serious risks of delays and, in some countries with a federal structure, it is an option that is out of question. Each of the Member States shall decide in their national transposition laws which system best adapts to its own judicial structure, seeking always to facilitate the swift transmission of the EIO and the easy identification of the executing authority. Taking into account that when receiving an EIO the judicial authority first has to check its own territorial competence before taking any further steps towards the execution of the EIO, the swifter this issue is solved the more effectively the system will function. If rules on territorial competence are not very precise and clear in the execution State, there is the risk that the EIO will keep wandering from one authority to the other: there may be very advanced legal instruments promoting quick and efficient co-

operation but if the tiny details on court management at the domestic level are not efficiently dealt with, the entire system will not result in more efficiency.

c) The defendant and third parties

Two aspects were controversial during the process of negotiating and approving the DEIO and still remain debatable with regard to the protection of the defendant's rights.²⁶ The first deals with the risk of imbalance between the powers of the prosecution and the defendant in the process of gathering evidence abroad, which would undermine the principle of equality of arms.²⁷ This uneven position of the parties in the transnational gathering of evidence is not new and is not generated by the EIO; however, these differences may be enhanced by this new EU instrument: while access to cross-border evidence by the prosecution will be governed by the principle of mutual recognition, for the traditional schemes that have been valid for decades in international judicial cooperation still apply to the defendant.

In order to respect the principle of equality of arms, the DEIO provides that “the issuing of an EIO may be requested by the suspected or accused person, or by a lawyer on his behalf.” The request by the defendant may be filed “within the framework of applicable defence rights in conformity with national criminal procedure” (Article 1.3 DEIO). This possibility was not foreseen in the initial text of the proposal for an EIO²⁸ and its inclusion in the text of the Directive thus merits a positive assessment. The wording of Article 1.3 DEIO is somewhat confusing, but the meaning appears to be clear: the Member States shall ensure that the defendant has the chance to request the issuing of an EIO, but they have discretion as to regulating how this right shall be exercised: the proceedings, moment, conditions, and other formal requirements for exercising these right shall be regulated by domestic law.

The system allowing the defendant to file a request to the court to collect evidence or to request the adoption of some investigative measures, is coherent with the so-called “inquisitorial” continental model of criminal procedure in which the prosecution acts with impartiality, defending legality and guided by the search for the truth, by looking for incriminating as well as exculpatory evidence. Within this type of proceedings, stemming from the Napoleonic *Code de Procédure Penale*, unequal access to the evidence on the part of the prosecution and defendant would theoretically be counterbalanced by the impartial approach of the public prosecutor.

Apart from the fact that this balance between the powers of the parties is often more theoretical than real and that practice shows many distortions of the principle of equality of arms,

the fact is that providing the defendant with the possibility to file a request to issue an EIO does not seem to be sufficient to ensure such principle.²⁹ In any event, the solution provided by the DEIO is not fully satisfactory for systems with a more adversarial criminal procedure in many EU countries (among them, Italy, Cyprus, Malta, or England and Wales): on the one hand, when the defendant requests the issuing of an EIO, the decision on the proportionality and necessity of the measure lies with the issuing authority, which will also be the public prosecutor in many cases. And, on the other hand, the mere filing of such a request implies disclosing the defensive strategy to the opposing party in an initial stage of the proceedings.

This imbalance is also present at the domestic level, as many legal orders do not allow the defence to gather evidence independently, but only by requesting the adoption of measures by the investigating authority or court. But the difficulties obviously increase when the evidence has to be gathered in a transnational setting. In sum, Article 1.3 DEIO is a first step towards providing access to cross-border evidence to the defendant, but it seems to be insufficient to protect adequately the rights of the defence and the principle of equality of arms.³⁰

It is still to be discussed whether the defence can intervene in the execution of the EIO in the executing State and the possibility to challenge the issuing and/or execution of an EIO. The Explanatory Memorandum of the DEIO recalls that this Directive shall be applied in the light of the Directives regarding the protection of the fundamental rights of the suspect or accused,³¹ but it is questionable whether such a reference is sufficient to ensure an effective protection of such rights. This issue will be discussed later. Finally, the Directive does not contain any provision regarding the protection of the rights of third parties that may be affected when executing an EIO, save the rules on witness' and experts' testimonies through videoconference, telephone, or other audio-visual means (Articles 24 and 25 DEIO). Insofar as third parties' fundamental rights can be encroached by the adoption of certain investigative measures – for example, the interception of communications (Articles 30 and 31 DEIO) or the controlled deliveries (Article 28 DEIO) –, the domestic laws should provide rules ensuring that these third persons are informed of the measure that has affected them and the ways to protect their rights.

When regulating the legal remedies against the EIO, Article 14.3 DEIO reads that “the authorities shall ensure that information is provided about the possibilities under national law for seeking the legal remedies,” if such information does not undermine the need for the confidentiality of an investigation. The Directive states neither who shall be informed about the legal remedies nor does it state who has standing to challenge the EIO: the defendant affected (all of the defendants

if several), the issuing authority, also any third parties? The Directive leaves a margin of discretion to the domestic legislator to regulate this and thus also to provide a way to protect the rights of third persons affected by the adoption of investigative measures in execution of an EIO. In the transposition of this Directive, the domestic laws should pay attention to the protection of the rights of third parties: first, providing that they shall be informed about them as soon as this is possible and, second, by establishing possible legal remedies if their rights have been unlawfully encroached upon.

3. Conditions and content of the EIO

According Article 6.1 DEIO, an EIO shall only be issued when it “is necessary and proportionate for the purpose of the proceedings” and the requested measure could have been ordered “under the same conditions in a similar domestic case.” Necessity and proportionality are the conditions that have to be assessed by the “judicial” authority issuing an EIO.³² This assessment is closely linked to the rules on the content of the EIO as provided under Article 5 DEIO.

a) Content of the EIO

The EIO will be initiated by filling out the form provided for that purpose,³³ the minimum content of which is regulated in Article 5 DEIO: identification of authorities and persons concerned; objective and grounds (reflecting the facts that are investigated and the evidence sought), description of the offence prompting the issuing of the EIO, indicating the criminal law applicable to it, and a description of the investigative measure to be carried out (Article 5.1 DEIO). This regulation is appropriate, but it remains to be seen in practice what level of detail is required. For example, what shall be the data to be provided regarding “the identification of the persons concerned?” Does this require the full name/the ID number, or will it be possible to identify the person by indicating the position in a company? To what extent shall the authority describe in the requesting form the criminal act being investigated? Would it be sufficient to refer to the conduct typified in the criminal code or should other particularities also be referred to that would allow the executing authorities to identify other ramifications of the offence? Similar questions arise with regard to the description of the measure requested: would a broad description be enough (e.g., bank data of X person) or shall it be more precise, in order to allow the executing authority to calculate the approximate costs (bank data of X person from a certain date to the present and regarding this precise account)?

It goes without saying that these issues are not to be clarified in the text of the Directive but should be defined as much as

possible in the transposition laws in order to avoid practical problems in the execution of the EIOs. Up to now, it was not uncommon in the execution of *letters rogatory* that the executing authority demands more detailed information before granting the execution of the request for cooperation, which always causes delays in the execution of the measures requested. It would be advisable to establish guidelines on the information to be detailed in the EIO, not only to promote a certain level of harmonization in the laws transposing it but also to avoid requests for complementary information, which are time-consuming for both sides.

In any event, if additional information is required for the execution of the EIO, direct consultation between the authorities involved is the path to be followed, and these contacts should be conducted in a swift and easy manner, avoiding undue delays as much as possible. What is clear is that an incomplete – or insufficiently detailed EIO – shall not lead to refusal of its recognition and/or execution, being applicable here *in fine* Article 6.3 DEIO.

b) Proportionality, necessity, and lawfulness as conditions for the issuing of the EIO

Before issuing or validating the EIO, the “judicial” authority shall assess whether the evidence or measure requested is necessary, adequate, and proportional for the criminal investigation. The proportionality requirement is undoubtedly the most difficult to assess, and it is even more difficult to find a common understanding at the European level.

It would seem unnecessary to require expressly in the DEIO that one of the conditions for issuing an EIO shall be its proportionality, as any evidentiary measure and specifically a measure restrictive of fundamental rights needs to undergo the proportionality test, in the latter case according to the long established case law of the ECtHR.³⁴ Nevertheless, and even if proportionality is a condition that could be considered as implicitly required for the adoption of any investigative measure, it is positive that this is specifically mentioned in the Directive, especially taking into account that, in some EU countries, not all investigative measures restrictive of fundamental rights are subject to prior judicial authorization. The experience with the EAW and its “disproportionate” use may also have influenced the text of the DEIO in this aspect.

Once established that the EIO shall comply with the proportionality principle, the Directive does not set any guidelines on how to assess it. It does not even exclude the issuing of an EIO for less serious or petty criminal offences and does not establish a threshold under which the EIO could be considered unproportional.³⁵

As there is no common concept of proportionality in the AFSJ, it may be advisable to recall briefly what the elements to be considered are when assessing the proportionality of an EIO:³⁶ seriousness of the offence, necessity of the evidence for the investigation and adjudication of the offence, existence of other less intrusive investigative measures that would serve to the same aim, the consequences of adoption of the measures for the persons affected, and finally – and generally – whether the measure is proportionate to the aims of the procedure.³⁷ In addition to this proportionality test focused on justification of the encroachment of fundamental rights, another approach to the proportionality assessment may also be taken into consideration: the costs derived from the execution of the measure requested.

Each of these elements have different implications: proportionality regarding the encroachment of fundamental rights may cause the inadmissibility of the evidence collected, while the disproportionate economic costs of executing an EIO not affecting fundamental rights has an influence on efficiency of the criminal justice system but no impact regarding exclusionary rules of evidence. This does not mean that this aspect is not important, taking into account that, as a rule, the costs of the execution, save those being exceptional, will be borne by the executing State. In practice, this element is highly important when providing international judicial cooperation, and the excesses seen in the handling of the EAW have made clear that the cooperation instruments must also be used according to a rational cost-efficiency assessment. It seems that the Directive, when referring to the proportionality principle, is also mindful of this last aspect related to costs.

Is such an approach sensible? From the point of view of facilitating cooperation in transnational evidence gathering, it seems to be adequate not to fix a threshold for issuing an EIO depending on the gravity of the offence. In the future, this will allow use of the EIO to prosecute road traffic offences which are not heavily sanctioned but whose prosecution may require information on the insurance or the ownership of the vehicle – at least until a common register of vehicles is fully established or the different national databases are interconnected.

The proportionality and necessity of the EIO is to be assessed exclusively by the issuing authority and, following the principle of mutual recognition, the requested authority is not entitled to check such assessment or refuse the execution on this ground.³⁸ This being said, however, the Directive grants some leeway to the executing authority in checking the proportionality of the measure, precisely when the requested measure is not in conformity with the principles – also proportionality – established in the executing State.

Moreover, the Directive added in the final stages of its elaboration a new paragraph to Article 6 DEIO, which reads as follows:

3. Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO.

The meaning of this provision is unclear. Literally, it allows the executing authority to “consult” the issuing one when there are doubts as to compliance with the conditions of proportionality and necessity. But does this mean that the executing authority can question the assessment made by the requesting authority on the necessity of the measure? Taking a look at the Explanatory Memorandum, this interpretation should be excluded. Should then the “consultation” be limited to questioning the proportionality of the EIO? In such case, what criteria of proportionality could be subject to consultation: only the proportionality of the costs or also the proportionality of an intrusive measure according to the offence investigated? The way in which Article 6.3 DEIO has been drafted admits any of these interpretations. This provision may function as a “warning” to the issuing authority: it will know that the executing State may, by way of “consultations,” exercise some control over the proportionality assessment made in the EIO. Be this the intention or not, in the end, the ambiguity of this article promotes the consultations between authorities.

More surprising is the consequence provided in Article 6.3 DEIO once the consultation has been completed: “after that consultation the issuing authority may decide to withdraw the EIO.” An answer to the consultation is not foreseen, nor a clarification of the doubts expressed by the executing authority. All this suggests that the main objective of this rule is to solve issues related to the costs of executing the EIO. If this is the case, the term “consultation” would express the unwillingness of the executing State to cover the costs of the investigative measure requested, indicating by way of “consultation” that the issuing State should bear the costs (totally or partially). At this new “economic scenario” the issuing State should consider either assuming the costs or withdrawing the EIO.

If this is how Article 6.3 DEIO is to be interpreted, the procedure of “consultations” would serve to counter the criticism expressed by several Member States against bearing the cost of carrying out investigations in support of offences prosecuted abroad, while those same offences would not be prosecuted in their own territory in application of the principle of opportunity in order to save costs.

But if Article 6.3 DEIO is one of those rules that is included in a legal instrument just to pave the way towards facilitating

its adoption and to overcome the opposition of some Member States – or the Council –, it cannot be overlooked that it gives rise to several questions: On one hand, because it does not state that the consultations will be limited to the costs of the execution of the EIO and, on the other hand, because through these “consultations” on the costs, there may be a risk that the cooperation is hindered or even that it is only provided if the costs are not “exceptional” (according to the point of view of the executing authorities) or if they are assumed by the requesting State.

Finally, in the future, it shall be clarified what is considered “exceptional costs,”³⁹ because if the legal differences between EU Member States are huge, the economic differences are no lesser, and there is also a risk that those economic differences may have a negative impact on the smooth implementation of the EIO. A common understanding of what proportional requests and proportional or reasonable costs are in the execution of EIOs should be reached with the aim of creating an environment favourable to transnational cooperation.

4. Recognition and execution of the EIO

In accordance with the principles of mutual recognition, the grounds for refusing to recognise and/or execute an EIO are limited to precise causes and, as a rule – as has been explained above – without reviewing the reasons which led to the issuing of the EIO.

During the process of drafting the DEIO, it was discussed at length how the grounds for refusal should be regulated in order to foster the principle of mutual recognition instead of creating reasons for distrust among the Member States.⁴⁰ Once the Directive has been adopted, this discussion should be left aside, as it is not a priority at present to define whether this principle is needed to overcome the problems of mutual legal assistance or to what extent the implementation of the principle of mutual recognition should move forward more quickly or rather with more caution. Despite the fact that there are still several EU countries not willing to yield any powers regarding the criminal law and that oppose carrying out intrusive investigative measures to support a foreign criminal proceeding, at the moment all stakeholders have to accept that the principle of mutual recognition shall apply to the gathering of evidence and everyone should contribute to the adequate implementation of the DEIO.

a) The grounds for substituting and/or refusing the EIO

When regulating the grounds for refusal of an EIO, the Directive has tried to limit them as much as possible and pro-

viding also that before refusing the execution of a measure, alternatives should be found to overcome the intransigence for the execution of measure requested in the EIO. Thus, the DEIO regulates “the recourse to a different type of investigative measure” (Art. 10 DEIO) and possible grounds for refusal (Art. 11 DEIO). Another ground for refusal, this one of mandatory nature, is the one foreseen in Article 9 DEIO for those cases where the EIO has been issued by an authority who has no competence under the DEIO.

– Recourse to a different type of investigative measure

Article 10 DEIO regulates the cases in which the executing authority, prior to consultation with the issuing authority, can or shall apply a different measure than the one requested. The situations are mainly three:

- 1) The investigative measure indicated in the EIO does not exist under the law of the executing State (Article 10.1 (a) DEIO);
- 2) The investigative measure indicated in the EIO would not be available in a similar domestic case (Article 10.1 (b) DEIO);⁴¹
- 3) The measure exists and could be applied, but the same result could be achieved by a less intrusive measure (Article 10.3 DEIO).

In the two first situations – the measure does not exist or is not applicable in the case described in the EIO –,⁴² if the EIO cannot be executed by resorting to an alternative measure, the issuing authority shall be informed about the impossibility of complying with the EIO. This can only happen with regard to measures not included in Article 10.2 DEIO, as such measures are considered to be applicable in every Member State.

With regard to the rest of measures – essentially those that would entail a restriction of fundamental rights – if the executing State does not have a measure equivalent to the one requested, the EIO shall be refused. Technically, this is not a “refusal” to execute but an “impossibility to provide the assistance requested” for legal reasons (Article 10.5 DEIO). This additional ground for non-execution is one of the examples of flexibility regarding the principle of mutual recognition, closer to the system of mutual legal assistance and was introduced in the EIO with the aim of protecting the coherence of the legal system of the requested State: this avoids the obligation to execute measures that would infringe its own principles on legality and proportionality and would imply applying different standards to the national investigations and to those investigations ordered by an authority of another Member State.⁴³ Imposing on the executing State the obligation to carry out a measure not provided for in its law would not only have caused internal inconsistency but would have also been contrary to the principle set out by the ECtHR on the “sufficient

legal basis” to grant the foreseeability and protect against intrusive investigative measures.

It can be argued that this is exactly what happens when executing an EAW if the double incrimination condition is lacking, where the executing State detains a person even when the conduct for which the detention is ordered is not an offence in the executing State. In this case, the “sufficient legal basis” and the “foreseeability” requirement are also missing, as the detention would not be allowed for “a similar national case.” This contradiction between the EIO and the EAW as to the approach to the principle of mutual recognition merits deeper reflection, which lies beyond the scope of this analysis.

It is manifest that the scope of application of the principle of mutual recognition has been limited in this Directive in comparison to the Framework Decision on the EAW of 2002. The explanation may be found in following reasons: On the one hand, the level of security alarm at present is perhaps not as high as it was at the moment the EAW was approved; on the other hand, since the adoption of the EAW, much criticism has been voiced against the abusive use of the EAW. This different scenario may explain – at least to a certain extent – that the Member States are no longer so willing to accept new EU legal instruments that require “blind” acceptance of the principle of mutual recognition, especially when those instruments may require the restriction of fundamental rights in their own territory. The EIO shows that the EU Member States may not be so enthusiastic to cooperate blindly in criminal matters against their own principles and traditions but, nevertheless, the EIO can still be viewed as progress in judicial cooperation in criminal matters.

The possibility to change the measure if another measure is less intrusive than the one indicated in the EIO would provide the same results also reflects a certain flexibility on the blind operation of the principle of mutual recognition. Article 10.3 DEIO allows the executing authority to check the proportionality of the measure selected in the EIO. This does not mean that the executing authority can review the assessment made by the issuing authority but, according to the facts described in the EIO and the legal framework of the executing State, it can suggest the substitution of the requested measure by another that is less intrusive than the one indicated in the EIO. For example, if the EIO requests taking blood samples to make a DNA match and such a DNA profile already exists in the police databases of the executing State, it is logical that the executing State can provide the same information by less intrusive means and thus that the change in measure should be carried out. Or, for example, if the EIO requests the entry and search of premises to obtain some financial information, if such information can be obtained through a production order

directed to the relevant bank, the less intrusive measure should be chosen. This mechanism is welcome insofar as it does not affect the efficiency of the cooperation, while it provides an additional safeguard for the fundamental rights of the persons affected by investigative measures requested through an EIO.

– Grounds for refusal of recognition or execution

The structure and content of the grounds for refusal of an EIO basically follow the same pattern as the one found in the international conventions on mutual legal assistance in criminal matters of 1959 and of 2000,⁴⁴ excluding the clause of *ordre public* and double incrimination but adding the general clause on the protection of fundamental rights recognised in the EU and in the domestic legal order.⁴⁵ The general grounds for refusal are listed under Article 11 DEIO, which are completed with other grounds making the execution of the requested EIO impossible (e.g., Article 24.2 DEIO, when the defendant does not consent to appear through video link).

As a ground for refusal of the EIO, the inclusion that “there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter” (Article 11.1 (f) DEIO), is consistent with Article 1.4 DEIO, which recalls that this Directive does not modify the obligation to respect the fundamental rights enshrined in Article 6 TEU. The European legislator addresses herewith the criticism expressed during the elaboration of this Directive for not adequately addressing the protection of the fundamental rights.⁴⁶ The formulation of this ground for refusal is quite broad: it does not require proof that there has been a violation of a fundamental right – which would be certainly difficult if not impossible – but it is sufficient that there are “substantial grounds to believe” that the execution of the EIO may cause such infringement. It is important here to draw attention to the fact that this provision refers to the rights recognised in the European Charter – as interpreted by the ECJ –, which will not be always coincident with the fundamental rights recognised in the national constitutions of the Member States.

Does this ground for refusal amount to a kind of European *ordre public* clause? To my mind, calling the ground provided in Article 11.1 (f) DEIO such would not be erroneous⁴⁷ and, as long as it is used correctly and not invoked in an abusive manner, it represents a specific safeguard for the protection of the fundamental rights in the AFSJ.

Before taking a decision on any refusal, the Directive imposes contacting the issuing authority, as a way of promoting fluent cooperation between both authorities and to overcome any

doubts relating to possible grounds for refusal (Article 11.4 DEIO). The continuous communication should be the guiding principle in the cooperation requests, albeit maintaining a certain formality in order to enable the defence to monitor the lawfulness of the proceedings.

b) Applicable law in the execution of the EIO

The rules applied to obtain evidence in a foreign State may determine the admissibility of such evidence in the criminal process developed in the requesting State. Some legal systems require that, in order to produce its effects, evidence must be obtained in accordance with the *lex fori*, while other systems recognize its validity as far as the *lex loci* has been respected.⁴⁸ There are countries in which evidence stemming from a foreign State is accepted in accordance with the so-called *principle of non inquiry*, i.e., the formalities or rules that governed the evidence-gathering process are not questioned or confirmed at any time; there is not even any control over whether such rules were respected or not⁴⁹. The diversity of solutions existing in each of the Member States prevents or impairs what has been named “the free circulation of criminal evidence,” on the one hand and, on the other hand, may have an impact on the defendant’s rights of defence.

To overcome the first problem, and while there is sufficient procedural harmonization at the European level, the best solution is likely that the executing State respects as much as possible the rules and formalities indicated by the issuing State. Such accommodation of the investigative measure to the *lex fori*, which was already foreseen in the 2000 European Convention on Mutual Legal Assistance (Article 4), appears in the Framework Decision on the European Evidence Warrant and in Article 9.2 DEIO. Its purpose is to prevent the obtained evidence from becoming inadmissible because of not complying with the *lex fori*. In order to ensure the correct execution of the EIO, and also accommodation of the required formalities, the issuing authority can request that authorities of the executing State assist the local authorities in their execution if this is not contrary to the fundamental principles of the relevant State (Article 9.4 DEIO). At the same time, the Directive prevents the *lex fori* from being imposed in the executing State if it is not compatible with the *lex loci* or, to be more precise, with its basic legal principles. Such a rule, no doubt, facilitates inter-State cooperation as well as the admissibility of evidence obtained abroad but, in my opinion, it does not provide an appropriate answer to the problems raised by transnational evidence.

The transnational dimension of a proceeding must indeed foster cooperation but not at the cost of distorting the principles applicable to the proceeding or reducing the defendant’s rights

of defence⁵⁰. This is the reason why many scholars argued, for a long time, that it is necessary to establish specific rules applicable to transnational criminal proceedings in Europe⁵¹ in order to ensure that the right of defence is not infringed when evidence is transferred from one Member State to another. It is often taken for granted that the executing State taking care that the investigative measure performed in its territory respects the *lex loci*, adjusted, if need be, to the formalities of the *lex fori*. But who controls in the main proceedings if such rules have been respected? In most countries, the defence is supposed to take care of it, but what are the real possibilities if the defence does not know how the evidence was obtained in the foreign country and what the applicable rules in that country are? This is definitely a pending issue in the construction of an AFSJ if we wish to guarantee that security does not ultimately become the prevailing *leitmotiv*.

For the time being, Article 14.7 DEIO at least introduces a general rule aimed at also advancing the protection of defence rights in transnational proceedings:

Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

This rule, added to the text of DEIO at the last minute, certainly constitutes significant progress because, even though it does not explicitly abolish the principle of *non-inquiry*, it does imply that the courts must scrutinize the way evidence was obtained in another State and check that the defendant’s fundamental guarantees have been respected.

c) Remedies

The substantive reasons for issuing the EIO can only be challenged before the courts of the requesting State “without prejudice to the guarantees of fundamental rights in the executing State” (Article 14.2 DEIO). As I understand this rule, it refers to the executing authority’s obligation to ensure that fundamental rights are duly respected (Article 1.4 DEIO), to the possibility to refuse the execution when there are serious reasons to believe that the execution would cause a violation of those rights (Article 11.1 (f) DEIO), or to the possibility to consult the issuing authority when there are doubts about the proportionality of the investigative measure requested in the EIO.

Moreover, in accordance with Article 14.1 DEIO, Member States are bound to ensure that all measures adopted in execution of an EIO can be challenged through the same channels foreseen for a similar domestic case, i.e., under the same conditions as if a national authority had decided the measure.⁵² This will be possible only if an essential condition is met: that

the defence knows and is informed of the execution of such measure.⁵³ The determination of when and under which conditions such information must be provided is left to national legislation as long as confidentiality is not undermined (Article 14.3 DEIO). In this respect, this rule does not add virtually anything to the general right to a remedy except for the generic requirement that domestic rules must allow the “effective exercise” of those legal remedies.

In practice, the possibility to challenge the measures carried out following an EIO will depend on a number of factors; in particular: knowledge of such measures and the time in which the defence is aware of them; the national regulation of the right to be assisted by a lawyer in the execution of the measures; and the defendant’s actual possibilities to have access to a lawyer in the executing State (or States). This is, of course, a complex subject that would deserve a separate study. For the purposes of this article, it will suffice to mention that neither the EU Directive on Access to Lawyer⁵⁴ nor the Proposal for a Directive on Legal Aid⁵⁵ foresee specific mechanisms to guarantee such types of transnational defence.

As a consequence, the defence, once it has been informed of the measures executed abroad, will normally be able to challenge them in the State of execution of the EIO only if it appoints and pays its own lawyer. Furthermore, if the challenge is successful, even when it is recognized that the measure was unlawful or executed infringing the law, this would not lead to the exclusion of such evidence from the criminal proceedings for which it was requested, as it will depend on the exclusionary rules of evidence applicable in the relevant State. The only real contribution of the Directive in this regard, as indicated above, is the provision of Article 14.7 DEIO: Member States are to ensure that fundamental rights are respected in the assessment of evidence. This rule should certainly not be understood as an optional recommendation; nevertheless, its real impact will finally depend on the way the Directive is transposed in each of the Member States and, of course, on the case law of the ECJ when deciding on infringement proceedings as well as on preliminary questions.

III. Assessment of the EIO: Progress and Pending Issues

No doubt the approval of this instrument is good news for the development of the area of freedom, security and justice in the EU in order to facilitate judicial cooperation in criminal issues and, therefore, to achieve a more efficient fight against transnational criminality.

From this perspective, it seems clear that it is very positive to have a single instrument for the requesting of cross-border

evidence, overcoming in this way the lengthy and inefficient system based on the letters rogatory transmitted according to international conventions – with their innumerable reservations and slow procedures – and through the limited mechanism of EEW. Certainly, the fact that it is possible to request in the same EIO both the evidence and the measure for securing it is already an important improvement in comparison with the current system (Article 32 DEIO). The use of standard forms simplifies the issuing and transferring of the judicial cooperation request, also facilitating its recognition and execution. However, the existence of standard forms does not automatically guarantee a fluent and smooth execution of an EIO. One of the main problems identified so far in the area of judicial cooperation on obtaining evidence is the slow pace of the execution of letters rogatory – it is no exception that the execution experiences delays of many months and even years.⁵⁶ Obtaining and securing evidence through fast channels is essential for the success of criminal investigation in most cases, above all when it concerns electronic data.

This Directive endeavours to avoid delays in the execution of an EIO especially in two ways. On the one hand, it provides that the EIO will be processed with the same priority as any other request for assistance coming from a national authority. On the other hand, it explicitly indicates that the execution will be performed “as soon as possible” and determines specific deadlines for it – a maximum of 30 days to decide on its recognition and execution (Article 12.3 DEIO) and 90 days to effectively execute the requested investigative measure (Article 12.4 DEIO).

It is to be expected that the EIO will contribute to rendering judicial cooperation in a more agile and expedient manner. It could be objected that international conventions also provide that the execution be performed without delay, and it has not prevented regrettable and often unjustified procrastination. However, as is well known in all procedural systems, the mere establishment of deadlines does not guarantee *per se* that terms will be respected but it no doubt fosters compliance. To this we can add the mechanisms to enforce the EU rules, which are potentially much more efficient than those foreseen in international conventions. In any event, the difficulties will not disappear immediately, among other reasons because the delays and dysfunctions existing in the administration of justice of some Member States at the domestic level will continue having an adverse effect *ad extra* when those countries receive an EIO.

When an EIO requests the adoption of measures to secure evidence (Article 32 DEIO), the executing authority, if possible, must decide on the execution and communicate its decision to the issuing authority within 24 hours (Article 32.2 DEIO). Note, however, that no specific term is indicated for the execu-

tion of the relevant measure and therefore general terms are applicable, without prejudice to the obligation to execute the measure without delay or as soon as possible. In any event, if the issuing authority mentions emergency reasons in the EIO that justify the urgent adoption of precautionary measures, in my opinion, the executing authority should follow the same criteria and procedures as if they were measures requested by a national court. However, in practice, it would be important not to make excessive use of “urgency” in securing evidence, the only aim being to speed up the timely execution of the EIO, as this may also have negative effects in the long run.

It has to be taken into account that the Directive is aimed not only at facilitating the execution of the requested measures but also at ensuring that they are admissible later in the criminal proceedings for which they have been requested. Therefore, the admissibility of evidence obtained will certainly be facilitated if, in the execution of the EIO, the *lex fori* is also respected – at least those formalities explicitly indicated by the issuing authority that do not contradict fundamental principles of the State of execution.⁵⁷ The Directive does not include rules on admission or exclusion of evidence but at least states that the trial court shall take into consideration the way evidence has been obtained in a foreign country in order to assess its evidentiary value (Article 14.7 DEIO).

It must also be noted that, although harmonization of procedural rules in the AFSJ is not a direct objective of this Directive, the detailed regulation on hearings through video link (Article 24 DEIO) will most likely lead to a certain harmonization of the current rules governing this method of interrogating witnesses, experts, and the defendant.⁵⁸ Certainly, the Directive regulates only the way in which a videoconference is performed in a cross-border setting; it may also promote a harmonised regulation of videoconferences at the domestic level. In effect, it is foreseeable that national legislations will tend towards adopting only one regulation for videoconferences and not separate regulations for videoconferences at trial hearings in domestic trials and at trial hearings in transnational proceedings (without prejudice to the special characteristics of transnational questioning).

Also, in the field of access to data from banks and other financial accounts and operations, the Directive encourages a certain legal harmonization, for it imposes on Member States the obligation to regulate and guarantee such access (“take the measures necessary to enable it to provide the information referred to,” Articles 26.2 and 27.2 DEIO).

If we look at the Directive from the perspective of the protection of fundamental rights, it can be said that its content has been notably improved since the initial drafts until approval

of the final text, and many problematic aspects have been corrected. The requirements that the issuing authority must meet before sending the EIO seem appropriate:⁵⁹

- Issuing authorities must assess the necessity and proportionality of the measure in question as well as its legality, applying the same criteria as if it were for a domestic case;
- Every EIO must be authorized or validated by a judge or public prosecutor (depending on the relevant national laws), which means that evidence that can be obtained directly by the police at the domestic level will always be subject to the control of a judge or public prosecutor if it has to be obtained in a foreign State;
- States are obliged to regulate the possibility to file a remedy against the EIO as well as against the evidence obtained through it, in a way that guarantees that it can be effectively exercised;
- The trial court, when assessing the evidence obtained through an EIO, must take into account the way in which it was obtained – the Directive does not impose any specific exclusionary rule of evidence but indicates that it is necessary to scrutinize whether the requisites for the admissibility of evidence have been met.

The guarantees that must be complied with in the executing State also seem sufficient, above all considering the provision on respecting the *lex loci*.

In sum, the assessment of the EIO from the point of view of protecting fundamental rights of defence is positive, although there are certain aspects that need to be improved in order to ensure an effective defence at the transnational level.

IV. Concluding Remarks

In this article, I have only addressed some aspects of the Directive regarding the EIO, considered relevant in order to make a preliminary assessment of this new EU legal instrument for the transnational gathering of evidence in criminal matters with a view to its adequate implementation into the national laws. There are many issues that need to be assessed in detail, for example the specific provisions on certain investigative measures, the impact of the DEIO on the rules contained in the FD EAW on the temporal transfer of detained persons, or also the important issue of the data protection of information transmitted in execution of an EIO.

Notwithstanding the positive assessment this Directive merits, the challenge remains of addressing a more effective protection of the fundamental rights of defendants in transnational criminal proceedings. As long as the right of access to a lawyer is not adequately guaranteed in both the issuing and the executing State, and as long as there is no effective possibility

for the defence lawyer to challenge the validity of the evidence obtained in another EU country, it can be concluded that the principle of mutual recognition operates mainly in favour of the prosecution: the defence still does not have the same opportunities to challenge transnational and national evidence, and this has a negative impact on the principle of equality of arms. However, these negative consequences are not attributable to this Directive per se but rather to the lack of rules comprehensively governing the transnational proceedings and especially the absence of a mechanism to grant an efficient transnational defence.⁶⁰

Finally, it can be questioned whether this Directive represents true progress in the implementation of the principle of mutual recognition in criminal matters, as the core principle for setting up the AFSJ as stated under Article 82 TEU. On the contrary, as the Directive has introduced a significant flexibility into the application of this principle, could this be viewed as a failure in adopting the principles accepted in the TEU? Are we at the beginning of a slow advancement towards the implementation

of the principles of mutual recognition or rather facing a step backwards in this process? The answer to this question obviously depends on the point of view taken: when compared to the EAW, the EIO is clearly less ambitious or more cautious with regard to the principle of mutual recognition. But if the comparison is made with the system of gathering evidence through the mutual legal assistance instrument, the EIO unequivocally represents a significant advancement towards the implementation of the mutual recognition principle.

All in all, it may not be worth continuing to discuss the slower or swifter pace of the implementation of the principle of mutual recognition. At present, the long awaited EIO has to be welcomed, as it will serve to better fight the transnational criminality in an EU without borders. Attention is now to be paid to the process of transposing this Directive into the national legal orders and further to the role the ECJ is called to play in ensuring the efficient implementation of the EIO, respecting the rights of all parties concerned and especially the rights of defence.



Prof. Dr. Lorena Bachmaier

Catedrática (acred.) Derecho Procesal
Complutense University of Madrid (UCM)

1 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L 130, 1.5.2014.

2 Council Framework Decision 2008/9787/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, O.J. L 350, 30.12.2008.

3 Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on EU the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000/C 197/01).

4 The international conventions, framework decisions and directives that are substituted and/or amended by the present Directive are listed in Article 34 DEIO.

5 Until now regulated in the Council Framework Decision 2003/577/JHA of 22 July 2003, on the execution in the EU of orders freezing property or evidence.

6 Paragraph 6 of the Explanatory Memorandum.

7 See paragraph 7 of the Explanatory Memorandum. See also L. Bachmaier, 'The role of the proportionality principle in the cross-border investigations involving fundamental rights', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Springer, Heidelberg, N.Y., 2013, pp. 85–108.

8 See, for example, G. Ormazábal Sánchez, 'La formación del espacio judicial europeo en materia penal y el principio de reconocimiento mutuo. Especial referencia a la extradición y al mutuo reconocimiento de pruebas', in *El derecho procesal penal en la Unión Europea*, Madrid, 2006, p. 37–73, pp. 50 ff.; L. Bachmaier, 'European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive', ZIS, 9/2010, p. 581 ff.; M. Jimeno Bulnes, *Un proceso europeo para el siglo XXI*, Cizur Menor, 2011, p. 92 ff.; F. Zimmermann,

S. Glaser and A. Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order', EuCLR, 2011, p. 56 ff.; F. Grande Marlaska-Gómez y M. Del Pozo Pérez, *La obtención de fuentes de prueba en la Unión Europea y su validez en el proceso penal español*, RGDE, 2011, Iustel, (<http://www.iustel.com>), pp. 1–42.

9 Point 36 of the Conclusions of the Tampere European Council of 15–16 October 1999: 'The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.'

10 O.J. C 12, 15.1.2001, in particular, see 2.1.1.

11 'Strengthening freedom, security and justice in the EU', O.J. C 53, 3.3.2005, approved in the European Council of 4–5 November 2004, known also as Tampere II. This document defines the objectives for the next five years for the establishing of the EU AFSJ.

12 See point 3.3.1 of The Hague Programme.

13 Done in Brussels 11.11.2009, COM (2009) 624 final. The full text is available under <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:EN:PDF>. Commenting this Green Paper see, S. Gless, *Beweisgrundsätze einer grenzüberschreitenden Strafverfolgung*, 2006; K. Ambos, 'Transnationale Beweiserlangung: 10 Thesen zum Grünbuch der EU-Kommission "Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat"', ZIS, 9/2010, pp. 557–567; and in the same issue, S. Allegrezza, 'Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', ZIS, 9/2010, p. 573 ff.

14 Brussels, 29.4.2010 (COPEN 115). The initiative for a Directive was presented by following Member States: Belgium, Bulgaria, Estonia, Spain, Luxemburg, Austria, Slovenia and Sweden. On that proposal for a DEIO, see, among others L. Bachmaier, 'European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive', ZIS, 9/2010, pp. 580–589; and also L. Bachmaier, *op. cit.* (fn. 7), pp. 85–107, and the literature there cited, and S. Ruggeri, 'Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg, N.Y., 2013, p. 282 ff.

- 15 Council Framework Decision 2008/9787/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. On this instrument see, L. Bachmaier, 'El exhorto europeo de obtención de pruebas en el proceso penal. Estudio y perspectivas de la propuesta de Decisión Marco', in *El derecho procesal penal en la Unión Europea. Tendencias actuales y perspectivas de futuro*, Madrid 2006, pp. 131–178; R.A. Morán Martínez, 'Obtención y utilización de la prueba transnacional', *Rev. de Derecho Penal*, 2010, no. 30, pp. 79–102; B. Hecker, *Mutual Recognition and Transfer of Evidence. The European Evidence Warrant*, in S. Ruggeri (ed.), *op. cit.* (fn. 14), pp. 269–278.
- 16 See L. Bachmaier (2006), *op. cit.* (fn. 15), p. 172.
- 17 Council framework Decision of 13 June 2002, on joint investigation teams 2002/465/JHA, O.J. 20.6.2002, L 162/1. On the joint investigation teams and its regulation in the EU Framework Decision see for example the monographic study of E. Vallines García, *Los equipos conjuntos de investigación penal en el marco de la cooperación entre los Estados de la Unión Europea*, Madrid, 2006, in particular p. 47 ff.
- 18 *Op. cit.* (fn. 17), p. 72 ff.
- 19 *Op. cit.* (fn. 17), p. 89.
- 20 See for example, M. Groenhuijsen y J. Simmelink, 'Criminal Procedure in the Netherlands', in B. Huber and R. Vogler (eds.), *Criminal Procedure in Europe*, Berlin 2008, p. 384 ff.; also M. Groenhuijsen and H. Selcuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law', *ZSTW*, 2014, p.254.
- 21 *Decreto legislativo* of 8 June 2001, n° 231, G.U. 19.06.2001 on the *Responsabilità amministrativa delle società e degli enti*.
- 22 See paragraphs 43–45 of the Explanatory Memorandum of the Directive.
- 23 The same in the Framework Decision 2008/978/JHA of 18.12.2008 on the European Evidence Warrant. The comments made on this provision of the EEW are mutatis mutandis applicable to the EIO, see L. Bachmaier, *op. cit.* (fn. 15), pp. 146–148.
- 24 Article 9.3 DEIO: 'When an executing authority receives an EIO which has not been issued by an issuing authority specified in Article 2 (c), the executing authority shall return the EIO to the issuing State'. It has to be noted that it does not say that the execution will be denied, but that the EIO shall be returned, in order to amend the defective request.
- 25 L. Bachmaier, *op. cit.* (fn. 8), p. 587, and B. Schünemann, 'The European Investigation Order: A Rush into the Wrong Direction', in S. Ruggeri (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg, N.Y., 2014, p. 32.
- 26 See G. Illuminati, 'Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, p. 23; A. Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order', *Utrecht Law Rev.*, Vol. 10, Issue 1 (January) 2014, p.116.
- 27 L. Bachmaier, *op. cit.* (fn. 8), p. 587.
- 28 It was included after the working sessions of 16 April and 14 May 2013, see the Council Document 8754/13, 24.04.2013. See also Council Document 9747/1/13, 29.05.2013.
- 29 In the same sense A. Mangiaracina, *op. cit.* (fn. 26), pp. 123–124, although with regard to the Proposal for a Directive. Critical also R. Belfiore 'Critical Remarks on the Proposal for an European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence', in S. Ruggeri (ed.), *op. cit.* (fn. 25), p. 101.
- 30 Criticism also with the lack of provision on the defence participation in the execution of an EIO, although with regard to the text of the Proposal for a Directive: S. Ruggeri, 'Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues', in S. Ruggeri (ed.), *op. cit.* (fn. 25), p.17.
- 31 See para. 15 Explanatory Memorandum.
- 32 These requirements are also found in Article 7 FD EEW, but they were not in the first text of the Proposal for a Directive EIO, see L. Bachmaier, *op. cit.* (fn. 8), p. 585.
- 33 See Annex A.
- 34 See L. Bachmaier, *op. cit.* (fn. 8), p. 585. Some authors understood that I was considering that the EIO should not be subject to the proportionality test, as S. Ruggeri, *op. cit.* (fn. 14), p. 288. However, this was never my stance.
- 35 See Article 4 DEIO.
- 36 I refer to L. Bachmaier, 'La orden europea de investigación y el principio de proporcionalidad', *RGDE*, 2011, Iustel (<http://www.iustel.com>), p. 7 ff., and the literature quoted there.
- 37 See, for example, M. Fordham and T. de la Mare, 'Understanding the principles of proportionality' in J. Jowell and J. Cooper (eds.), *Understanding human rights principles*, Antwerp, 2001, p. 29 ff.; L. Bachmaier, *op. cit.* (fn. 7), p. 88 ff.; S. Alegrezza, 'Collecting Criminal Evidence Across the EU: The European Investigation Order Between Flexibility and Proportionality', in S. Ruggeri (ed.), *op. cit.* (fn. 25), p. 59 ff.
- 38 L. Bachmaier, *op. cit.* (fn. 7), p. 98 ff.
- 39 On the difficulty of defining what are "exceptional costs" precisely with regard to the interception of communications see S. Arasi 'The EIO Proposal and the Rules on interception of Telecommunications', in S. Ruggeri (ed.), *op. cit.* (fn. 25), p. 133.
- 40 As stated already in L. Bachmaier, *op. cit.* (fn. 8), p. 584–585; and in 'La propuesta de directiva europea sobre la orden de investigación penal: valoración crítica de los motivos de denegación', *Rev. La Ley*, 28 December 2012, p. 7 ff.
- 41 This ground for refusal was not included in the initial text of the Proposal of a DEIO of 29 April 2010, which I already criticized in L. Bachmaier, *op. cit.* (fn. 8), pp. 584–585.
- 42 This is what S. Ruggeri has called 'availability assessment', who criticizes that the defence does not have an opportunity to intervene, S. Ruggeri, *op. cit.* (fn. 14), p. 293.
- 43 See L. Bachmaier, *op. cit.* (fn. 7), pp. 100–105.
- 44 See L. Bachmaier, 'La propuesta de directiva europea sobre la orden de investigación penal: valoración crítica de los motivos de denegación', p.7 ff.
- 45 M. Böse, 'Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', *ZIS*, 4/2014, p. 154 classifies the grounds for refusal in three types, similar to those set out here.
- 46 See A. Mangiaracina, *op. cit.* (fn. 26), p. 131.
- 47 In the same sense, M. Böse, 'Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', p. 154. On the need of this rule see J. Vogel in 'La prueba transnacional en el proceso penal: marco para la teoría y la praxis', in *La prueba en el espacio europeo de libertad, seguridad y justicia penal*, p. 57.
- 48 On the admissibility of evidence obtained abroad in the Spanish criminal proceedings, see, among others, F. Grande Marlaska-Gómez and M. Del Pozo Pérez, 'La obtención de fuentes de prueba en la Unión Europea y su validez en el proceso penal español', p. 13 ff.; F. Gascón Inchausti, 'Report on Spain', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, pp. 475–495.
- 49 A. van Hoek and M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', *Utrecht Law Review*, vol. 1–2 (2005), p. 15; S. Ruggeri, 'Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues', in S. Ruggeri, *op. cit.* (fn. 25), p. 15.
- 50 A. van Hoek and M. Luchtman, *op. cit.* (fn. 49), p. 16: 'the current inter-state practice thus creates a gap in legal protection that does not exist in purely national cases'.
- 51 See B. Schünemann, 'The foundations of transnational criminal proceedings', in B. Schünemann (ed.) *Ein Gesamtkonzept für die europäische Strafrechtspflege*, Köln, pp. 344–361; M.T. Krüssman, *Transnationales Strafprozessrecht*, Baden-Baden 2009, p. 134 ff.; S. Gless and J. Vervaele 'Law Should Govern: Aspiring General Principles for Transnational Criminal Justice', *Utrecht Law Review*, vol. 9–4, 2013, pp. 1–10. In the same issue, see S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' p. 90 ff. and L. Bachmaier Winter, 'Transnational criminal proceedings, witness evidence and confrontation: lessons from the ECtHR's case law', p. 129 ff.
- 52 As demanded by J. Vogel in *La prueba transnacional en el proceso penal: marco para la teoría y la praxis*, p.60.
- 53 Granting the possibility for the defence lawyer to be present during the execution of the EIO can also be crucial for the admissibility of evidence if such presence during the execution of an investigative measure is required in the *lex fori*, as for example in the Italian criminal procedure. See R. Belfiore, 'Critical Remarks on the Proposal for an European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence', in S. Ruggeri, *op. cit.* (fn. 25), p. 102.
- 54 Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013, on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty'. On this Directive see S. Cras, 'The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings', *Eucrim* 01/2014, pp. 32–44; C. Arangüena Fanego, 'El derecho a la asistencia letrada en la directiva 2013/48/UE', *Revista General de Derecho Europeo* 32, 2014, pp. 1–31.
- 55 Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings, Brussels 27.11.2013, COM (2013) 824 final.
- 56 See L. Bachmaier, 'La cooperación judicial en asuntos penales en Europa: consideraciones prácticas, situación actual y propuestas de futuro', in *El derecho*

procesal español del siglo XX a golpe de tango. Liber Amicorum en homenaje a Juan Montero Aroca, Gómez Colomer, Barona Vilar, Calderón Cuadrado (coords.), Valencia, 2012, pp. 1203–1223.

57 Although, as stated by S. Ruggeri, 'Transnational Investigations and Prosecution of Cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice', in S. Ruggeri (ed.), *op. cit.* (fn. 25), p. 221 ff., in order to determine which is the *lex fori* it has first to be clarified which State will finally have jurisdiction to adjudicate the case.

58 Despite the fact that the Explanatory report on the application of Article 10 of the EU Convention on Mutual Legal Assistance of 29 May 2000 has already fostered certain harmonization, see O.J. C 379, of 29.12.2000, pp. 7–29.

59 On those requirements see also M. Böse, *op. cit.* (fn. 45), pp. 153–154.

60 Similar thoughts, although with regard to the regulation on the right to interpretation and translation in criminal proceedings in the Directive 2010/64/EU, are expressed by T. Rafaraci, 'The Right of Defence in EU Judicial Cooperation', in S. Ruggeri (ed.), *op. cit.* (fn. 7), p. 340.

Is the EU Ready for Automatic Mutual Recognition ... in the Fight Against Crime?

Jean Albert and Dr. Jean-Baptiste Merlin

Today, crime pays! This is a familiar statement. Assets of criminals remain sheltered and their value is significant at both European and international levels.¹ The capacity for criminals to enjoy the fruits of their criminal endeavours has the following three immediate economic consequences. First, crime does pay. Second, criminal activities will continue to perpetuate, as criminals are able to invest in the future by having the means to corrupt others and inspire those keen to emulate their well-rewarded achievements. Third, as criminals seek to launder the fruits of their activities and reinvest in the regular economy, they create market distortions, for they are unfair competitors not having borne the initial costs of doing business.

In order to fight crime efficiently, to deter from criminal activities, one must ensure that crime does not pay. Although this has been a constant preoccupation of the EU (part I), recent developments in EU law-making and practice indicate that the momentum has grown, creating the opportunity for automatic mutual recognition to become a reality in criminal matters (part II).

I. Mutual Recognition in European Union Law

The principle of mutual recognition is captured in one clause in the U.S. Constitution². The full faith and credit clause includes strong but simple language capturing the level of trust that federated states place in each other's legal and administrative systems. The rationale for this provision has been subsequently clarified by case law interpretation that regards

it as a "nationally unifying force" within the United States.³ Although mutual recognition in the United States concerned primarily judicial decisions and records, it has been extended to public acts over time.

Unfortunately, the EU treaties do not contain such a clause. Instead, the Lisbon Treaty contains language that envisages mutual recognition on a case-by-case basis as may be agreed in the future by the European Union institutions. A future treaty will hopefully include simple yet commanding as well as straightforward and all-encompassing language.

In the civil law context, Art. 81 Paragraph 1 of the consolidated Treaty on the Functioning of the European Union (TFEU), after entry into force of the Lisbon Treaty, provides the legal basis for mutual recognition of judicial decisions as the foundation for judicial cooperation in civil law cases with cross-border implications, including taking measures for the approximation of legislation. In accordance with the ordinary legislative procedure, Art. 81-2 empowers the European Parliament and the Council to take certain measures to promote this objective (eight types of measures are listed). Pursuant to Art. 81-3, the Council, acting in accordance with a special legislative procedure, may also adopt a decision covering aspects related to mutual recognition in the area of family law.

In the criminal law context, the Lisbon Treaty provided the first legal basis for mutual recognition. As a result of its entry into force, Art. 82 Paragraph 1 of the TFEU states that

[j]udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the law and regulations of the Member States.⁴

Although mutual recognition is thus extended to criminal law matters, Arts. 82-2 and 82-3 provide for limitations and exemptions to the benefit of Member States.

Art. 81 leaves a greater margin for the EU to act unimpeded than does Art. 82. Thus, one can conclude that mutual recognition in civil matters, at least in some civil matters, was more of a priority than in criminal matters. This intent is reflected in debates at the European Commission and the European Parliament on the Lisbon Treaty at the time of its conclusion.⁵

It is generally accepted that mutual recognition provides a powerful means of improving judicial cooperation, especially in criminal matters.⁶ This has drawn international attention; new standards have been developed under the auspices of various international organizations.⁷ The United Nations and the Council of Europe have played a leading role in defining international multilateral instruments setting up basic standards in the field of mutual recognition and judicial cooperation in criminal matters.⁸

Building on these efforts, the EU has gone much further. Since the entry into force of the Lisbon Treaty, significant steps have been taken towards a unified European prosecution, although there is still a long way to go for this to fully materialize.⁹ To date, the most effective mutual recognition instrument in criminal matters in the EU is the European Arrest Warrant (EAW).¹⁰ Its success is due to at least four factors. First, the grounds for refusal to enforce a EAW are very limited. Second, the EAW clearly replaces traditional extradition procedures, thus becoming the only available instrument. Third, the case law of the ECJ has clarified aspects of the EAW, thus facilitating its implementation and contributing to legal certainty. Fourth, constitutional changes possibly required by such new instruments are possible. Since the EAW deals with the *ne bis in idem*, territoriality, and double criminality principles, lessons learned from its implementation are useful in the preparation of any new mutual recognition instruments in criminal matters.

The EU has less successfully put in place other instruments to fight against crime by allowing the freezing and confiscation of criminal assets and by inviting Member States to work together to ensure that the assets transferred or located in another Member State are not sheltered from freezing or confiscation. These instruments stem from the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999:

[e]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities.¹¹

They thus imply both an approximation of legislation and mutual recognition.

Prior to 2014, in the area of freezing and confiscation of criminal assets – at the EU level and in addition to existing international arrangements – two types of instruments were adopted and are, at least partially, still currently in force. The first instrument focuses on substantial rules for the confiscation of criminal assets. Council Framework Decision 2001/500/JHA of 26 June 2001 on “money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime”¹² and Council Framework Decision 2005/212/JHA of 24 February 2005 on “confiscation of crime-related proceeds, instrumentalities and property”¹³ epitomize this approach.¹⁴ The second instrument focuses on procedures for the mutual recognition of decisions from one Member State in another Member State on the freezing and confiscation of criminal assets. It translates into EU law as Council Framework Decision 2003/577/JHA of 22 July 2003 on “the execution in the European Union of orders freezing property or evidence”¹⁵ and Council Framework Decision 2006/783/JHA of 6 October 2006 on “the application of the principle of mutual recognition to confiscation orders.”¹⁶

Following the observation that these and other instruments were ineffective¹⁷ and the amounts of criminal assets recovered unsatisfactory,¹⁸ the European Commission, on 12 March 2012, adopted a proposal for a Directive¹⁹ (“2012 Proposal”) to harmonize substantial rules on the confiscation of criminal assets in the EU, including value-based confiscation, extended confiscation, third party confiscation, and the possibility for confiscation orders to be issued without a criminal conviction in specific cases. The 2012 proposal was finally adopted in 2014 as Directive 2014/42/EU.²⁰ The harmonization embedded in the directive aims at creating a coherent body of substantial rules that should, in turn, enhance mutual trust and effective cross-border cooperation.

II. Perspectives on the Stakes of Current Law-Making with regard to Mutual Recognition

The Commission Impact Assessment accompanying the 2012 Proposal²¹ identified that the preferred policy option for the Commission to pursue is the harmonization of substantial

rules coupled with an additional instrument on mutual recognition, in order to achieve maximum effectiveness. In a 1999 discussion paper on mutual recognition of judicial decisions and judgments in criminal matters, the UK Delegation to the K.4 Committee had already highlighted the risk that the harmonization of substantial rules alone might prove insufficient. In particular, it noted that:

[...] however, experience has shown that approximation is time consuming and sometimes difficult to negotiate. Full harmonisation of all criminal offences is not a realistic prospect; moreover, differences in criminal procedures will continue to impede judicial cooperation. Member States will continue to have different systems of criminal law for the foreseeable future. Even if laws were fully aligned, lack of mutual recognition would still imply the need to check facts and satisfy legal conditions before co-operation could be provided. In order to remove unnecessary procedural hurdles and formalities, work on approximation must be accompanied by progress towards mutual recognition. Mutual recognition can sometimes provide a shorter route to improving cooperation, without fully aligning legislation.²²

Indeed, during the negotiations on the draft directive, the Council called on the Commission to present an additional proposal on mutual recognition to amend Framework Decisions 2003/577/JHA and 2006/783/JHA.

The directive that aims at harmonizing substantial rules on the freezing and confiscation of criminal assets in the EU was finally adopted in 2014.²³ It is clear from its final wording that the text falls short of its original harmonization objectives. Indeed and understandably, EU states are reluctant to extensively harmonize areas that pertain to their core legal structures and sometimes even impact their constitutional principles. After all, it was not so long ago that “confiscation” was used as a tool to arbitrarily deprive people of their assets in some countries. Leaders remember this. So does the public. Everyone is aware of the potential for abuse. A general reluctance that results from the implementation of the European Arrest Warrant can also be noticed. Although the European Arrest Warrant is generally seen as a useful and effective tool, its use by some countries to prosecute minor offences, some of which were committed more than 20 or 30 years ago, has undermined confidence in the system. When using new effective legal tools, including those for the freezing and confiscation of unlawfully gained assets, countries must regularly keep in mind, the basic trust-generating principles captured in the protection of fundamental rights as well as the proportionality principles. This means that the measure undertaken be proportionate to the objective sought, taking the following into consideration:

- (i) The nature and impact of the measure in comparison to the offence committed and the time of its commission;
- (ii) The importance of a specific case in comparison to other cases (the idea being to prioritize the fight against terrorism, organized crime, drug trafficking, sex offences, and human trafficking by placing them at the top of the list);

- (iii) The cost-benefit ratio of enforcing a measure in the legal system (the idea being that resources are finite and that there must be a proportionate and rational use of resources).

In fact, harmonization is not always the better route. Harmonization can undermine the fabric of society. The EU is rich because of its diversity and this diversity should remain and even prosper within EU borders. Harmonization has its limits and often causes frustration among populations that have very different social, economical, and legal backgrounds, values, and cultures.

This is where the conceptual discussion on whether mutual recognition might be a preferred alternative to harmonization comes into play. Mutual recognition in this context is the following principle: if a judicial decision is made anywhere in the EU, it can be executed anywhere in the EU. Obviously, mutual recognition can increase the efficiency of harmonization tools such as the 2014 Directive. Where rules are similar, they are better understood and the execution of decisions implementing them consequently easier to enforce. As a stand-alone measure, however, mutual recognition also provides for a solution that avoids having to harmonize too intensely, thus preserving diverse legal cultures whilst ensuring that justice systems can remain effective within the framework of an area in which assets and criminals can move freely.

III. Mutual Recognition Ensures Diversity whilst Promoting Trust

Mutual recognition ensures diversity and respect for each Member State’s regulations and choices. Although the argument for limiting harmonization is based on the need to respect and preserve different legal systems, the same argument can be used to promote mutual recognition. There should be no excuse today for not executing in Member State B a judicial decision from Member State A that seeks to freeze or confiscate unlawfully gained assets. If a person goes to Member State A to commit an unlawful act, in doing so, he or she must be subjected to the consequences of his or her act in such Member State A, based on Member State A’s legal system – however different it may be from that of other Member States or even of Member State B.

In other words, if a judicial decision is rendered in a Member State against such person and he or she, using the freedoms afforded by the EU treaties, has taken refuge in another Member State with his or her illegally gained assets, that other Member State holds a duty to automatically execute the decision rendered in the first Member State. It thereby signals understand-

ing that the freedom afforded by the EU treaties have as their logical consequence the need to ensure that justice systems are not abused and respects the legal differences that it may have with the first Member State.

This duty should always be balanced with the duty to protect and uphold fundamental rights, including:

- Respect for the principle of legality;
- The right to a fair trial;
- The availability of effective legal remedies;
- Effective judicial review mechanisms;
- The protection of *bona fide* third parties;
- The right of access to justice;

- The right of defence;
- The right to a fair and public hearing within a reasonable time;
- The right to be informed on how to exercise other rights;
- The proportionality principle.

No Member State should become a safe haven for those who wilfully perpetrate unlawful acts in other Member States and abuse the freedoms afforded by the EU treaties in the process. Mutual recognition of judicial decisions is an essential component of the freedoms afforded by the EU treaties. Without it, the EU will always be as much an area of freedom for citizens as for criminals.

1 *Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes*, Research Report, United Nations Office on Drugs and Crime, Vienna, October 2011, 140 p.; available at http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf

2 Article 4, Section 1 of the U.S. Constitution, 1787 (so-called Full Faith and Credit Clause): "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

3 See, e.g., Werner Miguel Kühn Baca, 'The Principle of Mutual Recognition of Judicial Decisions in EU Law in the Light of the "Full Faith and Credit" Clause of the US Constitution', *Boletín Mexicano de Derecho Comparado*, vol. XLVII, No. 140, May–August 2014, pp. 464–468.

4 Treaty on the Functioning of the European Union (TFEU), consolidated version as amended by the Lisbon Treaty of 13 December 2007, O.J. C 326, 26.10.2012, p. 79.

5 See, e.g., Communication from the Commission to the Council – Reforming Europe for the 21st Century, Brussels, 10.07.2007, COM(2007) 412 final, p. 6 (where only judicial cooperation in criminal matters, as opposed to civil matters, is mentioned among the contemplated reforms); Report on the Treaty of Lisbon, doc. 2007/2286(INI), Committee on Constitutional Affairs, European Parliament, 29.01.2008, Document session A6-0013/2008, Rapporteurs: Richard Corbett and Íñigo Méndez de Vigo, sections 9.1(3) and 9.1(4) p. 41.

6 See inter alia *Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union*, General Report, study conducted by DBB Law Firm for the European Commission (DG Justice), Brussels, November 2013, p. 32; available at www.criminalassets.eu

7 *Ibid.*, pp. 27–39.

8 For the United Nations: UN Convention against Transnational Organized Crime, adopted by UNGA Resolution 55/25 of 15 November 2000 and the Protocols thereto; UN Model Treaty on Mutual Assistance in Criminal Matters, adopted by UNGA Resolution 45/117 of 14 December 1990, subsequently modified. For the Council of Europe: European Convention on Mutual Assistance in Criminal Matters, No. 30, 24 April 1959; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, No. 141, 8 November 1990; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, No. 198, 16 May 2005 (*inter alia*).

9 Jean Arthuis, conclusive statement to the seminary "Quel avenir pour la coopération judiciaire pénale en Europe?" organized by PRESAJE, France-Amériques and the French Association of Doctors in Law, Paris, 13 October 2014, *verbatim*, p. 23.

10 Established by Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, O.J. L 190, 18.07.2002, pp. 1–20. The EAW came into effect on 1 January 2004.

11 http://www.europarl.europa.eu/summits/tam_en.htm

12 O.J. L 182, 05.07.2001, pp. 1–2; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0500:EN:HTML>

13 O.J. L 68, 15.03.2005, pp. 49–51; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>

14 Mention should also be made of the Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money

Jean Albert

Lawyer, Arbitrator and Project Coordinator for the Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the EU

Dr. Jean-Baptiste Merlin

Lawyer, Consultant for the Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the EU

laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA); O.J. L 333, 09.12.1998, p. 1; available in its consolidated version at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998F0699:20010705:EN:PDF>

15 O.J. L 196, 02.08.2003, p. 45.

16 O.J. L 328, 24.11.2006, p. 59.

17 See, in particular, the European Commission's implementation reports on Framework Decisions 2005/212/JHA on extended confiscation and 2003/577/JHA on the mutual recognition of freezing orders under COM(2007) 805 and COM(2008) 885; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0805:FIN:EN:PDF> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0885:FIN:EN:PDF>. See also Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22.07.2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885 final, 22.12.2008; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0885&from=EN>

18 Commission Staff Working Paper, impact assessment, 12.03.2012, document SWD(2012) 31 final, paragraph 4.1.; available at: http://www.parlament.gv.at/PAKT/EU/XXIV/EU/07/57/EU_75735/imfname_10022180.pdf

19 COM(2012) 085, inter-institutional code 2012/0036 (COD); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF>

20 Directive 2014/42/EU of the European Parliament and of the Council of 3 April

2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, O.J. L 127, vol. 57, 29.4.2014, pp. 39-50. See at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:127:FULL&from=EN>

21 SWD(2012) 31 final, 12.03.2012; available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index_en.htm

22 See "Mutual Recognition of judicial decisions and judgments in criminal matters," Note from the UK Delegation to the (then) K.4 Committee, Council doc. 7090/99,

Brussels, Crimorg 35 Justpen 18, Limite, Brussels, 29.03.1999, especially par. 9; See reference at: <http://www.publications.parliament.uk/pa/ld199899/ldselect/lddeucom/62/6203.htm> and <http://www.publications.parliament.uk/pa/ld199899/ldselect/lddeucom/62/6204.htm> On 2 December 2014, the UK adopted The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (2014 No. 3141, Statutory Instruments, criminal law, data protection) transposing Directives 2003/577/JHA and 2006/783/JHA.

23 See note 20.

Information Sharing between OLAF and National Judicial Authorities

The Advantages of a Supranational Structure and the Legislative Limitations Specific to a European Hybrid Body

Dr. Romana Panait*

When dealing with the question of the sharing of information by OLAF, such a reflection must necessarily address the status of OLAF, not only taken individually but also in the more general context of the array of (present and future) European institutions. From its position in the European legal order, as a supranational body responsible for "the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests,"¹ OLAF is empowered to request the assistance of the competent national administrative authorities of the Member States operating in the same area, which are under an obligation to provide such assistance².

It is an entirely different situation when it comes to national judicial authorities,³ in relation to which OLAF positions itself as a parallel structure, both in terms of status and in terms of competence. This might appear to be a paradoxical state of facts, given that an important part of the outcome of OLAF's activity are the judicial recommendations⁴ addressed to the national prosecution authorities in the Member States, asking them to consider judicial actions.⁵ From that perspective, the relationship between OLAF and the national judicial authorities is the very mirror of the duality of the European Union-Member States relationship, with its timid European effusions alternating with national reticence. In this ambivalent reality, the advantages inherent to OLAF as a supranational structure (I) are incompletely matched by the legislative limitations defining OLAF as a European hybrid body (II).

I. The Advantages of OLAF as a Supranational Structure

Although the sharing of information is the key element that allows a supranational body like OLAF to fulfil its duties, it may be observed that, surprisingly, the issue of "exchange of information" is specifically mentioned as such in a very limited manner in the OLAF Regulation.⁶

Summary references are made to the necessity of putting into place "effective cooperation and exchange of information" with the anti-fraud coordination services in the Member States⁷ and to administrative arrangements concluded by OLAF, having the purpose of facilitating the exchange of information⁸ with external partners, including third countries and international organisations. An entire article is then dedicated to the "exchange of information between the Office and the competent authorities of the Member States," but its scope is limited to specific investigative needs not covered by the other articles of the regulation.⁹ To fulfil its primary task, which is the protection of the financial interests of the European Union, OLAF "investigat[es] (or work[s] with authorities investigating) allegations of fraud or irregularities to the detriment of the EU budget or which impact on the good reputation of EU institutions."¹⁰ This aspect of OLAF "working with authorities investigating" illustrates precisely OLAF's position within the legal order of the European Union and in relation to the national authorities of the Member States.

In this context, the sharing of information is necessary, or even indispensable, and nevertheless inherent throughout all the phases of an investigation: during the “selection” phase leading to the opening of an investigation,¹¹ when preparing or conducting specific investigative activities, upon completion of an investigation when the final report is disseminated,¹² or at any time during the investigation if needed.¹³ Benefits arise from OLAF’s status as part of the European institutions, being, as such, a supranational structure. The first benefit lies in OLAF’s competence, which has already been accepted at the national level. The second advantage is the speed of OLAF’s intervention, which can be decided solely at OLAF’s level without having to garner or search for the agreement of other authorities concerned as would be the case in a conventional cooperation scheme.¹⁴ At the same time and of equal importance, OLAF maintains well-established relationships with several national authorities, which facilitates the cooperation. All these advantages are, of course, valid for the cooperation with the EU Member States. It is in this context that the supranationality of OLAF finds its best expression. Where non-EU countries are concerned, supranationality takes on a new dimension and is no longer directly linked with the competences of OLAF but instead with its status as part of the European Commission and therefore with the image it carries. Distinction must however be made between “pure” third countries, candidate countries, and acceding countries. It must also be observed that the OLAF Regulation deals with cooperation with third countries in a very limited manner.¹⁵

In practice, several parameters have to be taken into account when sharing information (1), with a tangible impact on OLAF investigations, from an operational point of view (2).

1. The parameters guiding the sharing of information in practice

The exchange of information between different authorities of the Member States is covered by the OLAF Regulation, thus expressing an administrative “principle of European territoriality.”¹⁶ This could be qualified as the “primary territorial competence” of OLAF.

As a rule, the OLAF Regulation does not distinguish between the national authorities as regards the issue of sharing of information: the regulation mentions “competent authorities of the Member States” – therefore, administrative authorities as well as judicial authorities are covered. As another rule, the OLAF Regulation has a very specific way of addressing the sharing of information by OLAF, formulations such as “where necessary” or “may” having been chosen to express that OLAF

disposes of a certain margin of discretion when sharing information with the Member States.¹⁷ There is only one exception to both these rules and it concerns the internal investigations, cases in which OLAF “shall” – therefore has the obligation to – transmit to national judicial authorities information concerning “facts” that could give rise to criminal proceedings or fall within the jurisdiction of a judicial authority of a Member State. This compulsory transmission of information obtained following an internal investigation, as opposed to a discretionary transmission in external investigations,¹⁸ leaves, however, a certain margin of appreciation to OLAF. Not every indication or suspicion may be the subject of a transmission, but a certain amount of information must be collected to substantiate “facts,” as required by the regulation. Within this general framework established by the OLAF Regulation, the diversity of the practical situations that give rise to the necessity of sharing information with the national judicial authorities can be confined to two main hypotheses: an investigation is already ongoing at the national level or the final purpose is the opening of criminal proceedings in the Member State concerned.

In the first scenario, OLAF can establish contact with the national authority from the very moment it receives information of investigative interest, therefore even before an investigation is formally opened, and precisely with the purpose of deciding whether an OLAF investigation should be opened.¹⁹ Afterwards, if both a national and a European investigation are to be conducted at the same time, the sharing of information takes place in relation to every investigative activity. This will continue until the investigation is closed²⁰. In the second case, OLAF conducts its investigation by collecting enough evidence to, in the end, recommend to the judicial authorities of the Member States the opening of national proceedings in relation to facts which, under their national law, could be qualified as being of a criminal nature.

As designed, the OLAF Regulation is limited to establishing only guidelines concerning the sharing of information with the national authorities. For different situations that arise in practice, OLAF must turn towards a broader legal basis than its own regulation. This consists of the different acts regulating the fight against fraud in the European area, including the Convention on the protection of the European Communities’ financial interests;²¹ in the specific field of the sharing of information and transfer of data, its second protocol²² contains relevant provisions.²³ According to these, a Member State, when supplying information to the European Commission (in the present case, OLAF), has the possibility to “set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.”²⁴ The European Commission may, however, transfer personal data obtained from a Member State

to any other Member State, following simple information of the former of its intention to make such a transfer or following agreement about such transfer obtained in advance if the recipient is any third country. Within these limits, the main advantages resulting from the supranationality of OLAF are of a very tangible practical impact: OLAF does not need to process a huge amount of paperwork to certify mutual agreement on the transmission of the information, because this is already part of its competence that has already been fully accepted by the Member States. OLAF knows exactly which national authority to request or transmit the information from/to, resulting from several years of experience and the establishment of a database used on daily basis for such transmissions; OLAF can transmit or receive the information rapidly, ergo communication with the national authorities can be as fast and easy as an e-mail.

The “secondary territorial competence” of OLAF applies where non-EU countries are concerned and is usually established in the financial agreements between the European Union and the recipients of European money outside the EU area. When disbursing funds, the European Union also imposes the condition of exercising a certain type of control on the way these funds are distributed. Standard clauses are inserted into these agreements, referring to the competence of the European Commission and OLAF to verify, by examining the documents or conducting on-the-spot checks,²⁵ the use of the European funds.

The sharing of information by OLAF is fundamentally determined by the investigative need to share specific information. This “investigative logic” is, however, not the only one to be followed, as any exchange of information has to be reconciled with data protection requirements. According to OLAF’s own regulation, all the “relevant provisions” in this field are to be respected when transmitting or obtaining information in the course of the investigations.²⁶ A “data protection logic” therefore has to be additionally applied,²⁷ and the criteria to be taken into account is the “necessity” of the transfer.²⁸

On the sharing of information with third countries, the direct impact of the data protection requirements brings the control of the transmission of information by OLAF to a higher level. If there is an established degree of confidence with the Member States in relation to the protection to be given to the data transmitted by and to OLAF, the situation with third countries has to be evaluated case-by-case and on the basis of the administrative agreements signed with each respective country. Here again, a differentiation has to be established concerning the third countries, depending on the level of protection that the European Union recognises with regard to each of them, compared to the European Union standards.

It has been observed in the legal doctrine that, in relation to the transmission of information to judicial authorities, OLAF applied “the same procedure for non-Member States as for Member States, thus extending in practice the scope of the OLAF-Regulation.”²⁹ While OLAF is, indeed, entitled to apply the same procedure for the conduct of the investigations and for the internal authorisations of investigative activities,³⁰ the situation is, sensibly, different today as far as the transmission of information to the judicial authorities of third countries is concerned. The explanation rests in the fact that, besides the data protection aspect expressly mentioned in the OLAF Regulation for cooperation with third countries,³¹ other standards are to be observed. One of these is the level of respect afforded to human rights in the national criminal proceedings in third countries. This element is taken into account together with the official position of the European Union in diplomatic relations with the third country concerned, given that OLAF has no power of representation and is dependent on the European Commission regarding its relationship with non-EU countries.³²

2. An operational perspective

From the operational perspective, the advantages ensuing from the supranationality of OLAF in relation to the national authorities become apparent when considering the investigative activities of OLAF individually. The global appreciation of OLAF’s entire activity is reserved for the status-related considerations and conceptual analysis subject matter of the previous point. In practice, the needs may be different. The way to approach an investigative activity depends on the circumstances if a national investigation is opened, is to be opened, or if the contact has not yet been established with the national authority but there are sufficient indications, the national authority will be informed.

In the first case, every investigative step taken by OLAF will be discussed and decided in agreement with the national judicial authority in charge of the proceedings at the national level, in order to protect both the national and the European investigation. Moreover, by proceeding in such a coordinated manner, the respective legal basis allowing intervention on the part of OLAF and of the Member State can be put to maximum use; better results can be obtained more quickly. Taking the example of an on-the-spot check, such an intrusive investigative activity needs to be coordinated with the investigative strategy of the relevant national authority, in order to prevent revealing to the persons investigated elements that would put the national proceedings at risk. Beyond that, the disclosure of at least a certain amount of information is inherent to any investigative activity implying contact with persons who are

the subject of an investigation. In such case, the sharing of information between OLAF and the national judicial authority takes the form of a continuous dialogue, covering the preparatory phase, the actual execution of the investigative activity, and the results obtained.

A significant volume of information, and certainly the largest amount of personal data, is exchanged when digital forensic operations are carried out by OLAF on digital media and/or their contents,³³ following collection of the relevant data. The entire process of acquiring and examining the data being submitted to the legality requirements and procedural guarantees set out in the OLAF Regulation and the results of digital forensic operations are usable as such in national proceedings.

In general, the data is collected by OLAF and examined for the purpose of its own investigation. Situations may occur in which the data is collected by the national authority within the framework of its own national investigation and then sent to OLAF for examination, in full application of the legal provisions on the exchange of information. This can give rise to a diversity of situations in practice, which cannot be framed in a standard pattern regarding the exchange of information and to which OLAF has to respond by putting into effect a whole array of legal provisions. The duty of sincere cooperation established by European case law³⁴ as regards the obligations of the European Commission towards the national authorities, and in particular judicial authorities, should not be forgotten.³⁵

In specific cases, different questions have been raised and examined: to what extent is OLAF bound by the requirement of a national authority not to transmit further (to any other European institution or Member State authority) the information it had provided in the first place and which supports an important part of the OLAF findings if OLAF concludes the existence of facts that may give rise to criminal proceedings in a different Member State? Under which procedure can OLAF, acting as an expert, carry out another digital forensic operation, at the request of a national judicial authority, on data collected within the framework of an OLAF investigation that has meanwhile been closed? OLAF's duty is to ensure the legality of its own intervention, while reconciling it with the investigative needs and the requests of the national judicial authorities.

This range of possibilities for OLAF to share information with the national authorities, while taking advantage of its supranationality, largely facilitates the effective cooperation between OLAF and these authorities. In terms of actual consequences for the protection of the financial interests of the European Union, the legislative limitations put on OLAF's activity have also made a contribution.

II. The Legislative Limitations Defining OLAF as a European Hybrid Body

The status of OLAF as a European hybrid body is all the more apparent at the end of its investigations, when the body's results are to be transposed in actual consequences. As designed, the protection of the EU's financial interests by action on the part of OLAF is directed at recommending "disciplinary, administrative, financial and/or judicial action"³⁶ by the European Institutions or by the Member States. From this perspective, the intervention of OLAF concerns the collection of evidence,³⁷ with the purpose of transmitting it to other authorities which, in turn, have decisional powers. The key issue is the form this transmission takes, in other words, the form that the law grants. OLAF's competence was brought one step higher with the new OLAF Regulation that entered into force in 2013, when the simple "sending" or "forwarding" of information³⁸ by the Office to different authorities at the end of its investigations was transformed into a "power to recommend."

What remains is that OLAF is highly reliant on the national judicial authorities for an effective implementation of its investigative results.³⁹ The consequences of this legislative limitation can only be measured in practical terms, but in order to arrive at a pertinent conclusion, the analysis must not be simplistic. It cannot automatically be argued that the lack of a power to "prosecute" in favour of a limited power to "recommend" merely neutralises or weakens all the investigative effort behind an OLAF investigation. The doctrinal temptation to make such an assessment or a general, natural penchant to fit institutions into clearly established categories must be put aside. The reasoning should be taken even further, in order to incorporate the context surrounding the type of competence given to OLAF. In the European legal order, the battle of putting into place a new institution, or reforming it as was the case for OLAF, is dependent on national, supranational, pluralistic (multi-national), and integration concerns, all at the same time. The real impact of OLAF's power to recommend (1) may be evaluated to its full extent only if formal and informal aspects of OLAF's actual functioning are considered in the analysis (2).

1. The "power of a recommendation"

The power of a recommendation resides mostly and firstly in the quality of the investigation supporting the recommendation. The ultimate purpose is the opening of criminal proceedings at the national level. The OLAF report, which is drawn up following an investigation, establishes facts, provides "their preliminary classification in law,"⁴⁰ and takes into account the national law of the Member State concerned,⁴¹ in the perfor-

mance of a legal obligation imposed on OLAF by its own legal basis. The sharing of information by OLAF with the national judicial authorities, in the form of the recommendation, thus aims to be easier, clearer, and likely to have more substantial legal consequences.⁴²

It has been judged that OLAF's final report is not a final act with legal effects.⁴³ In exchange, the European case law has established for the Member States a duty to cooperate in good faith, implying that, when OLAF transmits to them information, "the national judicial authorities have to examine that information carefully."⁴⁴ In support of the final report, the investigative activities conducted by OLAF must cover enough elements revealing facts of a criminal nature. OLAF has to investigate "à charge et à décharge,"⁴⁵ therefore covering all the aspects that could clarify the factual situation. This can be achieved by taking full advantage of the investigative means at OLAF's disposal, within the limits of what is an administrative investigation, while at the same time respecting a standard of proof appropriate for supporting a pertinent judicial recommendation.

When all these elements are combined, the "collection of evidence" by OLAF turns into a persuasive exercise, determining the national judicial authority to act and becoming "admissible evidence" to the proceedings it would launch.⁴⁶ As a counterpart to giving OLAF simply the power to recommend, the European legislator has granted to OLAF's final "product" the value of being unambiguous admissible evidence. As formulated in the OLAF Regulation, the final reports drawn up by OLAF with due respect for the national law of the Member State concerned "shall constitute" admissible evidence in administrative or judicial proceedings of that Member State. No true margin of appreciation is left to the Member States from this perspective; however, their national authorities always have, as result of their independence and depending on the specificity and needs of their national investigation, a margin of manoeuvre to use the OLAF report as such or to repeat some investigative activities.⁴⁷ This is where the informal aspect of the relationship between OLAF and the national judicial authorities comes into play, adding value to the substance of the case being dealt with.

2. Formal and informal relationship between OLAF and the national judicial authorities – the operational perspective

In the dialogue⁴⁸ between OLAF and the national judicial authorities, the formal legal framework for the sharing of information is ultimately dependent on informal, day-to-day and case-by-case relationships established by OLAF with representatives of the national judicial authorities. Extrapolating,

this could appear to be a "transposal," at the interpersonal level, of the well-established European principle of mutual trust. The legislative limitations to OLAF's activity in terms of formal consequences may be compensated, if not entirely by the quality of the product delivered, by the availability and openness of OLAF staff to act with the aim of benefitting both the European and the national investigation. This can be achieved by cooperating and sharing information. An observation from the legal doctrine is still valid: "it is really the informal side, in other words the *de facto* acceptance of OLAF as part of national mechanisms that combat crimes against the financial interests of the Union, that will allow OLAF to be successful."⁴⁹

The supranationality of OLAF being confined to the European territory, recommendations for judicial actions can be addressed by OLAF only to the Member States. Following investigations in third countries, information revealing facts of a criminal nature can be simply transmitted to the national authorities of the third country concerned.⁵⁰ This obviously has an even less constraining effect than recommendations, but the same considerations as to the quality of the informal contact between OLAF and the competent national authority apply.

III. Conclusion – from *de lege lata* to *de lege ferenda*, Benefiting from the already Acquired Experience

Supranationality and legislative limitations, both specific to European institutions, converge to paint a picture that should eventually turn into concrete practical consequences. If there is a lesson to be learned at the European level, from the experience of OLAF, it is that of the absolute necessity for efficiency. This appears as the more important in the context of the European Public Prosecutor's Office. The founding treaties established the principle of subsidiarity for European intervention.⁵¹ A component of the subsidiarity, the "added value"⁵² to be brought by any new structure, is a requirement that must take priority. Reality has shown that, from the extensive and complex legislative process leading at the European level to the creation of a new structure, a long phase before its effective functioning has to be calculated. This process has on many occasions revealed itself to be perfectible, propelling the necessity to legislate again before the added value is translated into concrete results in practice.

In the area of the protection of the European Union's financial interests, there is an already long shared understanding in the political, academic, and practitioners' fields that a European public prosecutor is needed in order to prosecute criminal activity against the budget of the European Union.⁵³ It could be useful to depart from OLAF's experience while benefitting from OLAF's expertise.

From a conceptual viewpoint, the situation can be summarised in what has become a leitmotiv of European construction: “the search for solutions allowing to reconcile two objectives apparently contrary, but both equally necessary: integration and pluralism.”⁵⁴ The standard at the European level is therefore twofold: the need to ensure a horizontal coherence between the

European institutions and a vertical coherence between the European and the national institutions.⁵⁵ The sharing of information between OLAF and the national judicial authorities illustrates this perspective, because policy-related, status-related, and operational aspects blend to give a complete picture of what is to be – for future legislative measures – a practical reality.

* The opinions reflected in this article are exclusively the author's personal opinions and are not intended to reflect the views of the European Commission or OLAF.

1 Article 2(1) of the Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), O.J. L. 136, 31.5.1999, p. 20.

2 For example, Article 3 (2) of Regulation (EU, Euratom) No. 883/2013.

3 The term “judicial authorities” is understood here in a wider context, covering not only judicial authorities as designated *stricto sensu* in some Member States (i.e., courts) but also authorities with competence to launch criminal proceedings (i.e., prosecutors or even police services, depending on the national system).

4 For more detail on judicial recommendations, see point II.1. below.

5 For an up-to-date reflection, refer to the OLAF Report 2014, available on the OLAF website at http://ec.europa.eu/anti_fraud/documents/reports-olaf/2014/olaf_report_2014_en.pdf, p. 23 et seq.

6 Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999, O.J. L. 248, 18.9.2013, p. 1 (hereinafter “Regulation (EU, Euratom) No. 883/2013” or referred to as the “OLAF Regulation”).

7 Recital (10) and Article 3(4) of Regulation (EU, Euratom) No. 883/2013.

8 Article 2(7) of Regulation (EU, Euratom) No. 883/2013.

9 Article 12 of Regulation (EU, Euratom) No. 883/2013. This article was designed to serve the purpose of transmitting information during the course of the investigations, the other scenarios of transmission of information, e.g., during the selection phase or upon completion of an investigation being specifically addressed by other articles.

10 S. White, ‘Operational Activities and Due Process’, in C. Stefanou, S. White and H. Xanthaki, *OLAF at the Crossroads. Action against EU fraud*, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 77.

11 The “selection” phase is based on Article 5 of Regulation (EU, Euratom) No. 883/2013 and has to comply with the requirements set out therein.

12 Article 11 of Regulation (EU, Euratom) No. 883/2013.

13 See fn. 9 above.

14 This remark has to be nuanced, however, taking into consideration case-by-case cooperation with the national authorities concerned.

15 Article 14 of Regulation (EU, Euratom) No. 883/2013.

16 The Corpus Juris 2000 proposed several “guiding principles” for the European Public Prosecutor, and the principle of European territoriality was mentioned as one of the “new” guiding principles (Appendix II, point II); it was further detailed in Article 18, which explains that “the territory of the Member States of the Union constitutes a single legal area”.

17 See, in this respect, Articles 3(6), 5(6) or 12(1) of Regulation (EU, Euratom) No. 883/2013.

18 See, in this respect, concerning the situation under the former legal basis regulating OLAF’s investigative activities J. Gonzales-Herrero Gonzales and M.M. Butincu, ‘The Collection of Evidence by OLAF and Its Transmission to the National Judicial Authorities’, in *euocrim*, 3/2009, p. 92.

19 Among others, the principles of subsidiarity and added-value for OLAF intervention are taken into account when deciding whether or not an OLAF investigation is to be opened.

20 An analysis has to be realised here, on a case-by-case basis, of whether OLAF’s investigation should be continued or ended, based on the subsidiarity principle and the needs and purposes of each of the investigations

21 O.J. C. 316, 27.11.1995, pp. 49 et seq.

22 Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities’ financial interests, O.J. C. 221, 19.7.1997, pp. 12 et seq.

Dr. Romana Panait

Legal Officer – Reviewer, European Anti-Fraud Office (OLAF); Doctor in Law of the Paris 1 (Panthéon-Sorbonne) University



23 Article 7, “Cooperation with the Commission of the European Communities” and Article 10, “Transfer of data to other Member States and third countries”.

24 Article 7(2) of the Second Protocol to the Convention on the protection of the European Communities’ financial interests, cited above.

25 On-the-spot checks are conducted by OLAF on the basis of Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities, O.J. L. 292, 15.11.96, p. 2.

26 Article 10 of Regulation (EU, Euratom) No. 883/2013, treating aspects of “confidentiality and data protection”.

27 The many aspects related to the impact of data protection requirements on investigations by OLAF would require a separate analysis and shall not be treated more in detail here.

28 The limiting criteria for the transfer of personal data to EU institutions and bodies, Member State authorities, third country authorities, or international organisations are set out in Articles 7-9 of Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, O.J. L. 8, 12.1.2001, p. 1. Detailed rules applicable to OLAF’s investigative activity are to be found in the “OLAF Instructions to Staff on Data Protection for Investigative Activities”, applicable as from 19/04/2013 and available on the OLAF website at http://ec.europa.eu/anti_fraud/documents/dataprotection/2013/isdpfinal_2013.pdf

29 J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor’s Office*, Europa Law Publishing, Groningen 2011, p. 75. It should be noted that the publication refers to the situation under the former OLAF legal basis and corresponding internal rules.

30 The competences of OLAF, once established, are indistinctive as regards the recipients of EU funds and irrespective of their country of implementation.

31 Article 14 (2) of Regulation (EU, Euratom) No. 883/2013.

32 For more on the relationship of OLAF with third countries, see C. Stefanou, *Relationship with the Member States*, in C. Stefanou, S. White and H. Xanthaki, *op. cit.* (fn. 10), pp. 182-184.

33 The rules are set out in the “Guidelines on Digital Forensic Procedures for OLAF Staff”, applicable from the 1st of January 2014 and available on OLAF’s website at http://ec.europa.eu/anti_fraud/documents/forensics/guidelines_en.pdf

34 Case C-2/88 Imm. *J.J. Zwartveld and Others*, 6.12.1990.

35 For a detailed analysis on this point, see J.F.H. Inghelram, *op. cit.* (fn. 29), pp. 107-109.

36 Article 11(1) second sub-paragraph of Regulation (EU, Euratom) No. 883/2013.

37 L. Kuhl, “L’expérience de l’Office européen de lutte anti-fraude”, G. Giudicelli-Delage, S. Manacorda et J. Tricot (dir.), *Le contrôle judiciaire du parquet européen. Nécessité, modèles, enjeux*, Société de législation comparée, 2015, Paris, p. 178

38 Articles 9 and 10 of Regulation (EC) No. 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), O.J. L. 136, 31.5.1999, p. 1.
 39 L. Kuhl, 'Framework for Coordination Between Judicial Authorities and OLAF', in Michiel Luchtman (ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, Eleven International Publishing, 2013, p. 91.
 40 Article 11(1) first subparagraph of Regulation (EU, Euratom) No. 883/2013.
 41 Article 11(2) of Regulation (EU, Euratom) No. 883/2013.
 42 Along the same lines, see also J.F.H. Inghelram, *op. cit.* (fn. 29), p. 110.
 43 Case T-193/04, *Tillack v. Commission*, 4.10.2006, para. 69.
 44 Case T-193/04, para. 72. The judgment referred to the forwarding of information pursuant to Article 10(2) of Regulation No 1073/1999, which has now become Article 12 of Regulation (EU, Euratom) No. 883/2013.
 45 According to Article 9(1) of Regulation (EU, Euratom) No. 883/2013, "In its investigations the Office shall seek evidence for and against the person concerned".
 46 Article 11(2) of Regulation (EU, Euratom) No. 883/2013 provides that reports drawn up by OLAF with respect for the national law of the Member State concerned "shall constitute" admissible evidence in administrative or judicial proceeding of that Member State.

47 For example, interviewing a witness again.
 48 L. Kuhl, *op. cit.* (fn. 39), p. 178.
 49 C. Stefanou, *op. cit.* (fn. 10) p. 184.
 50 The rules of transmission as referred to in point I.1. above have to be followed.
 51 Article 5 of the Treaty on the European Union.
 52 See, in this respect, J. Tricot, 'Ministère public européen et système pénaux nationaux : les enjeux de l'articulation verticale', G. Giudicelli-Delage et S. Manacorda (dir.), *L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne*, Société de législation comparée, 2005, Paris, pp. 202/203.
 53 Recently, Vice-President Kristalina Georgieva, Commissioner Věra Jourová, and MEP Monica Macovei published the tribute "We urgently need a European Public Prosecutor's Office", available on EurActiv.com website.
 54 M. Delmas-Marty, 'Avant-propos', in *L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne*, *op. cit.* (fn. 52), p. 19 (author's translation).
 55 For an in-depth analysis of these aspects, see M. Delmas-Marty, *op. cit.* (fn. 54), pp. 16/17, and G. Giudicelli-Delage, 'Remarques conclusives', in *ibid.*, p. 375 et seq.

Der Rahmenbeschluss zu Abwesenheitsentscheidungen

Brüsseler EU-Justizkooperation als Fall für Straßburg?

Thomas Wahl

Judgments rendered in absentia are at the core of the *ordre public* discussion as has shown the "Melloni case." The issue has high practical relevance as a possible barrier to judicial cooperation in criminal matters. The following article investigates the solutions that have been found in European extradition law. In particular, it examines whether the new Article 4a of the Framework Decision on the European Arrest Warrant (introduced by Framework Decision 2009/299/JHA "on trials in absentia") indeed meets – as many critics doubt – the standards of the European Convention on Human Rights and the ECtHR's case law on the accused's right to be present at his/her trial. The problem has come to the fore since Germany is currently in the process of implementing the 2009 Framework Decision. The article concludes that the new provision regarding the European Union's extradition scheme can be "brought in line" via the means of interpretation that are in conformance with primary Union law. It also becomes apparent, however, that any future practice using the EAW form will jeopardize the defendant's rights since it is now no longer the executing authority but the issuing one that decides whether a derogation from the ground for refusal due to trials in absentia is justified.

I. Skizzierung des Problems

Im Vergleich zu anderen Kooperationsvoraussetzungen, wie der beiderseitigen Strafbarkeit oder dem *ne bis in idem*-Grundsatz, hat der Rechtshilfeschutz vor Abwesenheitsurteilen bisher wenig Beachtung in der rechtswissenschaftlichen Literatur gefunden, und dies, obwohl er in der Gerichtspraxis eine große Rolle spielt.¹ Letztere zeigt, dass dieses Feld eine Menge Sprengstoff birgt, denn hier kollidieren Grundwert- und Gerechtigkeitsvorstellungen der einzelnen Staaten im Hinblick auf die Notwendigkeit der persönlichen Teilnah-

me des Beschuldigten an seiner Strafverhandlung. Während eine Aburteilung in Abwesenheit des Angeklagten bestimmten Strafprozessordnungen, wie der deutschen oder österreichischen, grundsätzlich wesensfremd ist, lassen andere (wie z.B. die von Italien, Frankreich, Griechenland, Rumänien) in größerem Umfang zu, das Strafverfahren auch bei persönlichem Nichterscheinen des Angeklagten durchzuführen und durch ein rechtskraft- und vollstreckungsfähiges Endurteil zu beenden (*in absentia*-Verfahren).² Wird um Auslieferung eines in Abwesenheit Verurteilten oder um Vollstreckung eines Abwesenheitsurteils auf dem Rechtshilfeweg ersucht, kommt es

zum *ordre public*-Konflikt. Dieser zeigte sich sehr anschaulich im Vorabentscheidungsverfahren in der Rechtssache *Melloni*, in der der spanische Verfassungsgerichtshof eine Auslieferung des Verfolgten nach Italien für nicht vereinbar mit dem in der spanischen Verfassung verankerten Recht auf ein faires Verfahren hielt, weil nach Ansicht des Gerichts in Italien kein effektives Rechtsmittel gegen die dort getroffene Abwesenheitsentscheidung (10 Jahre Freiheitsstrafe wegen betrügerischen Konkurses) zur Verfügung stand.³

1. Europäischer *ordre public* als Konfliktlösungsmaßstab

Im europäischen Auslieferungsrecht (auf das sich der Beitrag beschränken möchte) versucht man den Konflikt mit europäischen Maßstäben zu lösen. Den ersten Schritt machte Art. 3 des 2. ZP-EuAIÜbk von 1978, den bisher 40 Staaten angenommen haben. Danach kann die ersuchte Vertragspartei die Auslieferung ablehnen, wenn nach ihrer Auffassung in dem einem Abwesenheitsurteil vorangegangenen Verfahren nicht die Mindestrechte der Verteidigung gewahrt worden sind, die anerkanntermaßen jedem einer strafbaren Handlung Beschuldigten zustehen. Die Auslieferung wird jedoch bewilligt, wenn die ersuchende Vertragspartei eine als ausreichend erachtete Zusicherung gibt, der gesuchten Person das Recht auf ein neues Gerichtsverfahren zu gewährleisten, in dem die Rechte der Verteidigung gewahrt werden. Die Regelung ist als Gesamtverweis auf Art. 6 EMRK und die entsprechende Rechtsprechung des EGMR zu Abwesenheitsverfahren zu verstehen.⁴ Damit standardisiert Art. 3 2. ZP-EuAIÜbk gleichzeitig den Auslieferungsschutz vor Abwesenheitsurteilen, indem nicht auf die wesentlichen Grundsätze der nationalen Rechtsordnung abzustellen ist, sondern auf die gemeinsamen europäischen Rechts(grund)sätze, wie sie sich in der EMRK widerspiegeln. Kurz: Statuiert wird ein europäischer *ordre public*.

Der Unionsgesetzgeber hat mit Einführung des neuen Auslieferungsregimes durch den Europäischen Haftbefehl im Jahre 2002 versucht, die allgemein gehaltene Klausel des Art. 3 2. ZP-EuAIÜbk zu konkretisieren. Leitlinie war die mittlerweile herausgebildete Rechtsprechung des EGMR. Nach Art. 5 Nr. 1 Rb EuHb sollte derjenige abwesende Angeklagte keinen Auslieferungsschutz genießen, der persönlich geladen worden war oder auf andere Weise von Termin und Ort der Verhandlung Kenntnis erlangt hatte. Ist dies nicht der Fall, kann die vollstreckende Justizbehörde die Übergabe an die Bedingung knüpfen, dass die ausstellende Justizbehörde eine als ausreichend erachtete Zusicherung abgibt, wonach die Person gegen die der Europäische Haftbefehl ergangen ist, die Möglichkeit haben wird, im Ausstellungsmitgliedstaat eine Wiederaufnahme des Verfahrens zu beantragen und bei der Gerichtsverhandlung anwesend zu sein.

2. Neuregelung durch den Rb 2009/299/JI und Kritik

Den (vorläufig) letzten Schritt macht nun der Rb 2009/299/JI zu Abwesenheitsentscheidungen.⁵ Er zielt darauf ab, zwei Inkohärenzen zu beseitigen: erstens solche, die durch die unterschiedliche Umsetzung des Art. 5 Nr. 1 Rb EuHb in den EU-Mitgliedstaaten entstanden sind; zweitens solche aufgrund unterschiedlicher bzw. abweichender Vorgaben in weiteren Rahmenbeschlüssen zur Umsetzung des Grundsatzes der gegenseitigen Anerkennung rechtskräftiger Entscheidungen im Vollstreckungshilfebereich. Für den Auslieferungsverkehr innerhalb der EU wird Art. 5 Nr. 1 des RB EuHb nun durch Art. 4a ersetzt. Art. 4a Rb EuHb präzisiert weiter die Fallgruppen, in denen die Ablehnung einer Auslieferung, denen ein Abwesenheitsurteil zu Grunde liegt, nicht mehr möglich sein wird. Im Unterschied zu der bisherigen in Art. 3 2. ZP-EuAIÜbk begründeten und in Art. 5 Nr. 1 Rb EuHb fortgeführten „Zusicherungslösung“ etabliert Art. 4a Rb EuHb nunmehr ein „Regel-Ausnahme-Verhältnis“: Die vollstreckende Justizbehörde kann die Vollstreckung eines zur Vollstreckung einer Freiheitsstrafe oder freiheitsentziehenden Maßregel der Sicherung ausgestellten Europäischen Haftbefehls verweigern, wenn die Person nicht persönlich zu der Verhandlung erschienen ist, die zu der Entscheidung geführt hat, es sei denn, einer von vier Ausnahmetatbeständen liegt vor. Ob ein solcher Ausnahmetatbestand vorliegt, bestimmt die Ausstellungsbehörde.

Prima facie orientiert sich Art. 4a Rb EuHb (weiterhin) an der Rechtsprechung des EGMR zu Art. 6 EMRK. Danach gehört das Recht auf persönliche Teilnahme des Angeklagten an der Hauptverhandlung zu den grundlegenden Garantien des fairen Verfahrens. Der EGMR leitet es aus einer Gesamtschau des fair-trial-Grundsatzes in Art. 6 Abs. 1 und den Verteidigungsrechten aus Art. 6 Abs. 3 lit. c) EMRK her.⁶ Abwesenheitsverfahren und -urteile widersprechen diesem Grundsatz, sind jedoch nicht per se mit Art. 6 EMRK unvereinbar, da das Anwesenheitsrecht nicht absolut ist. Blieb der Angeklagte in Kenntnis der Hauptverhandlung dem Verfahren fern, liegt ein Verzicht vor und das Strafverfahren kann durchgeführt und abgeschlossen werden, sofern die Verteidigungsrechte gewahrt worden sind. Hatte er keine Kenntnis, kann der Mangel durch eine neue Gerichtsverhandlung beseitigt werden, in der dem Betroffenen rechtliches Gehör gewährt wird und eine effektive Verteidigung gegeben ist.⁷ Beide Fallgruppen sind in Art. 4a RB EuHB umgesetzt worden:⁸ (1) Die betroffene Person macht trotz ihrer Kenntnis von ihrem Anwesenheitsrecht keinen Gebrauch oder sie verzichtet auf ihr Recht auf persönliche Teilnahme zugunsten der Vertretung durch einen Rechtsbeistand (Art. 4a Abs. 1 lit. a) und b) – Fallgruppe 1). (2) Die in Unkenntnis von ihrem Strafverfahren sich befindende Person kann in den Genuss eines neuen Verfahrens durch Einlegung eines entsprechenden Rechtsbehelfs kommen, es sei denn, sie

akzeptiert die Vollstreckung des ergangenen Abwesenheitsurteils (Art. 4a Abs. 1 lit. c) und d) – Fallgruppe 2).

Dieser Neuregelung des Auslieferungshindernisses bei Abwesenheitsurteilen im Rb EuHb ist – insbesondere von Anwaltsseite – mit heftiger Kritik begegnet worden.⁹ Stark bezweifelt wird, ob die neuen Ausnahmetatbestände bei genauerer Betrachtung noch konform mit Art. 6 EMRK bzw. den daraus abgeleiteten Grundsätzen des EGMR zu Abwesenheitsverfahren sind.¹⁰ Diese Kritik gewinnt an Aktualität, da in Deutschland die Umsetzung des Rb 2009/299/JI ansteht.¹¹ Setzt der deutsche Gesetzgeber eine EU-Norm um, die mit den europäischen Grundrechten (Art. 6 EUV) unvereinbar ist? Muss er ggf. im Umsetzungsgesetz im Hinblick auf eine Grundrechtskonformität nachsteuern? Werden die den Rb EuHb aufnehmenden Normen in den Umsetzungsgesetzen der EU-Mitgliedstaaten künftig auf dem Prüfstand vor dem EGMR in Straßburg stehen? Im Folgenden werden die einzelnen Bestimmungen von Art. 4a Rb EuHb im Lichte von Art. 6 EMRK, wie er durch den EGMR ausgelegt wird, betrachtet (III. und IV.). Zuvor sollen jedoch allgemein methodische Grundsätze des EU-Rechts erläutert werden, die für die Ausführungen unter III. und IV. von Bedeutung sein werden (II.).

II. Normebenenkonforme Auslegung

Bevor eine potentielle EMRK-Widrigkeit zulasten der Beschuldigten- und Verteidigungsrechte durch den Rb AbwE festgestellt werden kann, ist zunächst zu überprüfen, ob eine Einordnung in das Gesamtgefüge des Systems ohne Wirksamkeitsverlust möglich ist. Angesprochen ist die normebenenkonforme Auslegung in Form der primärrechtskonformen Auslegung des abgeleiteten Europarechts. Sie ist auch für die in der dritten Säule ergangenen Rechtsakte, also auch für die Rahmenbeschlüsse, anerkannt.¹² Stichpunktartig lassen sich die Grundsätze wie folgt zusammenfassen:¹³

- Regelungen können unbestimmte Rechtsbegriffe enthalten, welche durch die klassischen Auslegungsmethoden auszufüllen und zu präzisieren sind. Für die normebenenkonforme Auslegung ist darauf zu achten, ob der europäische Gesetzgeber aus entstehungsgeschichtlichen oder teleologischen Gründen Begriffe des abgeleiteten Unionsrechts so verstanden wissen will, wie sie im Primärrecht ausgelegt werden.
- Nicht alle Sachverhalte können durch Auslegung gelöst werden, Regelungen können Lücken aufweisen. In diesen Fällen sind die Mittel zur Ausfüllung dieser Lücken heranzuziehen, insbesondere der Analogieschluss und die teleologische Reduktion.
- Der Analogieschluss als Mittel der primärrechtskonformen Auslegung ist möglich, wenn das Sekundärrecht eine mit dem Primärrecht unvereinbare Lücke enthält, aber eine Regelung

vorsieht, die zwar nicht nach ihrem Wortlaut, jedoch nach ihrem Sinn und Zweck zur Schließung der Lücke angewandt werden kann.

- Die teleologische Reduktion kommt in Betracht, wenn der Normtext des abgeleiteten Unionsrechtsaktes im Vergleich zur Teleologie des Primärrechts zu weit gefasst ist.
- Die einschlägigen Bestimmungen des Rahmenbeschlusses sind so auszulegen, dass sie nicht mit den unionsrechtlich gewährleisteten Grundrechten in Konflikt geraten (grundrechtskonforme Auslegung).¹⁴ Maßstab für den RB 2009/299/JI ist über Art. 6 EUV primär die Europäische Grundrechtecharta (hier Art. 47, 48 GRC). Über Art. 52 Abs. 3 GRC findet die Inhaltsbestimmung ihre normebenenkonforme Rückkopplung zu Art. 6 EMRK in der Auslegung der Rechtsprechung des EGMR.
- Nach den Grundsätzen der grundrechtskonformen Auslegung ist, wenn eine Bestimmung des abgeleiteten Unionsrechts mehr als eine Auslegung zulässt, derjenigen Auslegung der Vorzug zu geben, bei der die Bestimmung mit dem Primärrecht, d.h. mit den Unionsgrundrechten vereinbar ist.¹⁵
- Bereits die Bestimmung des Inhalts der Norm hat sich an der grundrechtskonformen Auslegung zu orientieren. Zu beachten ist in diesem Zusammenhang, dass der Orientierungspunkt selbst – die Mindeststandards – selbst ausfüllungsbedürftig und ausfüllungsfähig sind.
- Die Grenze der grundrechtskonformen Auslegung bildet die Unmöglichkeit einer Korrektur *contra legem*. Das bedeutet, dass Wortsinn und der Zweck der sekundärrechtlichen Bestimmung die Grenze bilden; jedes der Kriterien für sich bildet aber keine unüberwindliche Hürde.

III. Die Fallgruppe des Verzichts

1. Ausbleiben trotz persönlicher Ladung oder anderweitiger Kenntnis

Nach Art. 4a Abs. 1 lit. a) Rb EuHb ist ein Europäischer Haftbefehl, dem ein Abwesenheitsurteil zugrunde liegt, zu vollstrecken, wenn die gesuchte Person rechtzeitig über den Termin und Ort der Verhandlung unterrichtet worden ist, und zwar durch persönliche Ladung oder andere tatsächlich offizielle Benachrichtigung, die zweifelsfrei nachgewiesen wurde; zusätzliche Bedingung ist die rechtzeitige Unterrichtung über die Möglichkeit, „dass eine Entscheidung auch dann ergehen kann, wenn sie zu der Verhandlung nicht erscheint“.

a) Unbestimmtheiten

Zunächst wirft die Verwendung unbestimmter Rechtsbegriffe Fragen auf.¹⁶ Was bedeutet „rechtzeitig“? Heißt „persönliche Ladung“, dass das Schriftstück dem Betroffenen persönlich zu übergeben ist, oder reicht auch eine postalische (Ersatz-)

Zustellung aus? Wie viele Zustellversuche muss das Gericht unternehmen? Was bedeutet „tatsächlich offiziell in Kenntnis gesetzt“? Muss in dem Zusammenhang der Verhandlungstermin öffentlich bekannt gemacht worden sein oder reicht die zufällige Kenntnisnahme über eine Behörde? Reicht es aus, wenn ein Beschuldigter über einen Verhandlungstermin von seinem Verteidiger persönlich und mündlich unterrichtet wird? Ist sichere Kenntnis erforderlich oder ist auf die bloße Möglichkeit der Kenntnisnahme abzustellen? Muss der Betroffene neben dem Tatvorwurf auch über die rechtlichen Bewertungen des Sachverhalts unterrichtet werden? Muss die Benachrichtigung über die Folgen des Ausbleibens auch die Unterrichtung enthalten, dass dem Verfolgten sein Verteidigerrecht verbleibt (Art. 4a Abs. 1 lit. b), so dass der Angeklagte ohne Verteidiger nicht schlechter gestellt wird als derjenige mit Verteidiger?

Hinsichtlich des Merkmals der „Rechtzeitigkeit“ enthält der Rb AbwE bereits eine Konkretisierung. Nach Erwgr. 7 muss die Person die Information „früh genug erhalten, um an der Verhandlung teilnehmen und ihre Verteidigungsrechte effektiv ausüben zu können“. Dies verbindet den Rb AbwE mit Art. 6 Abs. 3 lit. b) EMRK, wonach die angeklagte Person das Recht hat, ausreichende Zeit und Gelegenheit zur Vorbereitung ihrer Verteidigung zu haben. Die Zeitfaktoren sind einzelfallabhängig, pauschale Aussagen zu Mindestvorbereitungsfristen oder -maßnahmen können im Rahmen von Art. 6 Abs. 3 lit. b) nicht getroffen werden.¹⁷ Zur näheren inhaltlichen Bestimmung der übrigen Rechtsbegriffe ist auf die Rechtsprechung des EGMR zu rekurrieren.

Für den EGMR ist das Merkmal der Kenntnis von Termin und Ort der Hauptverhandlung sowie die Unterrichtung über die Folgen des Ausbleibens eine Bedingung für die Annahme des Verzichts. Die Zulässigkeit des Verzichts unterliegt strengen Voraussetzungen. Prämisse ist, dass er freiwillig und auf unmissverständliche Weise („in an unequivocal manner“) geschehen muss.¹⁸ Ein „echter“ Verzicht setzt voraus, dass eine Unterrichtung die Person tatsächlich und persönlich erreicht hat und auf einer amtlichen Benachrichtigung basiert; die abstrakte Möglichkeit der Kenntnisnahme wird als nicht ausreichend erachtet.¹⁹ Ferner setzt die Annahme eines Verzichts voraus, dass die Strafverfolgungsbehörden dem Angeklagten die prozessualen Möglichkeiten eröffnet haben, tatsächlich in der Verhandlung anwesend zu sein und diese aktiv zu beeinflussen. Daraus lassen sich entsprechende Fürsorgepflichten ableiten. Nationale Stellen müssen Vorkehrungen zur Ermöglichung der Teilnahme treffen und ungerechtfertigtem Nichterscheinen entgegenwirken.²⁰

Die o.g. Problemfelder lassen sich in diesen Rahmen einbetten. Danach reichen z.B. postalische Ersatzzustellungen nicht aus, wenn nicht sichergestellt worden ist, dass der Betroffene

von ihnen persönlich Kenntnis genommen hat. Der Einzelfall entscheidet, inwieweit das Gericht seiner Fürsorgepflicht genüge getan hat. Liegen tatsächliche Anhaltspunkte über Weg- und Umzüge vor (auch ins europäische Ausland), sind von den Justizbehörden gründliche Nachforschungen sowie entsprechende Zustellversuche zu unternehmen.²¹ Dagegen kann die Kenntniserlangung des Angeklagten von Termin und Ort der Verhandlung über einen Verteidiger genügen, wenn sicher feststeht, dass beide in Kontakt stehen und der Verteidiger seinen Mandanten tatsächlich informiert.²²

Ferner betont der EGMR, dass die Einzelaspekte des Anwesenheitsrechts im Lichte des allgemeineren Rechts auf ein faires Verfahren (garantiert in Art. 6 Abs. 1 EMRK) zu würdigen sind.²³ Dazu gehört auch, dass die für das rein nationale Verfahren entwickelten Grundsätze auch im Hinblick auf das „Informiert-Sein“ des Angeklagten für die Ausübung seines Verzichts Geltung haben. Der Verfolgte muss dementsprechend auch eine Anklage erhalten, in der eine *detaillierte* rechtliche Bewertung der Straftat enthalten ist. Darin wird ein essentielles Element des *fair trial*-Grundsatzes sowie des Rechts auf Unterrichtung über Art und Grund der erhobenen Beschuldigung nach Art. 6 Abs. 3 lit. a) EMRK gesehen.²⁴ Gleiches dürfte für das Recht auf Unterrichtung über seine Verteidigungsrechte in der Hauptverhandlung gelten. Letzteres müsste in den Staaten, die Abwesenheitsverfahren kennen, umgesetzt werden.

b) Lücken

Neben diesen Auslegungsproblemen sind in Art. 4a Abs. 1 lit. a) Rb EuHb auch Lücken feststellbar. Erstens erweist es sich wiederum als problematisch, dass der Rb an das Merkmal der Kenntnis vom Verfahren und nicht an den Verzicht anknüpft, was in Anbetracht der Rechtsprechung des EGMR geeigneter gewesen wäre. Dadurch werden vom Wortlaut der Norm auch diejenigen Fälle erfasst, bei denen der Angeklagte zwar Kenntnis von Termin und Ort der Verhandlung „tatsächlich und offiziell“ erhalten hat, aber aus nicht in seinem Einflussbereich stehenden Gründen an der Verhandlung nicht teilnehmen kann, z.B. weil er in einer ausländischen Haftanstalt vom Termin erfährt, aber die zuständigen Stellen ihm eine Teilnahme verweigern.²⁵ Solche Fälle lassen sich durch teleologische Reduktion lösen: Das Merkmal der „anderweitigen Kenntnis“ ist nach Sinn und Zweck der Norm einschränkend dahingehend auszulegen, dass ein Bezug auf einen unzweideutigen Verzicht sichergestellt sein muss. Der „unverschuldet Fernbleibende“ fällt nicht in die Fallgruppe 1, sondern ihm muss die Möglichkeit einer Neuverhandlung offenstehen (Fallgruppe 2).

Ferner ist es nach der Rechtsprechung des EGMR unabdingbare Voraussetzung für die Wirksamkeit eines Verzichts, dass die Unterrichtung ggf. in einer dem Betroffenen verständlichen

Sprache erfolgt ist.²⁶ Entgegen den Vorschlägen des EP²⁷ ist ein entsprechender Passus nicht eingefügt worden, das Problem lässt sich jedoch durch eine konforme Auslegung mit Art. 6 Abs. 3 lit. a) und e) EMRK lösen. Eine Kenntnis von Termin und Ort der Verhandlung kann nur wirksam sein, wenn erwiesen ist, dass der Angeklagte die Unterrichtungen auch verstanden hat; selbst Dolmetscherleistungen in Anspruch zu nehmen, um den Inhalt der amtlichen Unterrichtung zu verstehen, kann vom Betroffenen nicht verlangt werden.²⁸ Denkbar wäre auch eine analoge Anwendung von Art. 3 Abs. 3 der Richtlinie 2010/64/EU über das Recht auf Dolmetschleistungen und Übersetzungen in Strafverfahren in Verbindung mit einer Ermessenreduzierung auf Null. In diesem Zusammenhang ist darauf hinzuweisen, dass weder der Unionsgesetzgeber noch der nationale Umsetzungsgesetzgeber dazu verpflichtet ist, alle denkbaren Verstöße gegen die Mindestgarantien der EMRK aufzuführen. So wäre ein Ersuchen um Vollstreckung eines Europäischen Haftbefehls auch dann abzulehnen, wenn festgestellt wird, dass im Abwesenheitsverfahren die Rechte einer effektiven Verteidigung nicht gewahrt worden sind, z.B. weil einem Wahlverteidiger aufgrund der Abwesenheit des Beschuldigten bestimmte Verfahrensrechte nicht gewährt werden.²⁹

2. Vertretung durch mandatierten Verteidiger

Als zweite Ausnahme sieht der Rb AbwE vor, dass die Person in Kenntnis der anberaumten Verhandlung ein Mandat an einen Rechtsbeistand, der entweder von ihr oder vom Staat bestellt wurde, erteilt hat, sie bei der Verhandlung zu verteidigen und der Rechtsbeistand bei der Verhandlung tatsächlich verteidigt hat (Art. 4a Abs. 1 lit. b) Rb EuHb). Hier betritt der Rb in der Tat Neuland, denn der EGMR hat diese Fallkonstellation bisher nicht entschieden. Nach Sinn und Zweck der Regelung soll sichergestellt werden, dass die betroffene Person mit Wissen und Willen ihre Vertretung durch einen Rechtsbeistand akzeptiert, zwischen beiden ein Kontakt besteht sowie ein Informationsaustausch garantiert ist. Unter diesen Umständen ist eine Wertung als „echter Verzicht“ in Einklang mit Art. 6 EMRK möglich.³⁰

IV. Die Fallgruppe der Neuverhandlung

1. Rechtsbehelfsverzicht

Eine Auslieferung zur Vollstreckung eines Abwesenheitsurteils ist auch dann als zulässig zu erachten, wenn die betroffene Person nach Zustellung des Urteils und ausdrücklicher Unterrichtung über das Recht auf Wiederaufnahme des Verfahrens oder auf ein Berufungsverfahren, an dem sie teilnehmen kann, bewusst durch namentliche Erklärung oder Verstreichen-

lassen der geltenden Anfechtungsfrist keine Rechtsbehelfe geltend gemacht hat (Art. 4a Abs. 1 lit. c) Rb EuHb). Auch hier scheint der Unionsgesetzgeber vor dem Hintergrund der bisherigen Deutung von Art. 6 EMRK die Standards zu unterwandern, indem das bloße passive Verstreichenlassen der Frist zur Einlegung eines Rechtsbehelfs zum Ausschluss des Auslieferungsschutzes führt.³¹ Jedoch ist hierbei zweierlei zu beachten. Erstens hat der Unionsgesetzgeber durch die Belehrungspflichten bestimmte Schutzmechanismen zugunsten des Angeklagten eingebaut. Zweitens schließt der EGMR nicht aus, dass auch ein konkludentes Verhalten zu einem Verzicht auf das Anwesenheitsrecht führen kann, wenn die Folgen des Handelns vorhersehbar waren.³² Damit ist eine Wertung fehlenden aktiven Handelns des informierten Betroffenen als Verzichtserklärung von vornherein nicht als unvereinbar mit den Mindeststandards der EMRK zu erachten. Im Gegenzug muss aber nach der bisherigen Rechtsprechung des EGMR beachtet werden, dass die Wahrnehmung des Rechtsbehelfs effektiv sein muss. Eine zu kurz bemessene Frist, wie z.B. eine solche von 10 Tagen nach Erlangung der Kenntnis von der Verhandlung, wäre mit Art. 6 EMRK unvereinbar.³³

2. Neues gerichtliches Verfahren

Nach dem letzten Ausnahmegrund besteht kein Auslieferungshindernis, wenn die Person „die Abwesenheitsentscheidung nicht persönlich zugestellt erhalten hat, aber i) sie unverzüglich nach der Übergabe persönlich zugestellt erhalten wird und ausdrücklich von ihrem Recht auf Wiederaufnahme des Verfahrens oder auf ein Berufungsverfahren in Kenntnis gesetzt werden wird, an dem die Person teilnehmen kann und bei dem der Sachverhalt, einschließlich neuer Beweismittel, erneut geprüft werden und die ursprünglich ergangene Entscheidung aufgehoben werden kann; und ii) von der Frist in Kenntnis gesetzt werden wird, über die sie gemäß dem einschlägigen Europäischen Haftbefehl verfügt, um eine Wiederaufnahme des Verfahrens bzw. ein Berufungsverfahren zu beantragen (Art. 4a Abs. 1 lit d) Rb EuHb)“. Als besonders problematisch sind im Zusammenhang der Regelung zwei Bereiche hervorzuheben.

Der erste steht in Zusammenhang mit den schon zu 1) geäußerten Bedenken: Art. 4a Abs. 1 lit. d) Rb EuHb enthält keine Vorgaben zur Ausgestaltung von Rechtsbehelfsfristen und Art und Weise der Rechtsbehelfswahrnehmung. Nach der Rechtsprechung des EGMR gehört es jedoch zu den Essentialia der Wahrung der Garantie aus Art. 6 EMRK, dass die Rechtsmittel gegen das Abwesenheitsurteil aussichtsreich und effektiv angewandt werden. Dies bedeutet im Klartext, dass das Rechtsmittel ohne erhebliche Anstrengungen, wesentliche Antragserfordernisse, strenge Fristen oder vorherige staatli-

che Ermessensentscheidungen eröffnet sein muss.³⁴ Mithin muss es letztendlich zu einer tatsächlichen Durchführung der Neuverhandlung im Urteilsstaat kommen. An den genannten Hürden scheiterte in der Vergangenheit oftmals die auslieferungsrechtliche Anerkennung von ausländischen Abwesenheitsurteilen. Eine entsprechende Auslegung von Art. 4a Abs. 1 lit. d) Rb EuHb nach den Vorgaben des EGMR würde am Wortlaut scheitern, der lediglich eine Belehrungspflicht hinsichtlich Rechtsbehelf und Rechtsbehelfsfrist vonseiten des Ausstellungsstaates enthält und per Vermutungstatbestand auf dessen prognostische Entscheidung setzt, „das neue Verfahren werde schon durchgeführt werden“. Das würde den Anforderungen von Art. 6 EMRK nicht genügen.

Die *contra legem*-Grenze primärrechtskonformer Auslegung ist jedoch nicht überschritten, da die Auslegung nach Sinn und Zweck der Norm eine andere Seite aufdeckt. In Art. 4a Abs. 1 lit. d) Rb EuHb geht die bis dato erforderliche Zusage einer EMRK-gemäßen und -konformen Neuverhandlung durch den ersuchenden Staat auf. Die Norm stellt deshalb notwendigerweise auf dessen Perspektive ab. An den entwickelten Grundfesten will die Norm jedoch nicht rütteln. Das ergibt sich daraus, dass sie bestimmte qualitative Anforderungen an die neue Verhandlung stellt (Teilnahme des Betroffenen, erneute Prüfung des Sachverhalts einschließlich neuer Beweismittel, Aufhebung der ursprünglich ergangenen Entscheidung), deren Aufnahme sinnlos bliebe, wenn die Verhandlung aufgrund zu hoher Hürden tatsächlich nicht durchgeführt werden würde. Bestätigt wird Letzteres durch Erwägungsgrund 11 des Rb AbwE, wonach „[e]ine solche Wiederaufnahme des Verfahrens oder Berufung die Wahrung der Verteidigungsrechte bezweckt und durch folgende Aspekte gekennzeichnet ist [...]“. Damit kann nach Sinn und Zweck der Norm kein Ausnahmetatbestand im Sinne von Art. 4a Abs. 1 lit. d) Rb EuHb vorliegen, wenn strukturelle Defizite der Abwesenheitsverfahren in einzelnen EU-Mitgliedstaaten im Hinblick auf eine Vereinbarkeit mit der EMRK nicht behoben worden sind. Haben die vollstreckenden Justizbehörden Zweifel, müssen diese ggf. durch Nachfragebeschluss ausgeräumt werden.

Der zweite kritisch beurteilte Bereich bezieht sich darauf, dass der Rb AbwE keine (zusätzlichen) Anforderungen an die Qualität des neuen Verfahrens stellt, wie z.B. den Anspruch auf Dolmetscher- und Übersetzungsleistungen, das Recht auf einen Verteidiger oder das Recht, den Sachverhalt vom *iudex ad quem* überprüft zu bekommen.³⁵ Eine Primärrechtskonformität erfordert jedoch nicht zusätzliche verfahrenstechnische Sicherungen, zumal der EGMR z.B. hinsichtlich der Frage „*iudex ad quem* oder *iudex a quo*“ den Urteilsstaaten Handlungsspielräume belässt.³⁶ Bestünden Anhaltspunkte, dass Grundregeln der EMRK, wie das Recht auf Verteidigung oder auf Dolmetschung im neuen Verfahren nicht eingehalten

würden (was in der Praxis im Zeitpunkt der Auslieferungsentcheidung schwierig nachzuweisen ist), wären entsprechende Ersuchen als Verstoß gegen den europäischen *ordre public* zurückzuweisen.

V. Schlussbetrachtung

In Absentia-Verfahren sind ein heikler Bereich des Rechtshilferechts. Sie treffen den Kern der *ordre public*-Debatte. Allerdings kann der Umgang mit Abwesenheitsurteilen auch als Chance begriffen werden – als Chance, dass echte europäische Lösungen für den Ausgleich zwischen Sicherheitsstreben (Effektivität der Strafverfolgung) und Individualrechtsschutz durch Berufung auf gemeinsame Werte gefunden werden können. Gemeinsame Basis bildet der sog. europäische *ordre public*, zuvorderst in Form der EMRK (und deren Auslegung durch den EGMR), und nun auch in Form der EU-Grundrechtecharta. Im europäischen Rechtsraum – innerhalb oder außerhalb der EU, mit oder ohne Europäischem Haftbefehl – bildet dieser europäische *ordre public* den Maßstab. Dies hat auch der EuGH in der Rechtssache *Melloni* klargestellt, indem er der Berufung auf den nationalen (spanischen) *ordre public* eine Absage erteilt hat. Auch wenn die Auslieferung eines in Abwesenheit Verurteilten nach nationalen Maßstäben „Bauchschmerzen“ bereitet, ist sie im internationalen Rechtshilfeverkehr hinzunehmen, wenn nicht die Mindestgarantien des Art. 6 EMRK in der Lesart des EGMR unterschritten sind. Diese Leitlinie gibt bereits seit Ende der 1970er Jahre Art. 3 2. ZP-EuAIÜbk vor. Die Vertragsstaaten des Europarats konnten damals – anders als der EU-Gesetzgeber im Jahre 2002 – noch nicht auf eine detaillierte Rechtsprechung des EGMR bzw. der EMRK zurückgreifen, weshalb die Norm generalklauselartig formuliert wurde. Der Rb EuHb (Art. 5 Nr. 1 (alt) und Art. 4a (neu)) streben eine Konkretisierung der Tatbestände an, in denen kein Auslieferungsschutz für den seiner Strafverhandlung Fernbleibenden bestehen soll. Mit den Mitteln der normebenenkonformen Auslegung lässt sich der neue Art. 4a RB EuHb auf eine Linie mit Art. 3 2. ZP-EuAIÜbk bringen. Als besonders bedenklich erweist sich der Wortlaut von Art. 4a Abs. 1 lit. d) Rb EuHb, die Norm lässt sich aber durch teleologische Auslegung (noch) „retten“.

Die reine Analyse der Tatbestandsmerkmale hat jedoch einen Umstand ausgeblendet, der in Zukunft eine Erosion des Beschuldigten- bzw. Auslieferungsschutzes herbeiführen kann: Während bisher der ersuchte Staat das Recht – und nach der deutschen Sichtweise regelmäßig die Pflicht – hatte,³⁷ die EMRK-Konformität des Abwesenheitsverfahrens zu beurteilen, macht dies nun der ersuchende Staat, also derjenige, in dem das Abwesenheitsurteil ergangen ist. Dies geschieht durch „Ankreuzen“ einer Box im EHB-Formular, das die vier sog.

Ausnahmetatbestände auflistet, bei deren Vorliegen ein Auslieferungsgesuch für zulässig erklärt werden muss. Ungeachtet des Beigeschmacks, dass hier jemand „in eigener Sache tätig“ wird und der dadurch generell bestehenden Gefahr, dass durch „gezielte Falschinformationen“ die Verkehrsfähigkeit einer Abwesenheitsentscheidung EU-weit herbeigeführt werden soll, dürfte in der zukünftigen Praxis dem Betroffenen und dessen Verteidigung eine erhöhte Darlegungs- und Beweislast auferlegt sein. Denn durch das Formular wird ein Vermutungstatbestand geschaffen, der gegenüber dem ersuchten, über die Rechtshilfe entscheidenden Gericht erst erschüttert werden muss. Auch wenn formal der Amtsermittlungsgrundsatz gilt, dürfte es künftig für den Betroffenen ungleich schwieriger sein, genaue, auf den Einzelfall bezogene Anhaltspunkte vorzubringen, die die Annahme eines Ausnahmetatbestandes

widerlegen. Besonders bedenklich ist in dem Zusammenhang, dass das Formular zwar ein Freifeld vorsieht, in dem die ausstellende Justizbehörde Informationen eintragen muss, wie die Voraussetzungen der Ausnahmetatbestände erfüllt wurden, wodurch für die den EHB vollstreckende Justizbehörde eine Tatsachengrundlage geschaffen wird.³⁸ Allerdings gilt dieses Feld gerade nicht für den hier die Grenze des Vertretbaren streifenden, problematischen Fall der gerichtlichen Neuverhandlung (Art. 4a Abs. 1 lit. d).³⁹ Zwar mag ein Argument, Art. 4a Rb EuHb (neu) widerspreche generell Art. 6 EMRK, vor dem EGMR in Straßburg erfolglos bleiben, ausgeschlossen ist aber nicht, dass Straßburg künftig im Einzelfall implizit die missbräuchliche Nutzung des EU-Auslieferungsinstrumentariums rügen muss – dies jedoch Jahre nach Abschluss des Strafverfahrens im Urteilsstaat.



Thomas Wahl

Researcher at the Centre for Security and Society,
Project “Network of Excellence for the Law of Civil
Security in Europe (KORSE)”, University of Freiburg

- 1 Böhm/Rosenthal, in: Ahlbrecht u.a. (Hrsg.), *Internationales Strafrecht in der Praxis*, 2008, Rn. 676.
- 2 Vgl. die rechtsvergleichenden Erörterungen bei Paul, *Das Abwesenheitsverfahren als rechtsstaatliches Problem*, 2007 und Bartels, *Die Auslieferung zur Vollstreckung eines Abwesenheitsurteils in Europa*, 2014.
- 3 EuGH, Urt. v. 26.2.2013, Rs. C.-399/11, *Stefano Melloni*, Rn. 20f.
- 4 Council of Europe, *Extradition – European standards*, 2006, S. 87; Heger/Wolter, in: Ambos/König/Rackow (Hrsg.), *Rechtshilfe in Strafsachen*, 2015, Kap. 2, Rn. 1082.
- 5 Offizieller Titel: Rahmenbeschluss 2009/299/JI des Rates vom 26. Februar 2009 zur Änderung der Rahmenbeschlüsse 2002/584/JI, 2005/214/JI, 2006/783/JI, 2008/909/JI und 2008/947/JI, zur Stärkung der Verfahrensrechte von Personen und zur Förderung der Anwendung des Grundsatzes der gegenseitigen Anerkennung auf Entscheidungen, die im Anschluss an eine Verhandlung ergangen sind, zu der die betroffene Person nicht erschienen ist, ABI L 81 v. 26.03.2009, S. 24.
- 6 St. Rspr., siehe nur EGMR, 28.8.1991, *F.C.B. v. Italy*, EuGRZ 1992, 539 (540).
- 7 Zusammenfassend Murschetz, *Auslieferung und Europäischer Haftbefehl*, 2007, S. 201f. m.w.N.
- 8 Siehe auch GA Bot, Schlussanträge v. 2.10.2012, Rs. C-399/11 (*Melloni*), Rn. 56 ff.
- 9 BRAK-Stellungnahme Nr. 06/2008; DAV-Stellungnahme Nr. 14/2008; Kirsch, *StraFo* 2008, 449 (457); Heintschel-Heinegg, in: Sieber u.a. (Hrsg.), *Europäisches Strafrecht*, 2. Aufl., § 37, Rn. 55.
- 10 Bartels, Fn. 2; Klitsch, *ZIS* 2009, 1 (19); Murschetz, *JBl.* 2009, 29 (33).
- 11 BT-Drucks. 18/3562 v. 17.12.2014.
- 12 Böse, in: Grützner/Pötz/Kreß (Hrsg.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3. Aufl., vor § 78 IRG, Rn. 24; allgemein dazu Kraus, in: Dörr/Grote/Maruhn (Hrsg.), *EMRK/GG*, 2. Aufl., Kap. 3, Rn. 53f.
- 13 Siehe dazu insbesondere Leible/Domröse, in: Riesenhuber (Hrsg.), *Europäische Methodenlehre*, 3. Aufl., § 8, Rn. 4ff., 35ff; Müller/Christensen, *Juristische Methodik*, Bd. II *Europarecht*, 2007, Rn. 82ff., 545ff.; Kutscher, Thesen zu den

- Methoden der Auslegung des Gemeinschaftsrechts aus Sicht eines Richters, in: Gerichtshof der Europäischen Gemeinschaften (Hrsg.), *Begegnung von Justiz und Hochschule am 27. und 28. September 1976*, 1976, I-3ff.
- 14 EuGH, Urt. v. 9.3.2006, Rs. C-499/04 *Werhof*, Slg. 2006, I-2397, Rn. 32.
- 15 EuGH, Urt. v. 26.6.2007, Rs. C-305/05 *Ordre des barreaux francophones et germanophone u.a.*, Slg. 2007, I-5305, Rn. 28f.
- 16 Bartels, Fn. 2, S. 196ff.
- 17 BT-Drucks. 18/3562, S. 79; Meyer, in: Karpenstein/Mayer (Hrsg.), *EMRK*, Art. 6, Rn. 176.
- 18 EGMR, 12.2.1985, *Colozza*, Nr. 9024/80, Rn. 28.
- 19 BT-Drucks. 18/3562, S. 79; Esser, in: Löwe-Rosenberg, 26. Aufl., Bd. 11, Art. 6 EMRK, Rn. 672 m.w.N.; a.A. Paul, Fn. 2, S. 278.
- 20 Meyer, Fn. 17, Rn. 108; Paul, Fn. 2, S. 276.
- 21 EGMR, 12.10.1992, *T. v. Italy*, EuGRZ 1992, 541; Esser, Fn. 19, Rn. 666.
- 22 Esser, Fn. 19, Rn. 669 m.w.N.
- 23 EGMR (GK), 1.3.2006, *Sejdovic*, Nr. 56581/00, Rn. 90; siehe auch EGMR, 22.12.2009, *Makarenko*, Nr. 5962/03, Rn. 135: „A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and informed relinquishment of the right.“
- 24 EGMR, 25.3.1999, *Pélissier and Sassi*, Nr. 25444/94, Rn. 51; EGMR, Urt. v. 19.12.2006, *Mattei*, Nr. 34032/02, Rn. 34f.
- 25 EGMR, 14.6.2001, *Medenica*, Nr. 20491/92, Rn. 57. Siehe auch OLG Köln *StraFo* 2015, 27 sowie Esser, Fn. 19, Rn. 696.
- 26 EGMR, 19.12.1989, *Brozicek*, Nr. 10964/84, Rn. 38ff.
- 27 European Parliament legislative resolution of 2 September 2008, T6-0381/2008, Amendment 13.
- 28 Paul, Fn. 2, S. 278.
- 29 EGMR, 23.11.1993, *Poitrimol*, Nr. 14032/88, Rn. 35; EGMR, 21.1.1999, *Van Geyseghe*, Nr. 26103/95 Rn. 34f; EGMR, 22.9.1994, *Lala*, Nr. 14861/89, Rn. 34.
- 30 Siehe auch Böse, *Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant*, in: Ruggeri (Hrsg.), *Human rights in European criminal law*, 2015, 135 (140).
- 31 Kritisch BRAK-Stellungnahme Nr. 06/2008, S. 5; Bartels, Fn. 2, S. 205.
- 32 EGMR (GK), 1.3.2006, *Sejdovic*, Nr. 56581/00, Rn. 86f.
- 33 Siehe BGHSt 47, 120 und die dort wiedergegebene OLG-Rechtsprechung.
- 34 EGMR (GK), 1.3.2006, *Sejdovic*, Nr. 56581/00, Rn. 83, 103f.
- 35 Kritisch BRAK-Stellungnahme Nr. 06/2008, S. 7; DAV-Stellungnahme Nr. 14/2008, S. 4; Bartels, Fn. 2, S. 205.
- 36 EGMR, Urt. v. 10.06.1996, *Thomann*, Nr. 17602/91, Rn. 35f.
- 37 KG NJW 2008, 673 (675); OLG Hamm NStZ-RR 2001, 62.
- 38 Art. 2 Nr. 3 Rb AbwE i.V.m. lit. d) Nr. 4 EHB-Formular (neu).
- 39 Dies übersieht m.E. Böse, N.C.J. Int’L & Com Reg. 37 (2011), 489 (507f.). Zu recht kritisch Bartels, Fn. 2, S. 207f.

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Guenterstalstrasse 73, 79100 Freiburg i.Br./Germany

Tel: +49 (0)761 7081-0
Fax: +49 (0)761 7081-294
E-mail: u.sieber@mpicc.de

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For further information, please contact:

Dr. Els De Busser
Max Planck Institute for Foreign and International Criminal Law
Guenterstalstrasse 73,
79100 Freiburg i.Br./Germany

Tel: +49(0)761-7081-256 or +49(0)761-7081-0 (central unit)
Fax: +49(0)761-7081-294
E-mail: e.busser@mpicc.de

