

eucrim

2011 / 4

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: Sanctions

Dossier particulier: Sanctions

Schwerpunktthema: Sanktionen

The Civil Asset Forfeiture Approach to Organised Crime –
Exploring the Possibilities for an EU Model

Dr. Jon Petter Rui

The Isolation of Dutch Environmental Criminal Law

Rob de Rijck

Terrorism Lists and Freezing of Assets – Getting Behind Appearances

Réno Pijnen, LL.M, M.Phil.

Contents

News*

European Union

Foundations

- 134 Reform of the European Union
- 134 Enlargement of the EU
- 135 Schengen

Institutions

- 136 Commission
- 137 Court of Justice of the EU
- 137 OLAF
- 138 Europol
- 139 Eurojust
- 141 European Judicial Network
- 141 Frontex

Specific Areas of Crime / Substantive Criminal Law

- 141 Protection of Financial Interests
- 142 Corruption
- 142 Organised Crime
- 144 Environmental Crime
- 144 Sexual Violence
- 144 Racism and Xenophobia /
Violent Extremism

Procedural Criminal Law

- 144 Procedural Safeguards
- 146 Data Protection
- 147 Victim Protection
- 148 Freezing of Assets

Cooperation

- 148 Judicial Cooperation
- 149 European Arrest Warrant
- 149 Law Enforcement Cooperation

Council of Europe

Foundations

- 151 Reform of the European
Court of Human Rights
- 151 Other Human Rights Issues

Procedural Criminal Law

Articles

Sanctions

- 153 The Civil Asset Forfeiture Approach
to Organised Crime – Exploring
the Possibilities for an EU Model
Dr. Jon Petter Rui
- 162 The Isolation of Dutch Environmental
Criminal Law
Rob de Rijck
- 167 Terrorism Lists and Freezing of Assets –
Getting Behind Appearances
Réno Pijnen, LL.M, M.Phil.

Imprint

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

Editorial

Dear Readers,

It is a great pleasure and honour for me to address these introductory remarks to you on the central topic of the present issue of eucrim: “sanctions.” Traditionally, the imposition of sanctions for certain offences by administrative authorities was considered only in special cases. But with the advent of the welfare state and, as a consequence of the expansive state intervention, sets of administrative laws and regulations were increasingly introduced, thus establishing new duties and prohibitions that needed for their reinforcement the provision of adequate responses to violations. Therefore, a great development in administrative penal law took place, particularly in certain areas (*inter alia* the protection of the environment during the last decades of the 20th century). Furthermore, this development coincided with the tendency to move away from criminal law, which was consistent with promoting the use of purely civil penalties or administrative sanctions in order to decriminalise less serious offences.

The enforcement of administrative sanctions is usually considered to be faster, less costly, and less complex than criminal proceedings. However, and in any case, as the International Association of Penal Law (AIDP-IAPL) declared at its Sixteenth International Congress (Budapest 1999), the use of non-criminal sanctions “in order to circumvent the guarantees of substantive and procedural criminal law” should always be avoided. In this context, the way in which certain legal orders have evolved in relation to confiscation – changing its juridical nature to elude criminal procedure guarantees in order to cover the individual’s total assets – is not a good example and needs to be criticized. In fact, administrative-penal law (and, in general, any sanctioning law) should be always respectful of the principle of legality, proportionality, and other fundamental guarantees and subjected to judicial review.

Even if the lack of resources for inspections and the absence of political will and transparency in decision-making represent key obstacles to their efficient enforcement, relevant European reports underline that administrative sanctions cannot be considered less deterrent and less effective than criminal ones. In those systems in which the criminal responsibility of legal persons is not foreseen, administrative sanctions can

also be applied to corporations and other legal entities. Nevertheless, although administrative fines can be even higher than criminal ones, criminal sanctions are usually harsher, and they include a component of social blame that is not easily found in connection with administrative sanctions.



José Luis de la Cuesta

Deciding when a particular offence should be dealt with by means of the criminal law or according to administrative measures thus constitutes an important element of criminal policy. In practice, it has been proven in several cases that the most adequate solution is promoting synergies and combining advantages and disadvantages of both regimes. A high risk of overlapping and possible substantive *ne bis in idem* is inherent, however, to the coexistence of criminal and non-criminal sanctions in the same field. The adequate regulation of the treatment of those cases in which the same act meets the definition of both an administrative penal infraction and a criminal offence – the three levels of identity characteristic of *bis in idem* being present – is therefore essential. Priority is generally given to the criminal investigation, paralysing the administrative one and making the administrative procedure dependent on the evidence proven in the criminal process. However, when the criminal proceedings are initiated after the execution of the administrative sanction and it is impossible to bar the criminal prosecution itself, “full credit should be given, in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act,” as established by the Fourteenth International Congress of Penal Law (Vienna 1989).

Prof. Dr. Dr. h.c. José Luis de la Cuesta
President AIDP-IAPL, Director of the Basque Institute
of Criminology, University of the Basque Country, Spain



European Union*

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

Foundations

Reform of the European Union

Commission Presents Strategy and Principles for Building an EU Criminal Policy

On 20 September 2011, the European Commission presented a communication entitled “Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law” (COM(2011) 573 final). The EU institutions have been adopting legal instruments in the field of criminal law for many years but never defined a coherent and consistent policy in this area. With this communication, for the first time, a genuine plan was drafted containing the strategy and principles the Commission intends to apply when using criminal law as a tool to strengthen the enforcement of EU policies and to protect the interests of the citizens.

The Lisbon Treaty also introduced a new take on the adoption of legal instruments in the area of criminal law, with a strengthened role for the EP and full judicial control for the ECJ. The possibil-

ity of adopting measures supported by a qualified majority of the Member States has also changed the legal framework. Important limits to adopting criminal law measures are the Charter of Fundamental Rights and the “emergency brake” mechanism. The latter allows a Member State to refer a proposal to the European Council if it considers the fundamental aspects of its national criminal justice system to be affected by the proposed legislation.

The Commission’s communication highlights the scope of EU criminal law and the principles it should abide by such as the subsidiarity principle and the principle that criminal law should be a last resort. With regard to these principles, the Commission distinguishes between the decision on whether to adopt criminal law measures at all and the decision on what kind of criminal law measures to adopt.

In the final part of the communication, the Commission lists the policy areas in which criminal law measures might be necessary. For the financial sector, in the fight against fraud and the protection of the Euro against counterfeiting (areas that have already been

harmonised to some extent), according to the Commission, it has been established that EU criminal law measures are required. Plans have also been made to reflect on how criminal law could contribute to the economic recovery by helping tackle the illegal economy and financial criminality. Harmonised policy areas such as road transport, data protection, and environmental protection are among those listed as areas in which the potential role of criminal law could be explored further.

In a next step, the Commission will draft “sample language” in cooperation with the EP and the Council in order to ensure consistency and coherency in drafting EU legislation. Additionally, the Commission will set up an expert group that should assist in ensuring the implementation of EU law in national criminal justice systems. (EDB)

➤ [eucrim ID=1104001](#)

Enlargement of the EU

Progress for Western Balkans and Iceland but not for Turkey

The enlargement of the EU towards the Balkan area continues with the Commission recommending open accession negotiations with Montenegro and granting candidate status to Serbia on 12 October 2011. Also, the Commission confirmed its earlier recommendation to open accession negotiations with the Former Yugoslav Republic of Macedonia.

* If not stated otherwise, the news reported in the following sections cover the period August – October 2011.

With the arrest of two remaining persons indicted by the ICTY, an important step was taken in the constructive dialogue between Serbia and the EU. Additionally, the citizens of Albania and Bosnia and Herzegovina can enjoy visa-free travel to the Schengen area (since December 2010). Nevertheless, problems still exist on the level of good governance, the rule of law, and regional cooperation.

Negotiations regarding Iceland's accession are still ongoing. The main issues in this case are fisheries and environmental protection but the Commission is confident that this will not hinder progress.

The news is less positive with regard to accession negotiations with Turkey. In the past year, no new topics in the negotiations were opened and recent tensions in relations with Cyprus remain a concern. (EDB)

► eucrim ID=1104002

Schengen

Schengen Governance Package

The weaknesses at the external borders, which has been a recent problem within the Schengen zone (see eucrim 3/2011, pp. 95-96), and the planned revision of the Schengen Border Code (see eucrim 2/2011, p. 51) were addressed by the Commission in two legislative proposals presented on 16 September 2011. They consisted of a Communication on Schengen governance – strengthening the area without internal border controls (COM(2011) 561 final), on the one hand, and a proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis (COM(2011) 559 final), on the other.

Both documents were presented by Commissioner for Home Affairs Cecilia Malmström who highlighted that Schengen's intergovernmental approach should now be shifted to a European-based approach where decisions are

taken at the EU level. In her statement, Malmström referred to the power to decide on the reintroduction of border controls. This power is currently still in the hands of the Member States. However, after the experiences with France and Italy as well as Denmark (see eucrim 3/2011, pp. 95-96 and eucrim 2/2011, pp. 51-52), the Commission now proposes taking this decision to the EU level if the right to free movement is likely to be affected.

With a proposal of 16 November 2010, the Commission already introduced a monitoring mechanism ensuring the correct implementation of the Schengen rules. The Schengen rules include a common visa policy, police and judicial cooperation, common rules on the return of irregular migrants, and the establishment of common databases such as SIS. In accordance with this proposal, verifying whether the Schengen rules are implemented can be effected by means of announced or unannounced visits to a certain Member State by Commission-led teams that are joined by experts from other Member States and Frontex. Each Member State should be subjected to such an evaluation once every five years. Any shortcomings can be addressed in recommendations that include a recommended action and the timeframe for its implementation.

With the current amended proposal, the Commission adds the possibility of reintroducing internal border controls to the monitoring mechanism. It was the European Council of 23-24 June 2011 that called upon the Commission to draft a proposal for creation of a system enabling Member States to respond to extraordinary circumstances that put the functioning of the Schengen zone at risk but still respect freedom of movement (see eucrim 3/2011, p. 95). In exceptional circumstances and as a matter of last resort, where measures taken at the Union or national levels do not improve the situation, reintroducing border controls at internal borders with the non-compliant Member State is allowed. However,

the situation should constitute a serious threat to public policy or to internal security at the Union or national levels. Border controls could be reintroduced for renewable periods of up to 30 days, with a maximum duration of six months.

Under these conditions, the decision to reintroduce border controls would be taken by the Commission as an implementing act involving the Member States as necessary. The EP would be informed of such measures.

A decision to reinstall border controls by a Member State itself is only allowed in urgent circumstances and for a maximum of five days. An extension of this period of time would fall under the new decision-making procedure.

Finally, the Commission also proposed initiating a more regular and structured political dialogue between the European Institutions on the functioning of the Schengen area. (EDB)

► eucrim ID=1104003

Veto Against Bulgaria and Romania as Schengen Members

The postponed decision on the accession of Bulgaria and Romania to the Schengen zone ended in a veto during the JHA Council of 22 September 2011 (see eucrim 3/2011, p. 96). The draft Council decision needed the unanimous support of all Member States in order to be put to vote, however the Netherlands and Finland did not endorse the bid. The current Polish presidency is determined to continue pursuing an agreement.

In the meantime, the Commission has announced the presentation of an overall assessment of the progress made by Bulgaria and Romania within the framework of the Cooperation and Verification Mechanism (CVM) by the summer of 2012. The CVM monitors both countries' progress in dealing with *inter alia* corruption and organised crime (see eucrim 2/2010, pp. 76-84). Both the Netherlands and Finland planned to wait for this assessment before possibly reconsidering their position, however Finland decided to withdraw its veto on 14 No-

vember 2011. Together with most other Schengen countries, Finland has decided to support a two-phased entry of Romania and Bulgaria. (EDB)

►eucrim ID=1104004

Commission Presents Smart Borders Proposal

On 25 October 2011, Commissioner for Home Affairs Cecilia Malmström presented a plan to modernise travelling across the external borders of the EU. As the number of travellers at European airports is estimated to increase by 80% by 2030, the introduction of smooth and fast border checking procedures for regular travellers is necessary.

The so-called “Smart Borders Initia-

tive” consists of two parts. On the one hand, an entry/exit system would be introduced to record the time, place of entry, and length of stay in an electronic database. These data – presently recorded by stamping passports – would then be transferred to border control and immigration authorities. On the other hand, a Registered Travellers Program would allow frequent travellers to use simplified border checks at automated gates.

The initiative is part of the Schengen package (see p. 135 of this issue). After discussions with the EP, the Council, and the EDPS have been held, legislative proposals will be presented in the course of 2012. (EDB)

►eucrim ID=1104005

Common abbreviations

AML	Anti-Money Laundering
CBRN	Chemical, Biological, Radiological, and Nuclear
CCJE	Consultative Council of European Judges
CDPC	European Committee on Crime Problems
CEPEJ	European Commission on the Efficiency of Justice
CEPOL	European Police College
CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
COSI	Standing Committee on Operational Cooperation on Internal Security
COREPER	Committee of Permanent Representatives
DG	Directorate General
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EIO	European Investigation Order
EJN	European Judicial Network
(M)EP	(Members of the) European Parliament
EPO	European Protection Order
EPPO	European Public Prosecutor Office
GRECO	Group of States against Corruption
ICTY	International Criminal Tribunal for the former Yugoslavia
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
JSB	Joint Supervisory Body
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
PNR	Passenger Name Records
SIS	Schengen Information System
SitCen	Joint Situation Centre

Institutions

Commission

Olli Rehn Appointed Vice President of the Commission

On 27 October 2011, European Commission President, Jose Manuel Barroso, appointed Olli Rehn, Commissioner for Economic and Monetary affairs, as Vice-President of the Commission. The Vice-President assists the President on all matters relating to the work of the European Council, Euro Area summits, and economic governance. Eurostat (the EU office that provides the EU with statistics on states and regions), previously under the responsibility of Olli Rehn, has been assigned to the European Commissioner for Taxation, Customs, Audit and Anti-fraud, Algirdas Šemeta. (ST)

►eucrim ID=1104006

Commission Strengthens Eastern Partnership

On 27 September 2011, the Commission released a communication on cooperation in the JHA area within the Eastern Partnership. The Eastern Partnership was established at the Prague Summit in May 2009 by the EU and Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova, and Ukraine. It provides a forum for discussing, *inter alia*, free trade and visa agreements, labour mobility, border security, and cooperation on environmental and climate issues. In the Stockholm Programme, the European Council invited the Commission to present a plan on how to further cooperation in the area of JHA with the Eastern Partnership countries.

The Communication lists several areas in which cooperation needs to be enhanced and proposes measures to be taken in the process:

■ Data collection and analysis: providing more support to national statistical institutes and research facilities in order to gain more accurate data on migration-related issues;

- Legal migration: considering mobility agreements and further opening migration channels for migrants from Eastern Partnership countries;
- Border management: supporting close cooperation between the Eastern Partners and FRONTEX;
- Security: exchanging best practices in the area of document security; intensifying the dialogue on fighting trafficking in human beings and assisting the victims; increasing cooperation between the Partnership countries and the respective EU agencies in order to effectively tackle organised crime, financial crime (including terrorist financing), drug trafficking, and corruption;
- Justice and fundamental rights: monitoring reform in the judiciary and the protection of human rights in the Partnership countries, encouraging the adoption of appropriate data protection laws, and introducing independent data protection supervisory authorities to guarantee the individual's right to protection of his data. (ST)

►eucrim ID=1104007

Court of Justice of the EU

Commission Presents Opinion on ECJ Amendments

On 30 September 2011, the Commission published its opinion on the ECJ's request for amendment of its statute as presented by the Court in March 2011.

The proposed amendments concern all three courts. Regarding the Court of Justice, the amendments include the establishment of the office of Vice-President of the Court, modification of the composition of the Grand Chamber as well as an increased quorum for decisions by the Grand Chamber and the full Court. Overall, the Commission supports the proposed amendments. However, it makes suggestions as to how to ensure more stability within the new enlarged Grand Chamber, e.g., by introducing the rule that three presidents of chambers

of five judges must always form part of the Grand Chamber. As to the General Court's request to increase the number of judges to 39 (currently 27 judges), the Commission shares the Court's view that the General Court's caseload and the current duration of proceedings call for the appointment of more judges. The Commission even suggests introducing specialised chambers within the General Court to further increase its efficiency and to appoint a Vice-President of the General Court, similar to the request made for the Court of Justice.

The Commission also approves the Civil Service Tribunal's request for the appointment of three temporary judges upon whom it could call in the event that a permanent judge is prevented from attending court for a prolonged period of time. However, the Commission criticizes a rule contained in the proposal stipulating that, when the permanent judge returns after a long absence, the Tribunal may decide whether or not the temporary judge should continue to perform his duties until his cases are completed. The Commission takes the view that letting the permanent judges decide on whether or not their temporary colleagues may continue to perform their duties may weaken the independence of the temporary judges. The Commission therefore recommends adopting an objective criterion to handle situations in which a permanent judge returns before the temporary judge has completed his cases. (ST)

►eucrim ID=1104008

OLAF

Court of Auditors on Management of OLAF

At the JHA meeting from 27-28 October 2011, the Council adopted conclusions on the Court of Auditors' follow-up audit on special report No. 1/2005 concerning the management of OLAF (see eucrim 3/2011, pp. 97-98). The Council

welcomed OLAF's efforts to improve its efficiency, but regretted that the average duration of investigations and initial assessments is still far too long.

The Council called on OLAF to further improve its planning and to optimise the use of its resources and tools. As to OLAF's investigative function, the Council states that OLAF should allocate more of its existing resources to its investigative tasks in order to increase the number and speed of its investigations. The Council also agreed with the Court of Auditors on the need to publish performance statistics in a single document and to further clarify the role of the Supervisory Committee. (ST)

►eucrim ID=1104009

OLAF Reform – State of Play

On 12 July 2011, the European Court of Auditors published an opinion on the proposed Regulation (COM (2011) 135) regarding the reform of OLAF (see eucrim 2/2011, p. 54). *Inter alia*, the Court found that, due to overlapping, incoherent, or incompatible provisions, there is a need to simplify and consolidate the anti-fraud legislation currently in force. The Court also states that, although the proposed Regulation aims for more independent control of the legality of investigative acts, no effective control is possible unless a body or a person independent of OLAF and equipped with the power to issue binding opinions carries out this function.

According to the Court, the proposed amendments contain vague wording and unclear key notions, resulting in a failure to keep the provisions of the OLAF Regulation concise, clear, and consistent. In the Court's opinion, the proposed Regulation should include clear wording regarding the priority of OLAF's core investigative function over other tasks. Regarding OLAF's cooperation with other authorities, the Court recommends using objective criteria to identify appropriate cases for collaboration and equipping the Supervisory Committee with the power to monitor the exchange

of information between OLAF and other authorities. (ST)

►eucrim ID=1104010

OLAF 2010 Annual Report

On 19 October 2011, OLAF published its annual activity report covering the year 2010. Overall, OLAF handled 493 investigative and operational cases and completed 691 assessments. 189 investigative and operational cases were closed in 2010. With 225 new cases opened that year, OLAF's workload increased slightly compared to 2009 (220 new cases) and 2008 (204 new cases). The average total duration of investigations and operations, including the assessment phase, was nearly 28 months. Following OLAF's investigative results, national courts sentenced offenders to a cumulative 125 years of imprisonment and imposed financial penalties of nearly €1.47 billion.

The report gives an outlook on changes in OLAF's work in 2012. *Inter alia*, OLAF's Director General, Giovanni Kessler, has launched an internal review to improve the performance of the office. The review is planned for completion by the end of 2011 and will focus on ways to simplify the procedures for investigations, shorten the duration of investigations, and make better use of resources. (ST)

►eucrim ID=1104011

Europol

Memorandum of Understanding with Interpol Against Transnational Crime

On 12 October 2011, Europol and Interpol signed a Memorandum of Understanding to extend their collaboration in the fight against transnational organised crime.

Under the memorandum, a secure communication line linking up the secure networks of both agencies shall be established to facilitate the exchange of

operational and strategic information on crime. Furthermore, the two agencies agreed to enhance their collaborative operational efforts against transnational organised crime and against terrorism by endorsing operational action plans of co-operation in five areas: maritime piracy, counter-terrorism, security for major international public events, cybercrime, and the sexual exploitation of children. (CR)

►eucrim ID=1104012

Conclusions of the European Police Chiefs Convention 2011

Europol published a report, including conclusions and a photo album, on the European Police Chiefs Convention that took place from 29 June to 1 July 2011. The focus of the convention was the future of organised crime and terrorism (see eucrim 3/2011, pp. 99-100).

Regarding the future of organised crime, the convention concluded that, although law enforcement in the EU has made progress in intelligence co-ordination and the joint investigation of crimes already considered a priority, the reactive nature of policing and tight budgets leave law enforcement agencies insufficiently prepared for new threats. Changes in the global environment, demographic shifts, geopolitical unrest outside the EU, economic disparity, and the continued development of the Internet as well as related technologies are seen as factors likely to influence criminal activities such as trafficking in human beings, cybercrime, and economic crime. Hence, the convention recommended taking the following actions, to name a few:

- To collaborate with partners in the private sector, especially to create public-private partnerships;
- To provide tools and training on new forms of crime and to raise awareness of less visible forms of crime;
- To strengthen asset recovery and financial investigation capabilities and to develop an integrated approach to strategic planning at the EU level.

Looking at the future of terrorism, the convention saw terrorism and extremism shifting to more hybrid forms. Facilitated by new technology and the Internet, terrorist and extremist groups are becoming more fragmented networks that use the virtual world as a tool, target, and weapon. Growing immigration flows will have an impact on terrorism and extremism, and new types of terrorism such as eco-anarchism will come to the fore. Ultimately, the convention expects a symbiosis to develop between organised crime and terrorism.

In reaction to these new developments, the convention suggested the following actions:

- To encourage deradicalisation and the prevention of radicalisation; to develop the interoperability of criminal and intelligence databases;
- To ease the administrative hurdles that currently exist between key agencies (Europol, SitCen, Frontex, etc.), to facilitate cooperation;
- To change Europol's status by giving it a more ambitious role, including certain executive powers in this particular field. (CR)

►eucrim ID=1104013

Europol Review 2010

Europol has published a general report on its activities in 2010. The report presents an overview of Europol's activities with the aim of explaining Europol's contribution to the fight against serious crime and terrorism in Europe.

Besides a general chapter on Europol's mission, priorities, and resources, the report contains a detailed chapter on how Europol works. The core of the report is the chapter on Europol's operational activities and support efforts in 2010 in relation to the different areas of serious crime. According to the report, in 2011, Europol's support was used most in the fields of illegal immigration, counterfeiting of the Euro, and heroin trafficking. Europol's forensic and technical support was used in 125 cases, its operational analysis in 78 cases, and its

financial support for operational meetings in 60 cases and in 35 cases for investigations. Europol hosted 33 operational meetings, used its mobile office support in 31 cases, and helped with the coordination of 23 cases. The report concludes with two chapters outlining Europol's scope as well as future strategy and goals, underlining that Europol will continue to follow the goals set out in its Strategy 2010-2014. (CR)

►eucrim ID=1104014

Work Programme 2012

At its meeting of 22-23 September 2011, the JHA Council endorsed Europol's work programme for 2012.

The work programme is Europol's annual business plan that translates the goals of Europol's Strategy 2010-2014 and other relevant strategies, e.g., the Internal Security Strategy for the EU (see eucrim 3/2010, p. 92), into annual objectives and provides a basis for budgetary planning.

To fulfil the first goal of Europol's Strategy 2010-2014, namely to increase its support for law enforcement operations, Europol plans to support Member States' investigations more proactively and to align operational resources with priority crime areas in 2012. Furthermore, Europol plans to intensify its co-operation efforts with the United States, EU candidate and potential candidate countries, Russia, and Interpol and to strengthen its working relationships with the European External Action Service (EEAS).

To achieve the second goal – to develop into the EU criminal information hub – Europol would like to finalise the methodology for the new Serious and Organised Crime Threat Assessment (SOCTA) in 2012 and to implement a new Analysis Work File concept with realisable improvements in data handling and operational utility.

For the third goal, the expansion of its capabilities as an EU centre for law enforcement expertise, Europol will continue to enhance its cybercrime and

financial intelligence capability in 2012. This will include the development of the Internet Crime Online System (ICROS) as well as the strengthening of Europol's Criminal Assets Bureau (ECAB) for criminal assets tracing.

As the fourth goal of its strategy, Europol is asked to ensure that it has the proper capabilities to achieve its operational goals. Hence, according to the work programme, Europol will continue to optimise its ICT support such as electronic workflows, the automation of records, and human resource management in 2012.

The annexes to the work programme include the following:

- An overview of resource allocation (18.2% of the total budget are allocated to the first goal, 12.1% to the second, 6.8% to the third, and 30% to the fourth goal);
- An overview of critical risks that could have a negative effect on the annual business planning and mitigating measures;
- An overview of planned procurement activities;
- An organisational chart.

The work programme will now be forwarded to the EP for information. (CR)

►eucrim ID=1104015

Publication: The European Investigator – Targeting Criminals across Borders

Europol has published a brochure entitled "The European Investigator – Targeting Criminals across Borders." It consists of five chapters illustrating the different types of assistance offered by Europol with regard to operational analysis, mobile office/on-the-spot support, forensic and technical support as well as the benefits of employing a Joint Investigation Team. The final chapter contains information on the Member States' National Units at Europol.

In addition to a generic brochure published in English, individual brochures are available for each Member State in its national language, the last chapter

also having been adapted to the national organisation of its Europol National Unit. (CR)

►eucrim ID=1104016

Eurojust

Memorandum of Understanding with the European Commission

Eurojust and the European Commission are currently negotiating a Memorandum of Understanding. The draft text of the Memorandum was sent to the Council by the President of Eurojust, Aled Williams, on 24 October 2011.

The draft memorandum aims to further improve cooperation between Eurojust and the Commission and to establish mechanisms for efficient, regular, and transparent contacts and the exchange of information between them.

It foresees a set of general principles of cooperation for regular meetings, the Commission's participation at College meetings of Eurojust where non-operational strategic issues and documents are discussed, and the establishment of the Commission's Directorate General for Justice as the first and single central contact point for relations between the Commission and Eurojust.

With regard to consultation and information, the memorandum foresees, on the one hand, that the Commission can consult Eurojust on relevant new legislative proposals, communications, etc. that it intends to publish, and it may invite Eurojust to relevant expert meetings. On the other hand, Eurojust is to consult the Commission on strategic documents such as its draft budget, annual working plans, etc. and to invite the Commission to make recommendations on its annual reports. Upon request, Eurojust shall provide the Commission with information, including statistical data, anonymised case illustrations, and analysis of Eurojust activities in order to enable the Commission to make recommendations, issue opinions, or propose

initiatives. Furthermore, Eurojust and the Commission will inform and consult each other on studies and evaluations dealing with Eurojust's activities. Finally, Eurojust and the Commission will ensure the exchange of all relevant administrative documents.

Concerning Eurojust's relations with other European bodies and institutions, the draft memorandum foresees that Eurojust submit the documents intended for discussion to the EP, Council, or the EEAS, at the same time also to the Commission, and that it inform the Commission of its intention to attend meetings of these bodies and institutions.

Regarding Eurojust's external relations, under the draft memorandum, Eurojust agrees to inform the Commission of any substantial developments and to consult the Commission on external policy issues. Furthermore, Eurojust agrees to inform the Commission of its intention to attend formal meetings of international organisations or with representatives of third countries.

Ultimately, the draft memorandum foresees that Eurojust inform the Commission on its staff development and that the Commission's DG for Justice be invited to participate in the selection board for the recruitment of Eurojust's administrative director and as an observer in the evaluation committee for his/her probationary and/or annual performance. (CR)

►eucrim ID=1104017

JSB Activity Report 2010

Eurojust's Joint Supervisory Board (JSB) has published its Activity Report for the year 2010. The JSB is an independent body tasked with monitoring the activities of Eurojust to ensure that the processing of personal data is carried out in accordance with the Eurojust Decision. The JSB also hears appeals lodged by individuals dissatisfied with Eurojust's response to their requests to exercise their rights as data subjects. However, according to the Activity Report, no appeals were lodged with the

JSB in 2010. The JSB received official accreditation to the International Conference of Data Protection and Privacy Commissioners at the 32nd International Conference held in Jerusalem from 27-29 October 2010.

Activities of the JSB in 2010 included, for instance, four meetings in The Hague, translation and publication of the approved rules of procedures of the JSB, regular contacts with Eurojust's Data Protection Officer, and the annual inspection of Eurojust. In its report for the annual inspection, the JSB expressed its concerns about Eurojust's Case Management System (CMS), which was not being fully used and about the processing of data in manual files. Furthermore, in 2010, the JSB was involved in discussions concerning the implementation of the revised Eurojust Decision, new possibilities for Eurojust's CMS, a secure connection for the exchange of information with OLAF, and Eurojust's co-operation agreements with third states. The JSB further discussed the supervision of data protection at Eurojust after the entry into force of the Lisbon Treaty, concluding that the current system of specialised supervision of data processing activities carried out by Eurojust should be maintained because it worked efficiently. At the end of 2010, the JSB launched its own webpage within the Eurojust website.

In 2010, the JSB received an allocation of €46,000 from the Eurojust budget. (CR)

►eucrim ID=1104018

Successful Action Against € 175 Million Fraud

On 27 September 2011, a joint operation between judicial authorities and police officers in eight countries that was supported and coordinated by Eurojust was successfully conducted against a worldwide criminal network committing financial fraud, forgery, money laundering, and swindling. Simultaneous house searches and arrests at 27 locations in the Netherlands, Belgium, Spain, the

UK, Turkey, Switzerland, the USA, and Dubai led to the seizure of real estate and other goods valued at millions of Euros as well as the arrests of four key members of the criminal network.

Between July 2007 and September 2011, a Dutch company, *Quality Investments B.V.*, and its international affiliates committed financial fraud, forgery, and swindling via the so-called "Ponzi" scheme. A Ponzi scheme is a fraudulent investment operation that pays returns to its investors from their own money or the money paid by subsequent investors rather than from any actual profit earned by the individual or organisation running the operation. (CR)

►eucrim ID=1104019

New Administrative Director Appointed

On 14 July 2011, Klaus Rackwitz was appointed new Administrative Director at Eurojust. After his law studies in Germany, Mr. Rackwitz worked as a judge until he took up a position as head of the division for information technology and reorganisation in the Ministry of Justice of the German state North Rhine-Westphalia. Before joining Eurojust, he worked as Senior Administrative Manager of the Prosecution Office of the ICC. Mr. Rackwitz took up his duties on 1 October 2011. (CR)

►eucrim ID=1104020

New National Members Appointed for Finland, France, and the Netherlands

On 1 August 2011, Mr. Harri Tiesmaa was appointed National Member for Finland at Eurojust. Before Mr. Tiesmaa took up his position at Eurojust, he worked as a prosecutor specialised in economic crime and served Eurojust as Seconded National Expert between September 2009 and February 2010. The former National Member for Finland, Ms. Sahavirta, will remain at Eurojust as Deputy National Member for Finland.

On 1 August 2011, Sylvie Petit-Leclair was appointed National Member for France at Eurojust, replacing the retiring National Member Gérard

Loubens. Before joining Eurojust, Ms. Petit-Leclair served as Deputy Prosecutor at the Court of Versailles and the Appeals Court of Paris.

On 1 October 2011, Marc E.F.H. van Erve was appointed National Member for the Netherlands at Eurojust, replacing the retiring former National Member Arend Vast. Before he took up his position at Eurojust, Mr. van Erve was Counsellor for Judicial Affairs and Liaison Magistrate at the Embassy of the Netherlands in Paris. (CR)

►eucrim ID=1104021

European Judicial Network

Cooperation with Two Judicial Regional Platforms Begins

In their annual meetings of May and June 2011, the Regional Judicial Platform of Sahel countries as well as the Platform Justice of the Indian Ocean Commission expressed their willingness to establish ties with the EJN. The intention to cooperate with the EJN was also included in the conclusions and recommendations of their annual meetings.

The two Judicial Regional Platforms were established by the Terrorism Prevention Branch and Organized Crime and Illicit Trafficking Branch of the United Nations Office on Drugs and Crime (UNODC), with the aim of strengthening international cooperation in criminal matters in the regions of the Sahel and the Indian Ocean. The Platforms are international cooperation networks of focal points that facilitate extradition and procedures of mutual legal assistance in criminal matters with the Member States of their Platforms. The Judicial Regional Platform of Sahel Countries comprises Burkina Faso, Mali, Mauritania, and Niger. The Judicial Regional Platform of the Indian Ocean Commission (IOC) countries includes Comoros, France (Réunion), Madagascar, Mauritius, and the Seychelles. (CR)

►eucrim ID=1104022

Frontex

New Regulation Adopted

On 10 October 2011, the Council adopted the new Regulation amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (see eucrim 1/2010, pp. 9-10, eucrim 1/2011, p. 6, and eucrim 2/2011, p. 56).

On 13 September 2011, the EP had already given its green light – by a large majority (431 in favour, 49 against, 48 abstentions) – to the compromise agreement reached between Council and Parliament in June (see eucrim 2/2011, p. 56). In order to guarantee the fundamental rights of immigrants, the EP ensured that the new Regulation contain a series of provisions to ensure respect for human rights in all Frontex actions, including the designation of a Fundamental Rights Officer and the establishment of a Consultative Forum on Fundamental Rights to assist the agency's management board. The Consultative Forum will include the EU Fundamental Rights and Asylum Support agencies, the UN High Commissioner for Refugees, and NGOs specialising in this field. Under the new Regulation, if fundamental rights are breached, a mission will be suspended or terminated. Frontex will also have to regularly report back to the EP on its fundamental rights work.

Further changes to Frontex under the new regulation include:

- The possibility to buy or lease its own equipment or to buy such equipment in co-ownership with a Member State;
- A mechanism for Member States to second national border guards and make available equipment to the agency;
- Equipment put at the disposal of the agency will be registered in centralised records of a Technical Equipment Pool (TEP);
- A co-leading role in joint operations and pilot projects;
- “European Border Guard Teams” as

the common name for teams deployed during Frontex operations;

- More detailed provisions on the operational plan;
- Reinforced tasks as regards risk analysis;
- Specific provisions on processing of personal data, including the possibility to transfer personal data to Europol or other EU law enforcement agencies on persons suspected of involvement in cross-border criminal activities, the facilitation of illegal immigration activities, or human trafficking activities;
- Reinforced tasks as regards training;
- A strengthened coordinating role as regards joint return operations;
- The possibility to launch technical assistance projects and deploy liaison officers in third countries.

The regulation enters into force 20 days after its publication in the Official Journal of the EU. (CR)

►eucrim ID=1104023

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Commission Report on Protection of Financial Interests

On 29 September 2011, the Commission presented its annual report on the protection of the EU's financial interests. The overall financial impact of irregularities reported by the Member States in 2010 is estimated at €1.8 billion compared to €1.4 billion in 2009. In this context, irregularity means any infringement of an EU provision by an economic operator that has, or would have, the effect of prejudicing the EU's financial interests. All irregularities involving more than €10,000 in EU resources must be reported to the Commission. The financial impact of suspected fraud in expenditure has increased from an estimated €180 million in 2009 to an estimated €478 million in 2010.

The report shows that, due to the implementation of an improved reporting system (Irregularities Management System), Member States report irregularities with greater speed and at a higher volume than in 2009. The Commission notes that some Member States (France, Germany, Spain, and UK) consistently report very low suspected fraud rates and asks these Member States to present more information on their national control systems. Apart from that, the Commission plans to analyse the national irregularity and anti-fraud control systems and present the results in the 2011 annual report.

Following the analysis, the Commission highlights some measures taken in 2010 to protect the EU's financial interests, e.g., successful joint customs operations like "Sirocco" (see eucrim 4/2010, p. 135) or agreements to fight the illicit trade in tobacco (see eucrim 4/2010, p. 135 and eucrim 3/2010, p. 90). New anti-fraud policy initiatives include the Commission Anti-Fraud Strategy (CAFS) and the OLAF reform proposal (see eucrim 2/2011, p. 54). (ST)

►eucrim ID=1104024

Commission Steps Up in Fight Against Market Abuse

On 20 October 2011, the Commission proposed a new Directive on minimum criminal sanctions for insider dealing and market manipulation. This is the first time that the Commission is making use of its new power to enforce an EU policy through criminal sanctions as established by the Lisbon Treaty. The new Directive requires the Member States to introduce criminal sanctions for insider dealing, market manipulation, as well as for inciting, aiding, and abetting market abuse. According to the proposal, insider trading means that a person who has price-sensitive inside information trades in related financial instruments. The artificial manipulation of prices of financial instruments by, *inter alia*, spreading false or misleading information and by conducting trades in related

instruments to profit from the manipulation is defined as market manipulation. The proposed Directive excludes certain types of transactions from its scope, e.g., buybacks and stabilisation programmes, monetary policy and debt management activities, and some activities concerning emission allowances.

To complement the proposed Directive, the Commission also proposed a Regulation on insider dealing and market manipulation. The proposed Regulation would serve as an update and reinforcement to the existing regulatory framework, namely the Market Abuse Directive (2003/6/EC). The proposal extends the scope to financial instruments traded only on new platforms and over the counter (OTC) and to multilateral trading facilities (MTFs). The proposal includes a number of measures to ensure that regulators have access to relevant information, e.g., by extending the current reporting of suspicious transactions to unexecuted orders and suspicious OTC transactions or by granting authorities the right to obtain telephone and data traffic records from operators as well as granting access to private documents or premises. (ST)

►eucrim ID=1104025

MEPs Call for Better Protection of Public Funds

On 29 September 2011, the EP's Civil Liberties Committee approved a resolution asking the Commission to draft rules ensuring that the use of EU funds is fully traceable by public authorities, citizens, and the media. MEPs see a need for stronger protection of public funds from misuse by mafia-style organisations. The text specifically asks for more attention to be paid to local authorities, which "are more liable to infiltration by organised crime." The Committee also endorses setting up a special EP committee focusing on the misuse of public funds by and the infiltration of the public sector and the financial system through cross-border criminal organisations. (ST)

►eucrim ID=1104026

Corruption

Commission Sets Up Advisory Group on Corruption

On 28 September 2011, the Commission published a decision to set up a group of experts on corruption. The group shall advise, help, and assist the Commission in all matters related to the EU Anti-Corruption Report (see eucrim 3/2011, p. 104), anti-corruption policies, the gathering of relevant information, as well as the identification of necessary measures and actions to effectively fight corruption throughout the EU. The group is to be composed of 17 members who will each be appointed for a period of 4 years. (ST)

►eucrim ID=1104027

MEPs Welcome Plans for Anti-Corruption Report

During its meeting on 31 August 2011, the EP's Civil Liberties Committee discussed the Commission's plans to set up an EU Anti-Corruption Report (see eucrim 3/2011, p. 104). MEPs welcomed the Commission's initiative and agreed that more political commitment in each Member State is needed to effectively fight corruption. Since the report will be issued every two years only and the first report will not be published before 2013, MEPs discussed the use of interim reports to focus on the biggest problems and earlier publication of the first report. During the discussion, some of the major issues raised concern the need for better protection of whistleblowers, speedier investigations, and harmonised rules regarding bribery of state officials in third countries. (ST)

►eucrim ID=1104028

Organised Crime

Council and Commission Take on Fight Against New Synthetic Drugs

Following its announcement to present more detailed plans on how to fight new

synthetic drugs (see eucrim 3/2011, p. 105), the Commission has put forward a new approach. On 25 October 2011, the Commission presented key points of their new strategy, including stronger EU legislation on new psychoactive substances, new EU legislation to target cross-border trafficking in drugs by means of criminal law, and new EU laws to strengthen control over chemicals used for drug production.

Following the Commission's approach, on 27 October 2011 the Council adopted a European pact against synthetic drugs. The pact focuses on the production of synthetic drugs, trafficking in synthetic drugs, the fight against new psychoactive substances, and better training of law enforcement authorities. The text calls for improvements in the exchange of information and closer cooperation between EU agencies and the Member States. Also, new substances that might be harmful must be subject to a risk assessment and be swiftly eliminated from legal circulation. Member States are encouraged to set up joint investigation teams and cooperate with Europol and Eurojust to track, freeze, and confiscate proceeds of drug-related crime. (ST)

➤eucrim ID=1104029

EP Resolution on Organised Crime in the EU

On 25 October 2011, the EP adopted a resolution on countering organised crime in the EU.

Inter alia, the text calls on the Commission to submit new legislative proposals for improving the EU's legislative framework, e.g., a proposal for a Directive which contains a clear definition, key features, and new types of "organised crime" as well as a proposal for a Directive on the procedure for the seizure and confiscation of the proceeds of crime. Among other measures, the Commission is also asked to strengthen the role and competences of Asset Recovery Offices, draw up a study on the investigative practices

employed in the Member States, and establish a European fund to protect and assist victims of organised crime and court witnesses.

The EP itself intends to set up a special committee on the spread of criminal organisations that operate across borders. With respect to the Member States, the text recommends that Member States strengthen their judicial authorities and police forces, pursue a proactive approach towards investigation, and draw up national plans to combat organised crime. The EP also suggests effectively implementing the European Arrest Warrant in all Member States, regularly updating agreements on judicial and investigative cooperation with non-EU countries, and introducing an appropriate system of penalties and suitable detention provisions for offences relating to organised crime. (ST)

➤eucrim ID=1104030

Annual Forum on Combating Corruption in the EU 2012

Protecting the European Union's financial interests: internal and external auditing

ERA, Trier, Germany, 16-17 February 2012

This sixth Annual Forum on Combating Corruption in the EU, co-financed by OLAF, will gather approximately one hundred lawyers to debate the topic of internal and external auditing in the context of the protection of the EU budget.

The first session will be dedicated to a general overview of the European legal framework for combating corruption, highlighting the recent EU anti-corruption and anti-fraud strategy.

The focus will then move towards auditing activities. Public expenditure is subject to several means of control; therefore, it is vital to examine the role and the function of different EU and national bodies in order to guarantee an effective protection of the European Union budget against fraud or irregularities.

Who are the main EU players in the field? What are the main difficulties in establishing valid evidence on damages resulting from fraud and irregularities? What is the function of OLAF in this respect? Is forensic audit a necessary and appropriate tool in order to determine whether damages occurred?

The Forum will highlight the importance of a coordinated approach by internal and external EU control bodies in order to prevent fraud and irregularities and to better protect the financial interests of the European Union. The role, the power (and the limits) of control bodies such as the European Court of Auditors, OLAF, and the European Commission in complex cases will be scrutinised.

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

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

Civil Liberties Committee Tackles Homemade Explosives

On 4 October 2011, the EP's Civil Liberties Committee approved a draft Regulation to restrict the public's access to chemicals that can be used to make homemade explosives. The text includes restrictions on the sale of products containing certain chemicals, e.g., fertilisers or pool cleaners, if these chemicals exceed a certain concentration. In case of legitimate need to use these chemicals in higher concentrations, customers will be able to obtain a license to purchase these products. (ST)

➤eucrim ID=1104031

Organised Criminal Groups Engage in Illegal Waste Dumping

In June 2011, Europol published an OC-SCAN Policy Brief regarding the involvement of organised crime groups in illegal waste trafficking and dis-

posal. Europol identified a significant increase in illegal waste shipments operated by criminals and organised criminal groups. The “low risk-high profit” margin leads to substantial profits of an estimated €4 billion per year for some groups. To effectively counter the problem, Europol recommends the exchange of best practices between national experts involved in combating illegal waste management through EnviCrimeNet (see eucrim 3/2011, p. 106) and close cooperation between all authorities involved in waste transport control operations as well as visits to suspected illegal waste disposal sites. (ST)

►eucrim ID=1104032

Environmental Crime

EU and US Strengthen Cooperation to Jointly Fight Illegal Fishing

On 7 September 2011, the EU and the US signed a joint statement on efforts to combat illegal, unreported, and unregulated (IUU) fishing. IUU fishing leads to an estimated annual loss of up to \$23 billion for legal fishermen and coastal communities.

The statement expresses the political will to cooperate on all levels in order to ensure that only legally caught seafood is imported into their territories, e.g., by setting up a new system to exchange information on IUU activities. (ST)

►eucrim ID=1104033

Member States Face Court Proceedings over Breach of EU Environmental Legislation

The Commission is taking several Member States to the ECJ for not complying with EU environmental legislation despite having received warnings from the Commission. According to a new policy in force since January 2011, the Commission may now ask for immediate financial penalties to be imposed upon the first referral to court if

the Member State fails to transpose EU legislation into national law by the required deadline.

■ On 29 September 2011, the Commission announced that it would refer Spain to the ECJ over failing to fully transpose EU water legislation. By the end of 2003, Member States had had to bring into force the necessary laws, regulations, and administrative provisions to comply with the Water Framework Directive (2000/60/EC). The Spanish transposition still contains several shortcomings, especially regarding obligations related to river basin management plans. (ST)

►eucrim ID=1104034

■ On 27 October 2011, the Commission decided to take Luxembourg back to court over poor handling of urban waste water. In November 2006, the ECJ had already once decided that Luxembourg was failing its obligations originating from the Urban Waste Water Directive (91/272/EEC). The Commission is now asking the Court to impose fines, suggesting a lump sum of € 11.340 and a daily penalty payment of € 1248 until the obligations are fulfilled. (ST)

►eucrim ID=1104035

Sexual Violence

Council Adopts Directive on Fighting the Sexual Exploitation of Children

On 27 October 2011, the EP adopted a legislative resolution on the proposal for a Directive by the EP and the Council on combating the sexual abuse and sexual exploitation of children as well as child pornography, repealing Framework Decision 2004/68/JHA (see eucrim 3/2011, pp 107, 108; eucrim 1/2011, p. 13; eucrim 1/2010, p. 12). The amendments adopted in the plenary are the result of a compromise negotiated between the EP and the Council. The amendments mainly concern clarifications, more protection for child victims, and provisions on prevention measures. The Council

adopted the Directive on 15 November 2011 and called upon the Member States to ensure the rapid adoption of national measures to comply with the Directive during the JHA Council of 13-14 December 2011. (ST)

►eucrim ID=1104036

Racism and Xenophobia / Violent Extremism

Radicalisation Awareness Network Launched

On 9 September 2011, Cecilia Malmström, Commissioner for Home Affairs, introduced the Radicalisation Awareness Network (RAN). The network is being set up to counter violent extremism and the recruitment of individuals for terrorist activities. It aims at supporting national efforts to prevent violent radicalisation, identify good practices, and promote the exchange of information. RAN will be supported by an online forum as well as EU-wide conferences. It will bring together social workers, religious leaders, youth leaders, policemen, researchers, and others involved in countering radicalisation. (ST)

►eucrim ID=1104037

Procedural Criminal Law

Procedural Safeguards

Right of Access to a Lawyer – Reservations and Remaining Points of Discussion

After adopting the draft text in July 2011 for a Directive on the right of access to a lawyer and the right to communicate with consular authorities and with a third person upon arrest, the Commission presented this proposal to the Member States' ministers during the JHA Council of 22-23 September 2011

(see also eucrim 3/2011, p. 108). During this Council meeting, the scope of the draft Directive was the main point of discussion.

Before this meeting, however, Belgium, France, Ireland, the Netherlands, and the UK had expressed their reservations about the proposal in a note sent to all delegations. Their concerns focus on four points:

- Firstly, the five States are concerned about a lack of balance between the right of access to lawyer, on the one hand, and, on the other, the need to ensure the effectiveness of Member State legal systems. They anticipate a delay in investigations if the presence of a lawyer is mandated for every investigative measure.

- Secondly, they point out that the proposal goes further than is required by the ECHR. The precise relation between the proposed Directive and the ECHR as well as the impact of the Directive remains unclear however.

- Thirdly, the different ways in which Member States have implemented the right to a fair trial in their national criminal justice systems, should be taken into consideration.

- Fourthly, the costs and implications of the Directive for the Member States' legal aid systems need to be studied.

These matters motivated the Council's conclusion to urge its preparatory bodies to continue discussions on the proposed Directive. The UK and Ireland indicated they would not yet use their right to opt-in but would cooperate on drafting the Directive.

On 27-28 October 2011, the state of play regarding the proposed Directive was presented to the JHA Council. The Polish Presidency summarised the three most important topics that formed part of the ongoing discussion since the last JHA Council on 22-23 September 2011:

- Firstly, with regard to the scope of the Directive, two options are open: a guarantee approach, in which public authorities would have to ensure the actual assistance of a lawyer, or an opportunity

Criminal Defence in the Context of European Criminal Justice and Judicial Cooperation in the EU

Seminars are scheduled to take place in February 2012, April 2012, June 2012, and September 2012 in Edinburgh, Brussels, Prague, and Barcelona.

This EU-wide project offers defence counsel training on EU criminal justice instruments and judicial cooperation. While most training projects at the EU level in recent years have exclusively addressed judges and prosecutors, this project closes the gap by offering training to defence lawyers in the EU Member States. The project also feeds into the step-by-step approach agreed on by the EU regarding the establishment of certain procedural safeguards by presenting the approach itself and discussing the proposed safeguards with defence lawyers throughout the EU.

The impact of the developing area of European criminal law on the daily work of the defence in the EU Member States, especially with regard to the increasing use of instruments based on the principle of mutual recognition, forms the main content of training.

At the heart of the training are problems and questions arising from the perspective of the defence with regard to cross-border cases that involve investigative measures where EU instruments are already in force – namely the European Arrest Warrant and freezing and confiscation orders – or planned, especially in the field of obtaining evidence across internal EU borders.

The programme offers a mixture of training methods, varying from lectures to interactive workshops. In order to guarantee valuable practical training, the topics will be dealt with by means of "national" workshops. In these workshops, a national expert will present and analyse the topics and conducts a case study based on the individual national criminal justice system. In this way, participants will benefit from training that is tailor-made to deal with the questions and problems arising in their daily practice when dealing with cross-border cases. In order to benefit from different perspectives, the groups of experts conducting the seminars consists of judges, prosecutors, and academics with longstanding experience in judicial cooperation in criminal matters in the EU.

The project consists of six seminars conducted throughout the EU. Each one targets different groups of selected Member States (approx. 25 participants from 4-5 Member States per seminar). The 1,5 day training runs from noon on Friday to late afternoon on Saturday.

The project is co-financed by the European Commission under the Criminal Justice Programme. It is supported by the European Criminal Bar Association (ECBA), the Czech Bar Association, the Délégation des barreaux de France (DBF), the Finnish Bar Association, the Österreichischer Rechtsanwaltskammertag (Austrian Bar), the Scottish Faculty of Advocates, and the Barcelona Bar Association.

The number of seminar places is limited (5-10 places/national group/seminar; 25 places/seminar). They will be allocated among the eligible applicants on a first-come, first-serve basis.

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

approach, in which the suspect or the accused has the right to a lawyer's assistance but does not necessarily exercise this right.

- The second topic is strongly related to scope, as it concerns the situations

in which the right to the assistance of a lawyer should be granted. There is consensus that this right should be given in all situations in which a suspect or accused is the subject of criminal proceedings before a court and in which he has

been arrested. However, with regard to other situations, such as a police officer stopping a person on the street to ask questions, agreement has not yet been reached.

■ The third topic concerns the evidential value of statements that are not made in the presence of a lawyer. The Commission proposed that statements or evidence obtained in breach of the right of access to a lawyer may not be used as evidence against the person concerned at any stage of the procedure. Still, there would be a margin of discretion where the use of such evidence would not prejudice the rights of the defence. Most Member States do not agree with this and prefer a court examination of the value of such statements.

The Commission and the Member States will continue to discuss these three issues during the coming months in order to reach agreement on the proposed Directive. (EDB)

►eucrim ID=1104038

Landmark Decision on Jurisdiction for Defamation by Internet

On 25 October 2011, the Court of Justice ruled on the question of jurisdiction in cases involving infringement of personality rights by means of the Internet. When defamation is committed by making statements in a written newspaper distributed in several Member States, Regulation (EC) No 44/2001 allows the victim to bring action before either the courts of the Member State where the publisher is established or the Member State in which the newspapers were distributed.

The Federal Court of Justice of Germany (Bundesgerichtshof) and the Paris Regional Court in France (Tribunal de grande instance de Paris) asked the ECJ whether this Regulation is also applicable if defamatory comments are published on the Internet. In two joined cases (C-509/09 and C-161/10), the ECJ decided that victims can bring actions before courts in the Member State in which the victim has his centre of inter-

ests, which, according to the ECJ corresponds to his or her habitual residence. This choice is motivated by the impact that the material placed online is likely to have on an individual's personality rights, and this may best be assessed by the court of the jurisdiction where the victim resides.

However, in analogy to the aforementioned Regulation, the Court stated that the victim can opt to bring the action before the courts of each Member State in the jurisdiction where the online content is or has been accessible. This can be chosen instead of an action for liability in respect of all of the damage. Similarly, the victim may also bring an action, in respect of all of the damage, before the courts of the Member State in which the publisher of the online content is established. (EDB)

►eucrim ID=1104039

Data Protection

Commission Asks Germany and Romania to Transpose Data Retention Directive

Over the past two years, the Constitutional Courts of Germany and Romania both ruled that their national laws implementing Directive 2006/24/EC, also known as the Data Retention Directive, are unconstitutional (see eucrim 4/2009, pp. 136-137). As a consequence, both national laws were annulled. So far, both Member States have not yet adopted new implementation legislation on data retention.

The Data Retention Directive should have been transposed into national law by 15 September 2007. However, Member States had the option of postponing the retention of communications data relating to Internet access, Internet telephone calls, and Internet e-mail until 15 March 2009. As both Germany and Romania still do not have laws in place today and therefore failed to ensure full compliance with the EU rules on data re-

tention, the Commission sent a letter of formal notice to both Member States on 17 June 2011.

Germany sent a reply on 16 August 2011, informing the Commission that the Ministry of Justice has developed a proposal for implementation of the Directive that is currently at the stage of inter-ministerial consultation. The Romanian authorities also confirmed that negotiations on a new national law are still going on at the inter-ministerial level. Within two months after the date of the formal notice, both Member States must take action on ensuring national implementation legislation on data retention. If they fail to comply, the Commission can refer both States to the ECJ in accordance with Art. 258 TFEU. (EDB)

►eucrim ID=1104040

New PNR Agreements with US and Australia

On 29 September 2011 the new Agreement between the EU and Australia on the processing and transfer of PNR data by air carriers to the Australian Customs and Border Protection Service was signed.

The new Agreement will replace the existing Agreement that has been provisionally applied since 2008. This Agreement was only applied on a provisional basis because it was signed subject to its conclusion at a later date (see also eucrim 1/2010, pp. 13-14). Due to the entry into force of the Lisbon Treaty, the conclusion of the Agreement had to be approved by the EP. On 19 April 2010, the EP voted in favour of postponing its approval in order to give the Commission time to work on a "PNR package" setting out the requirements for new PNR Agreements with the USA, Canada, and Australia. In January 2011, the Commission presented such a proposal for an EU PNR system that protects against terrorist offences and serious crime (see eucrim 1/2011, p. 15).

Following this proposal and the finalisation of the negotiations with Australia on the new PNR Agreement, it has now

been signed. In a next step, the EP will be asked to give its consent before it can be concluded. Negotiations with Canada are currently in progress.

The PNR Agreement with the US has been drafted and approved by the Council on 14 December 2011. The negotiations that started in December 2010 (see eucrim 1/2011, pp. 14-15) resulted in a new Agreement that contains a detailed description of what purposes PNR will be used for, including the prevention, detection, investigation and prosecution of terrorism and certain transnational crimes. The latter are further defined by the text of the Agreement as crimes punishable by 3 years of imprisonment or more under US law and committed in more than one country or committed in one country provided that links exist to other countries. Exceptions are made for using PNR on a case-by-case basis for the protection of vital interests of passengers, e.g., to protect against communicable diseases, or if ordered by a US court.

The transfer of PNR data runs by the so-called “push method” meaning that air carriers send data to the US and that US authorities will not access the air carriers’ reservation systems to extract data themselves. Exceptions to this transfer method are only allowed in the case of technical failures or urgency. A new element in the EU-US PNR Agreement is the depersonalisation of data that are retained. PNR data will be stripped from their personally identifiable information after remaining in a database for 6 months. The total time that PNR data can be stored is 15 years.

With regard to the protection of PNR data, the Agreement provides in the possibility for passengers to obtain access to their PNR, to request corrections if necessary and to seek administrative and judicial redress in accordance with US law. In addition, in order to prevent profiling, authorities are not allowed to take decisions adversely affecting passengers based only on automatic processing of data. Independent supervision of the

processing of the data is provided for by the Chief Privacy Officer, the Department of Homeland Security Office of Inspector General, the US Government Accountability Office and the US Congress.

After the Council’s approval, the EP needs to give its consent to this new Agreement before it can enter into force. When it is adopted, the new Agreement will have a duration of 7 years and will be automatically renewable. (EDB)

►eucrim ID=1104041

EU-US Discussions on Data Protection

On 21 September 2011, the US Attorney General Eric Holder visited the EP to discuss matters of data protection. Given the divergent approaches of the EU and the USA to data protection, the negotiations have been challenging on agreements concerning the exchange of PNR (see eucrim 2/2011, p. 62) and financial messaging data in the Agreement on the Terrorist Finance Tracking Programme (see eucrim 3/2011, p. 109).

Now that the PNR Agreement is drafted, a general agreement covering data protection in exchanges of personal data between the EU and the US remains. The approval of the EP is necessary for this agreement to be concluded.

Attorney General Holder encouraged the members of the EP to focus on a pragmatic approach and assured them that the US administration has a more fundamental rights-oriented approach than before. (EDB)

►eucrim ID=1104042

Regulation on Large-Scale IT Systems Agency Signed

The Regulation on the establishment of a European agency for the operational management of large-scale IT systems was adopted by the Council based on a compromise text with the EP on 12 September 2011 (see also eucrim 3/2011, p. 110).

The large-scale IT systems that this agency will manage include the second generation Schengen Information Sys-

tem (SIS II) that is currently still under construction, the Visa Information System (VIS), and EURODAC. In the future, other databases that may be created in the area of freedom, security and justice can also be included after a decision by the Council and the EP.

The agency will have its main seat in Tallinn, Estonia and should be operational in the summer of 2012. (EDB)

►eucrim ID=1104043

Victim Protection

Victim’s Rights Directive – State of Play

During the JHA Council of 27-28 October 2011, the Directive on the rights, support and protection of victims of crime was discussed. During the debate, the Member States focused on two issues.

The first issue concerned the scope of certain rights, more specifically the right to information, the right to interpretation and translation, and the right to reimbursement of expenses. With regard to these rights, the majority of Member States is in favour of granting these rights in accordance with the role of victims in the relevant justice system. Other Member States fear impeding court proceedings and creating administrative burdens by choosing this approach.

Secondly, with regard to the criteria for identifying vulnerable victims, the Council agreed to always consider children vulnerable victims. Furthermore, Member States reached consensus on not including an indicative list of vulnerable victims in the Directive but deciding on a case-by-case basis. In this context, it was mentioned that the Directive should not affect more far-reaching provisions contained in other EU acts which address the specific needs of vulnerable victims such as the Directive on trafficking in human beings. Discussions in the Council will continue along these lines. (EDB)

►eucrim ID=1104044

UK and Ireland Join Discussions on Victim's Rights Directive

On 19 and 26 August 2011, Ireland and the UK confirmed their participation in the negotiations for a Directive on the rights, support and protection of victims of crime as well as the proposal for a Regulation on mutual recognition of protection measures in civil matters. Both proposals were presented by the Commission on 18 May 2011 (see also eucrim 2/2011, p. 64) and ensure minimum standards for victims of criminal offences in the EU Member States. (EDB)

►eucrim ID=1104045

European Protection Order – Compromise Text

The proposal for a Directive on the European Protection Order (see also eucrim 2/2011, pp. 76-78 and eucrim 1/2011, p. 15) was discussed by the Presidency, the Council, and the EP, resulting in a compromise text that was presented at the JHA Council of 22-23 September 2011.

The EPO in criminal matters aims at protecting victims of criminal offences, even after they move to another Member State. The agreed text states that a victim can request cross-border protection, after which the State of origin will issue an EPO and forward it to the State that the victim is moving to. An EPO may be issued for any crime but only if the initial State bans the aggressor from places where the victim resided or which the victim visited, or if restrictions are imposed on approaches by the aggressor or contact with the victim. The aggressor has the right to be heard and challenge the EPO. Due to an amendment of the EP, the EPO was extended to include not only the victim but also relatives of the victim.

The agreed text encompasses the EPO in criminal matters and will be complemented by separate legislation for civil matters. Formal adoption of the EPO in criminal matters is pending. (EDB)

►eucrim ID=1104046

Freezing of Assets

Asset Freeze Lifted for Libyan and Ivory Coast Entities, Increased for Syria

Due to the developments in Libya, Catherine Ashton, High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission, announced on 1 September 2011 that the EU's asset freeze on Libyan ports, energy, and banking sectors had been lifted. According to the High Representative, the EU now needs to provide resources to the interim government as well as the Libyan people in order to help make the economy function again.

A similar decision was taken on 22 September for 13 persons from the Ivory Coast whose assets had been frozen by EU decisions.

With regard to the situation in Syria, the Council added four more persons and three entities to the list of those targeted by an asset freeze and travel ban on 2 September 2011. (EDB)

►eucrim ID=1104047

Cooperation

Judicial Cooperation

Commission Communication and Council Conclusions on Judicial Training

In its communication of 13 September 2011 entitled "Building trust in EU wide justice: a new dimension to European judicial training," the Commission has set a clear target for increasing the numbers of judges, prosecutors, lawyers and other legal practitioners trained in European law, thus aiming to ensure that half of all legal practitioners in the European Union – approximately 700,000 – participate in some form of European judicial training by the year 2020.

On the basis of this communication, during its meeting of 27-28 October 2011, the JHA Council adopted conclu-

sions on European judicial training. In the conclusions, the Council welcomes the Commission's communication and underlines the contribution that European judicial training could make towards the development of a genuine European judicial culture. The Council strongly supports further efforts to train judges, prosecutors, and other judicial staff in European law. It also welcomes the facilitation of training of other legal practitioners, including bailiffs, notaries, and advocates. Nevertheless, the Council also stresses that training should not jeopardise the independence of the legal and judicial professions. It recommends making full use of existing structures and networks at the European and national levels. Training on the Union *acquis* shall be made systematically available for legal practitioners. Furthermore, legal practitioners, particularly judges and prosecutors, shall have the possibility to benefit from at least one week of training on the Union *acquis* and instruments during their career. According to the Council, national professional organisations of legal practitioners shall be encouraged to promote participation in training activities among their members. The national bodies in charge of training judges, prosecutors, and judicial staff are asked to expand their training in EU law and in national legal systems. Even though information on currently available training in EU law and on the number of practitioners trained by national judicial training structures is to be shared with the Commission annually, if possible through the European Judicial Training Network (EJTN), national legal professional organisations shall be encouraged to inform the Commission of available trainings on EU law and on the number of practitioners trained through their European-level organisations.

The Commission is asked to identify and assess solutions at the European level, including European training schemes for all professionals involved and to ad-

vance the judicial training section of the European e-Justice portal (see eucrim 3/2010, p. 100). Furthermore, the Commission shall further build on and support the existing structures, actors, and networks, whether national or European. It should also simplify administrative procedures regarding access to European financial programmes and, within them, make additional funds available for European judicial training. Lastly, the Commission is asked to initiate a new exchange programme for newly appointed judges and prosecutors. (CR)

►eucrim ID=1104048

Network for Legislative Cooperation Reviewed

At its meeting of 27-28 October 2011, the JHA Council adopted a report on the application of the Resolution on the establishment of a network for legislative cooperation between the Ministries of Justice of the European Union (adopted on 28 November 2008).

The network aims at promoting a better understanding of the laws of the other Member States, with the goal of improving the exchange of information on legislation in force, on judicial and legal systems, and on major legal reform projects, particularly in the fields of civil and criminal law.

As the resolution requires the Council to review its application three years after its adoption at the latest, the Polish Presidency had prepared a draft report in cooperation with the French Ministry of Justice, which currently acts as the network's administrator.

According to the report, 25 Member States designated national correspondents in application of the resolution, and provided the administrator with the required contact information. Since its establishment in 2008, three meetings were organised. Internal guidelines on practical arrangements for the operation of the network and a website were set up. According to the annual activity reports of the administrator, the exchange of information within the network is

steadily increasing (from 113 requests for information and 634 replies in the first year to 129 requests and 797 replies in the second year). Nevertheless, more Member States could provide replies to requests.

In summary, the report sees the network as useful tool to foster the exchange of information on legal systems, to improve the transposition of EU legal instruments into national systems, and to facilitate major legal reforms in Member States.

In order to further improve the functioning of the network, the report suggests considering new internal guidelines or, possibly, a new resolution that would ensure that requests are drafted in a clearer and more specific way. They are to provide reasonable timeframes for replies and foresee solutions for urgent cases. Although the provision of replies should remain voluntary, the new framework should ensure that more Member States provide replies to requests. Furthermore, Member States should reflect on ways to facilitate the work of national correspondents, envisage publication of the network's comparative law studies, and integrate the network's website into the European e-Justice portal. Ultimately, the suggestion was made to enhance the stability of the network and its efficient operation. Solid financing as well as solid legal footing for the day-to-day operation of the network should be considered. (CR)

►eucrim ID=1104049

European Arrest Warrant

Transitional Provisions Regarding the EAW

Under Art. 32 of the European Arrest Warrant Framework Decision (EAW), by the extradition system applicable before 1 January 2004, Member States had the possibility to make a statement indicating that, as executing Member States, they would continue govern-

ing requests relating to acts committed before a specific date but no later than 7 August 2002.

Five Member States (Austria, Czech Republic, France, Italy, and Luxembourg) made such statements and, as executing states, apply the extradition system that was in place before 1 January 2004 to acts committed before a date set by them and prior to 7 August 2002.

However, various difficulties can arise in respect of Art. 32 EAW statements. For instance, in cases where the act(s) were committed before 7 August 2002 but where the state of the location of the person sought is unknown, the issuing state can only ascertain that the executing state has made a statement under Art. 32 EAW after checking the Schengen Information System. Hence, withdrawal of the statements would have several advantages: not only would it create legal certainty within the EU for both Member States and requested persons as regards the applicable system, but practitioners could also rely on one procedure without having to check its applicability. Furthermore, given the passage of time since the cut-off date of 7 August 2002 and the fact that prescription forms an optional ground for refusal under Art. 4.4 EAW, the need for an Art. 32 EAW statement should by now have been considerably reduced.

Therefore, the Commission services are now considering asking the Member States involved to consider withdrawing their declarations under Art. 32 EAW. (CR)

►eucrim ID=1104050

Law Enforcement Cooperation

Council Adopts Conclusions and Report on the Swedish Framework Decision

On its meeting of 27-28 October 2011, the JHA Council adopted conclusions regarding the implementation of Framework Decision 2006/9601 on simplifying the exchange of information and

intelligence between law enforcement authorities of the Member States of the European Union – the so-called “Swedish framework decision” (see eucrim 3-4/2006, pp. 68-69). It also endorsed the report on Member States’ compliance with the provisions of this Framework Decision.

According to the report, almost two thirds of the Member States had transposed the Swedish Framework Decision into domestic legislation by 31 December 2010. Member States that have not met the transposition deadline indicated lengthy national parliamentary procedures as the main reason for non-compliance. As to Member States’ compliance with the provisions of the Framework Decision, the report finds that the provisions on the notification of bilateral and multilateral cooperation agreements, on National Contact Points, and on competent authorities were fulfilled. However, the majority of Member States stated that they do not draw on the Framework Decision on a regular basis to request information. In particular, the forms annexed to the Framework Decision for requesting and submitting information are not generally used, as this procedure is considered complex and cumbersome.

In summary, the Commission paper concludes that the Framework Decision has not yet reached its full potential.

Hence, in its conclusions, the Council invites those Member States that have not yet done so to finalise the implementation as soon as possible and, until then, to ensure that information is made available in the spirit of the Framework Decision. All Member States are invited to utilise up-to-date IT tools, update national follow-up routines, and make every effort to respond to urgent requests for information and intelligence within eight hours. The Commission is asked to examine the usefulness of the Framework Decision in the exchange of supplementary information (post-hit) on the basis of the “Prüm Decisions” (Decisions 2008/615/JHA and 2008/616/JHA on the stepping up of cross-border

cooperation) in its draft Communication on the European Information Exchange Model. (CR)

►eucrim ID=1104051

First COSI Proceedings Report

In its meeting of 22-23 September 2011, the JHA Council transmitted to the EP and national parliaments the report on the proceedings of COSI (see eucrim 4/2009, p. 123) for the period January 2010 to June 2011.

According to the report, COSI has met nine times since its establishment in February 2010, involving representatives from Europol, Eurojust, Frontex, and CEPOL. The initial phase of the COSI proceedings was marked by the elaboration of its role and tasks and the setting-up of a work programme containing 14 themes, e.g.:

- The EU policy cycle;
- The Internal Security Strategy (see eucrim 3/2010, p. 92);
- Cooperation in addressing organised crime;
- Coordination mechanism for joint operations;
- Coordination between agencies;
- Reinforcing the protection of external borders and combating illegal immigration, etc.

Furthermore, according to the report, COSI has been active in establishing and improving a number of mechanisms to improve the planning and coordination of tasks in the field of internal security, e.g., the Commission’s EU internal security strategy and the EU policy cycle for organised and serious international crime. Other advancements are a working method for the implementation of measures to improve interagency cooperation and a working method for closer cooperation and coordination in the field of EU security. In the given period, COSI also worked on implementation of the established mechanisms. Hence, it worked on the implementation of the different measures for the EU policy cycle for organised and serious international crime. It also produced a policy

advisory document on the basis of the 2011 EU Organised Crime Threat Assessment (OCTA) that shall assist the committee in drafting conclusions to the Council, setting the EU’s new priorities for the fight against organised crime between 2011 and 2013. COSI has taken over the management and follow-up of the COSPOL projects (Comprehensive Operational Strategic Planning for the Police, set up by the European Police Chiefs Task Force) and it has established three project groups for implementation of the European Pact to combat international drug trafficking. Finally, COSI streamlined the discussion of certain co-operation activities in the fight against organised crime originating in West Africa, reached agreement on its involvement in the implementation of five measures set out in the Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration, and discussed a report on the judicial dimension of the fight against terrorism. (CR)

►eucrim ID=1104052

Prüm Decision: DNA Data Exchange with Latvia

In its meeting of 27-28 October 2011, the JHA Council adopted a decision on the launch of an automated data exchange with regard to DNA data pursuant to the Prüm Decision 2008/615/JHA (see eucrim 1-2/2008, pp. 35-36) with Latvia. Hence, Latvia is now entitled to automatically search and compare DNA profiles for the investigation of criminal offences. (CR)

►eucrim ID=1104053

List of National Contact Points of KYNOPOL Published

In accordance with a Council Resolution on the use of police dogs in the European Union (see eucrim 2/2011, p. 65), a list of national contact points to participate in the activities of KYNOPOL has been compiled that includes most Member States. (CR)

►eucrim ID=1104054



Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Factsheets On Human Rights Related Jurisprudence

On 18 October 2011, the ECtHR launched factsheets in English and French on all countries that have ratified the Convention in order to make its work and case law better known. These “country profiles” provide information on human rights-related jurisprudence of the Court regarding the respective countries, including noteworthy judgments, pending cases, and statistics for 2008-2011.

The factsheets can be found on the Court’s website.

►eucrim ID=1104055

Statement Regarding the Immunities of the Judges of the ECtHR

On 19 November 2011, Sir Nicolas Bratza, the President of the Court, issued a statement regarding the immunities of the judges of the ECtHR. The statement was issued in response to a search carried out at the home of a Romanian judge by the Romanian prosecuting authorities as part of an inquiry concerning allegations about his wife.

The respective regulations on immunities are provided for in the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe and Art. 51 of the ECHR.

The statement clarifies that immuni-

ties are essential for judicial independence under the rule of law. They are enjoyed by judges of every international court and also extend to their spouses and minor children. In the context of the Convention, they should allow the judges to carry out their duties in accordance with the independence and impartiality required of them. In concrete terms, Art. 4 of the Sixth Protocol allows only the plenary Court to waive a judge’s immunity. At the time of the statement, however, no request for a waiver of immunity had been presented to the Court.

►eucrim ID=1104056

Other Human Rights Issues

Human Rights Commissioner Publishes 2nd Quarterly Activity Report for 2011

On 7 September 2011, Thomas Hammarberg, CoE Commissioner for Human Rights (hereinafter: the Commissioner), published his second Quarterly Activity Report for 2011 (for a summary of the first Quarterly Report, see eucrim 3/2011, p. 116). It contains an overview of the central themes of the Commissioner’s most recent work and the visits he made as well as a summary of meetings attended and of his work related to the ECtHR. The latter follows up on the Interlaken Declaration (see eucrim 4/2009, p. 147) in order to encourage the prompt implementation of judgements issued by the ECtHR. In this context, the Commissioner addressed primarily Georgia regarding the right to a fair trial.

The Commissioner underlined the need for clear recognition of the presumption of innocence and the need to ensure adequate time and facilities for the defence. Furthermore, the right to an adversarial trial and the equality of arms need to be respected by the authorities as established by the case law of the Court.

Additionally, the Commissioner criticised the situation of “erased persons” in Slovenia, persons deleted from the register of permanent residents who - in some cases – even became stateless. The “erased person” status of certain people surfaced due to a 1992 law and thus had a serious negative impact on these persons’ enjoyment of basic human rights. This situation was not fully remedied by the amended law of 2010.

Other criminal law aspects of the Activity Report concern mainly Georgia and Serbia. For Georgia, the Commissioner raised the issues of overcrowding in prisons and the lengthy terms of imprisonment even for relatively minor crimes. One of the Commissioner’s main concerns was the assessment of plea-bargaining: he fears that high conviction rates, a stringent sentencing policy, and low public trust in the justice system may cause defendants to plead guilty even if they are innocent. Based on the information he received, the Commissioner further raised the issue of alleged politically motivated prosecutions. Concerns regarding the “zero tolerance” of petty crimes were also stressed and, in general, a more human rights-oriented criminal policy was called for. He also emphasised the need for further efforts to ensure judicial independence in Georgia. Finally, he urged aiming at a better balance between the procedural rights of the prosecution and those of the defence.

Regarding Serbia, the Commissioner called for the effective prosecution of all war crimes as well as the reinforcement

* If not stated otherwise, the news reported in the following sections cover the period August – October 2011.

of the reported seriously deficient witness protection system. The Commissioner also stressed his position against the criminalisation of defamation and the imposition of excessive fines, which threatens media freedom, pluralism, and democratic society in general.

➤eucrim ID=1104057

Human Rights Commissioner on the State of Media Freedom in Europe

On 12 September 2011, the Commissioner gave a presentation in Stockholm on the state of media freedom in Europe. The Commissioner underscored the media's crucial role in the protection of human rights and overall in the public discourse. He pointed out that the way in which a national legislation ensures media freedom reveals the state of democracy in the respective country. In order to raise awareness, the Commissioner initiated a series of lectures in 2011, which dealt with topics such as the protection of journalists, ethical journalism, access to official documents as well as media pluralism and human rights. The Commissioner concluded that there is a

need to treat the killings or other violations of journalists as serious crime, to further decriminalise defamation, and to promote better and more widespread self-regulation. Ultimately, further access to government documents must be ensured under the principle of transparency.

➤eucrim ID=1104058

Human Rights Commissioner Submits First Written Observation to the ECtHR on his Own Initiative

On 18 October 2011, the Commissioner submitted his first written observation on his own ECtHR initiative since the entry into force of Protocol No.14 to the ECHR (see eucrim 1/2009, pp. 25-26 and 4/2009, pp. 147-148). The observation concerned the treatment of a disabled person in Romania and his failure to gain access to justice before his death. The Commissioner expressed his view that, as an exception, NGOs should be allowed to lodge applications to the ECtHR on behalf of vulnerable victims even in absence of specific authorisation to facilitate their access to justice that is

in line with the principle of effectiveness under the Convention.

➤eucrim ID=1104059

Procedural Criminal Law

CEPEJ: Implementation of the 2010-2012 Evaluation Cycle of Judicial Systems

At its meeting in Strasbourg on 20 and 21 October 2011, the working group on evaluation of judicial systems (GT-EVAL) assessed the implementation of the new evaluation cycle of judicial systems in place since June (publication planned in September 2012). The peer evaluation in 2011 (Turkey, Netherlands, and Austria), which intended to guarantee the coherence and credibility of judicial data used at CEPEJ, was also reviewed. Within the framework of a study based on CEPEJ work by a team from the University of Besançon (France), the group further discussed the access to justice in the different Member States.

➤eucrim ID=1104060

The Civil Asset Forfeiture Approach to Organised Crime

Exploring the Possibilities for an EU Model

Dr. Jon Petter Rui

I. Introduction

The common approach to fighting crime is to collect evidence, charge the offender in a criminal trial, and, if the defendant is proven guilty, to impose criminal sanctions such as fines or imprisonment. Most legal systems also provide for the possibility to confiscate the proceeds of crime following a criminal conviction. As organised crime has evolved, governments and international institutions have been attempting to fight it using this *traditional criminal law approach*. In order to obtain a criminal conviction of organised criminals, the criminalisation of money laundering is perhaps the best known measure. The common experience in most legal systems, however, is that the criminalisation of money laundering has not been an effective measure in the fight against organised crime; criminal convictions are almost non-existent.¹ Efforts to improve the system have also been made as regards confiscation rules, *i.e.*, the introduction of statutory presumptions and reversal of the burden of proof. But as long as a criminal conviction is required to confiscate, these measures are also insufficient.²

The reason why the traditional criminal law approach has proven insufficient lies in the very nature of organised crime. Organised criminals use their power and intelligence to keep themselves removed from the crimes they are masterminding, and they are able to mask the criminal origin of their assets. For this reason, it has become extremely difficult to carry out successful criminal investigations leading to the prosecution and conviction of such perpetrators. The result is that financial proceeds from crime are often effectively out of reach of the law and remain available for use to finance more crime and acquire even more economic power. If this vicious circle is not interrupted, it will damage public confidence in the rule of law and provide negative role models.³ In the long term, organised crime disrupts the credibility and predictability of the economic system⁴ and vital government institutions,⁵ and, thus, shakes the very foundations of society.

In addition to combating organised crime through the traditional criminal law approach, a number of alternative

approaches have been launched. A *first* method is the *administrative law approach*. Perhaps the most prominent example is the US government's use of tax legislation to attack Al Capone's criminal organisation.⁶ With the introduction of the Proceeds of Crime Act (POCA) in 2002, the United Kingdom may now also use tax legislation to fight organised crime.⁷

A *second* measure against organised crime is the *preventive approach by which the private sector is mobilised*. On the European level, the Third Money Laundering Directive serves as a good example.⁸ The directive imposes duties on the financial sector and a vast number of private businesses (e.g., lawyers and real estate agents) to carry out customer due diligence, to investigate customers and clients if money laundering or terrorist financing is suspected, and to report any suspicion to the authorities. However, as long as the authorities only have traditional criminal law measures at hand when it comes to following up on suspicious transactions, the information received from the private sector often has a limited impact.

A *third* way to counteract organised crime is through the *civil litigation approach*, which is especially used to recover corruptly acquired assets from politicians who have looted their country and deposited money abroad, the so-called "regime change lawsuits".⁹ Civil litigation is, in principle, the same process that would be used by private citizens or corporate entities with a claim against one another, in the context of, *i.e.*, fraud, by a liquidator seeking to recover assets wrongfully diverted from an insolvent company.¹⁰ The use of civil proceedings to fight organised crime is recognised in the United Nations Convention against Corruption (UNCAC) Art. 53.¹¹

A *fourth* tool in combating organised crime is the civil asset forfeiture regime. The purpose of this article is to look deeper into how *civil asset forfeiture* can be used to tackle organised crime. Firstly, what civil asset forfeiture is will be outlined by surveying two operative civil asset forfeiture models (sections II and III). Secondly, it will be discussed to what extent civil asset forfeiture might be introduced on the EU level (IV). Thirdly, several conclusions will be drawn (V).

II. The US Model

The legal notion of civil asset forfeiture is alien to most civil law systems but it is well known and has deep historical roots in common law.¹² Building on ancient English common law, the 1st United States Congress, in 1789, enacted statutes that allowed the government to forfeit property by filing a civil lawsuit against the property itself, rather than by filing an action – civil or criminal – against the property owner. In other words, the government could proceed against the property without having to wait until the owner was identified, apprehended, and convicted. The notion was that the property itself was the offender. Frequently, in cases involving smuggling, piracy, and slave trafficking, the ship or its cargo was within the jurisdiction of the USA but the property owner either remained abroad or could not be found at all.¹³ Thus, designing a measure to attack the property was the only way to tackle this type of crime.

In the 1980s, the wave of organised crime emerging from drug-related crime, first and foremost represented by the Medellín and Cali cartels, hit the USA¹⁴ This led, among other measures, to the resurrection of the old English common law notion of civil asset forfeiture. Instead of ships, the objects were now houses, businesses, and bank accounts.¹⁵

The current US civil asset forfeiture regime is entirely independent of and wholly unaffected by any criminal proceeding. Thus, an acquittal in a criminal case does not bar civil forfeiture proceedings.¹⁶ Statutes permitting civil forfeiture are spread over numerous acts, and it has to be decided in each case whether the law allows civil forfeiture proceedings. In practice, civil forfeiture proceedings are allowed in a vast number of cases.¹⁷

US federal law has two forms of forfeiture regimes that do not require a criminal conviction of the offender to forfeit property. The first is *administrative forfeiture*. Basically, an administrative forfeiture begins when a federal law enforcement agency seizes property discovered in the course of an investigation. The seizure must be based on probable cause to support the belief that the property is subject to forfeiture. As a main rule, the seizure has to be carried out pursuant to a judicial warrant but there are numerous exceptions. In practice, it is fair to say that administrative forfeiture entails forfeiture of property without formal court action.¹⁸ Once the property has been seized, the responsible agency initiates the administrative forfeiture proceedings by sending notice of its intent to forfeit to anyone with potential interest in contesting that action and by publishing a notice in the newspaper. If nobody contests the forfeiture by filing a claim within the prescribed time limit, the

agency concludes the matter by entering a declaration of forfeiture that has the same force and effect as a judicial order.¹⁹ In the USA, 80 percent of all seizures for forfeiture purposes remain uncontested. In 2006, the US Department of Justice forfeited \$ 1.2 billion, and 38 % came from uncontested civil cases (\$ 456 million). The other figures were 29 % from contested civil cases (\$ 348 million) and 33 % from criminal cases (\$ 400 million).²⁰

If someone files a claim contesting the administrative forfeiture, the government has two options, namely criminal forfeiture by securing a criminal conviction (traditional criminal law approach) or civil asset forfeiture. The civil forfeiture proceedings begin when the government files a verified complaint alleging that the property is subject to forfeiture and that claimants are required to file claims to the property and answer the forfeiture complaint within a certain period of time. Thereafter, the case is prepared for trial by a civil court through civil procedure. During trial, the government bears the burden of establishing the forfeitability of the property by a balance of probabilities. Even if the government succeeds in establishing a nexus between the property and an offence, the case is not over. To protect the interests of truly innocent property owners who were unaware that their property was being used for illegal purposes or who took all responsible steps under the circumstances to prevent such misuse, the “uniform innocent owner defence” is available. Under this statute, a person contesting the forfeiture must establish his ownership interests and his innocence on a balance of probabilities. If such a plea is unsuccessful, the court will enter judgment for the government, and title to the property will pass to the state.²¹

III. The UK Model

In the United Kingdom, the modern concept of civil asset forfeiture (civil recovery) was introduced by the Proceeds of Crime Act (POCA) in 2002. It has been said that this part of the act was the most significant and innovative aspect of the law but also the most controversial.²² As in the USA, civil asset forfeiture is directed against property and not a person; it is totally independent from criminal proceedings, and an acquittal in criminal proceedings is no obstacle to the initiation of civil recovery proceedings.²³ All property obtained through unlawful conduct, except cash, might be subject to civil recovery, irrespective of what type of crime it stems from.²⁴

POCA allows two types of civil recovery: the High Court procedure on the one hand and the cash seizure and forfeiture procedure on the other. The enforcement authority in the High Court procedure is the Serious Organised Crime Agency

(SOCA). In practice, the recovery process starts off with an *ex parte* application for a freezing order prohibiting the use or disposal of assets before the formal civil recovery process commences.²⁵ If successful, SOCA launches a claim, proving on the balance of probabilities that the property was obtained by criminal conduct.²⁶ The claim is sent to the High Court, which is a civil court. SOCA is obliged to serve the claim on the respondent “wherever domiciled, resident or present.”²⁷ A respondent who absconds would not usually result in any delay in the proceedings as long as he had been served with the relevant pleadings, and judgment could be entered against the respondent in his absence.²⁸

If the High Court finds, on the balance of probabilities, that the property was obtained by criminal conduct and recoverable, it makes a recovery order vesting the property in a “trustee for civil recovery.” The trustee is a suitably qualified person nominated by SOCA. There are two exceptions in which the court does not issue a recovery order. Firstly, the order may not contain any provision affecting the property if it is incompatible with the Human Rights Act 1998. Secondly, the court has discretion not to include recoverable property if it would not be equitable to do so and if various conditions regarding acquisition in good faith are satisfied.²⁹

The second type of civil recovery – the cash seizure and forfeiture procedure – allows the authorities, firstly, to seize and forfeit cash which is being imported into or exported from the United Kingdom and which is related to all forms of unlawful conduct. Secondly, the authorities may provide for the seizure of such cash “found at any place in the United Kingdom,” regardless of its geographical provenance or destination. The conditions in both situations are that the cash is either “recoverable property” or “intended for use by any person in unlawful conduct.” The seizure may be upheld without a trial for up to two years. The Magistrates Court decides on the matter of forfeiture.³⁰

IV. Exploring the Possibilities for an EU Model of Civil Asset Forfeiture

1. Introduction

A substantial civil asset forfeiture model on the EU level will most likely be developed through the principles of mutual recognition and the harmonisation of substantive law. The principles of mutual recognition and harmonisation are intrinsically connected; a certain level of harmonisation will be helpful to promoting mutual recognition, and mutual recognition might be the first step on the way to achieving harmonisation.³¹ As

we will see in the next section, in the case of civil asset forfeiture, the latter seems to be the appropriate route.

A first important organisational step towards closer cooperation in the field of asset forfeiture in the EU has already been taken. A Council Decision from 2007 obliges Member States to set up or designate national Asset Recovery Offices (ARO).³² These offices will function as national central contact points “which facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime. The decision allows the AROs to exchange information and best practices, both upon request and spontaneously, regardless of their status (administrative, law enforcement or judicial authority).”³³ The implementation deadline set by the Commission is 2014.³⁴

Before we take a look at the European Union level, some remarks are called for on the status of civil asset forfeiture at the international global and national levels. At *the international global level*, the first legal instrument worthy of mention is UNCAC Art. 54 (1) (c), which requests State Parties to consider taking measures to permit confiscation “without a criminal conviction, in cases in which the offender cannot be prosecuted by reason of death, flight or in other appropriate cases.” This statement reflects the growing number of jurisdictions in which forfeiture can be ordered in the absence of a criminal conviction. With this endorsement, the UNCAC, for the first time in the text of a global criminal law convention, acknowledges the importance of non-conviction based forfeiture to the recovery of criminal proceeds.³⁵

In UNCAC Art. 54 (1) (a), which addresses international cooperation for purposes of forfeiture, State Parties are obliged to enable domestic authorities to recognise and act on “an order of confiscation issued by a court of another State Party.” Art. 54 (1) (b) sets out an obligation “to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin.” These provisions are broadly worded and will most likely encompass civil asset forfeiture measures.³⁶ In addition, UNCAC Art. 43 requires State Parties to consider assisting each other in investigations of and proceedings in civil and administrative matters related to corruption. This includes civil asset forfeiture proceedings and addresses the problem encountered in the past that states could provide legal assistance and cooperation in criminal matters but not in civil cases.³⁷

Secondly, the third of the Financial Action Task Force’s (FATF) Forty Recommendations³⁸ states that countries “may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction.”

nal conviction [...] to the extent that such a requirement is consistent with the principles of their domestic law.” This is clearly a reference to civil asset forfeiture. FATF is perhaps the most influential international organisation in the field of combating money laundering and terrorist financing. The UN Security Council in Resolution 1617 “(s)trongly urges all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.”³⁹ The EU is a member of FATF.

Thirdly, the G8-Countries’ Best Practice Principles on Tracing, Freezing and Confiscation of Assets (para. 26) gives the following advice: “Where they have not already done so, States are encouraged to examine the possibility to extend, to the extent consistent with the fundamental principles of their domestic law, confiscation by: permitting the forfeiture of property in the absence of a criminal conviction; requiring that the lawful origin of alleged proceeds of crime or other property be demonstrated by the claimant.”

At the *national level*, we have seen that civil asset forfeiture regimes are operative in the USA and the UK. In addition, civil asset forfeiture is found in numerous common law jurisdictions around the world, e.g., Australia, five Canadian provinces, Ireland, South Africa, and a number of Caribbean jurisdictions.⁴⁰ On the European continent, Bulgaria, Italy, Serbia and Slovenia have civil asset forfeiture laws.⁴¹

2. Mutual Recognition of Civil Asset Forfeiture Orders

As we already have seen, UNCAC Art. 54 (1) (b) in combination with Art. 54 (1) (c) most likely oblige the ratifying states as regards recognition of a civil asset forfeiture order from another jurisdiction in cases concerning corruption, even if the requested state does not have an operative civil asset forfeiture regime. There are no treaty obligations, however, which require states to recognise civil asset forfeiture orders from other states in general that are not linked to the specific offence of corruption.

Thus, the EU will probably be the first international body to introduce legislation to facilitate mutual recognition of civil asset forfeiture orders between jurisdictions in general terms. In the Communication “The EU Internal Security Strategy in Action: Five steps towards a more secure Europe” from the Commission to the European Parliament and the Council, the Commission reveals that it will propose such legislation in 2011.⁴² It is to be expected that legislation will take the form

of a relatively detailed directive and that an autonomous notion of civil asset forfeiture will be carved out. A common understanding of what civil asset forfeiture amounts to on the European level is essential to make such legislation practical and effective.

3. Investigating the Possibilities of Introducing Substantial Rules on Civil Asset Forfeiture

The question addressed in this section is whether or not it is recommendable to introduce substantial EU legislation on civil asset forfeiture. In the Communication “Proceeds of organised crime: Ensuring that ‘crime does not pay’” from the Commission to the European Parliament and the Council,⁴³ the Commission indicates that this is a current issue. In addition to a recasting of the existing legal framework on forfeiture, the Commission states that, among other topics, “(c) onfiscation without a criminal conviction (civil confiscation)” could be considered for discussion:

Under most Member States jurisdictions confiscation is a sanction linked to a criminal conviction. However, a new legal instrument could introduce instances where confiscation takes place without a prior criminal conviction (thereby transposing FATF Recommendation 3 into EU legislation). For example:

- When there is a suspicion that assets are the proceeds of serious crimes, due to their disproportion with the declared income of their owner and to the fact that he/she has habitual contacts with known criminals. In this instance a case may be brought before a civil court (which may order the confiscation of assets) based on an assumption, on the balance of probabilities, that the assets may be derived from proceeds of crime. In these cases the burden of proof is reversed and the alleged criminal should prove the legitimate origin of the assets.
- When the person suspected of certain serious crimes is dead, fugitive for a certain period of time or otherwise not available for prosecution.
- In certain cases, when cash is seized by customs authorities in breach of the EC Regulation on Cash Controls. An administrative decision may empower authorities to detain the amounts above € 10000 which were not declared when entering or leaving the EU. However, if these amounts need to be confiscated (for example as the proceeds from tax evasion) a court order is ultimately needed. As tax evasion is not prosecuted in all EU Member States with criminal proceedings, this may be a further case of civil confiscation.⁴⁴

An ongoing research project at the Max Planck Institute of Foreign and International Criminal Law in Freiburg, Germany

focuses on the questions of whether, to what extent, and how it might be recommendable to introduce substantial rules of civil asset forfeiture on the EU level. A conference will be held in June 2012. An anthology based on the conference results is to be published in autumn 2012.

a) Advantages

An introduction of a civil asset forfeiture model at the EU level would undoubtedly offer some significant advantages. A very current example of the benefits civil asset forfeiture may offer is seen in the challenges that fallen (and falling) dictators in Arabic countries represent to Europe. Today, billions of Euros belonging to these persons are frozen all across Europe. It is an unacceptable situation for a country adhering to the rule of law not to be able to repatriate frozen money that appears to have been looted from an entire population. As regards dictators still in power, it goes without saying that acquiring a forfeiture of the property located in Europe by means of criminal conviction in the country of the dictator concerned is impossible in practice. Obtaining a criminal conviction in Europe will, in most cases, be impossible as well; it is sufficient to mention problems gathering evidence in order to fulfil the burden of proof required in the European Convention on Human Rights (ECHR) Art. 6 No. 2 (“beyond reasonable doubt”)⁴⁵ and the limitations on judgments *in absentia* in the ECHR Art. 6 No. 1.⁴⁶

The case of the “failing State”⁴⁷ could also present a problem in bringing about the criminal conviction of a political leader no longer in office. The essential problem is often how to establish an independent and impartial tribunal in the country in which the political leader has had control, perhaps for decades, over all government branches. The other side of the coin is the problem of inaugurating former strong system opponents as prosecutors and judges. Failures on this point have the potential to underpin the effect of a criminal conviction at the forfeiture and recovery stage. A lawyer in Europe successfully arguing that a criminal conviction against a former leader was not impartial and independent in terms of ECHR Art. 6 No. 1 will effectively be able to bar the use of the conviction of the former leader in recovery proceedings. An operative civil asset forfeiture regime in the European countries in which the leader has deposited his property solves these problems: the property will be forfeitable without a criminal conviction.

Even in less prominent cases, civil asset forfeiture proceedings offer advantages compared to criminal forfeiture requiring a criminal conviction. Criminal trials are often made impossible when a suspected criminal is a fugitive, dead, dies before conviction, or if he is immune from criminal prosecution. The

case might also be such that the offender is unknown and assets are found (e.g., assets found in the hands of a courier who is not involved in the commission of the criminal offence). If assets are derived from crime, an owner or violator may be unwilling to come forward and defend himself in civil recovery proceedings for fear that this would lead to a criminal prosecution. Another example is that in which the relevant property is held by a third party who has not been charged with a criminal offence but is aware – or is wilfully blind to the fact – that the property is tainted. While traditional criminal forfeiture may not help seize property held by *bona fide* third parties, civil asset forfeiture makes it possible to forfeit the property from a third party without a *bona fide* defence.⁴⁸

As mentioned above, the European standard of evidence for conviction in a criminal case is very high (“beyond reasonable doubt”). Civil asset forfeiture, however, is not a criminal punishment (at least *sensu stricto*). As we have seen in the U.S and U.K models of civil asset forfeiture, the facts have only to be established on a balance of probabilities. In addition, as civil asset forfeiture focuses on the link between property and criminal conduct, it is not necessary to prove a link between the property and a person having committed a crime. This is perhaps the greatest advantage of the civil asset forfeiture regime and makes it a very useful tool to fight organised crime. Very often, investigations of organised criminals end up at the gates of tax havens where secrecy laws make it impossible to obtain access to information on the physical persons hiding behind complex company schemes. It is evident that the possibility to concentrate on property located in Europe will often be the only way to tackle the protection that tax haven legislation offers.

Another advantage of the US and UK models is that a civil asset forfeiture case is totally independent of any criminal case. In these jurisdictions, it is possible to proceed with a civil asset forfeiture case if the defendant is acquitted in criminal proceedings. It has also been argued that civil asset forfeiture law should be able to be applied retroactively⁴⁹ and, thus, used to recover proceeds that had been acquired before the law came into force and that civil asset forfeiture proceedings are less time-consuming than criminal trials.⁵⁰

b) Challenges

To investigate which challenges an EU civil asset forfeiture model might represent, it is necessary to outline some contours of such a model. Based on the US and UK models presented above, the following common denominators emerge: Civil asset forfeiture is an action against the asset itself and not against an individual. It is a totally separate action from any criminal

proceeding. The essential substantial question is whether a link can be established between the property and the criminal conduct. The authorities have the burden of proof, and the link between the property and crime has to be established on the balance of probabilities. Because the action is not against an individual defendant but against the property, the owner of the property is a third party having the right to defend the property. If such a third party appears and is able – on the balance of probabilities – to establish ownership of the property and that he acted in good faith as regards the link between the property and crime, forfeiture is not executed. If the third party does not succeed in his defence, the property will be forfeited. An independent and impartial court decides on the matter.

An EU model of civil asset forfeiture will meet several challenges:

- The *first* focal question is whether such a civil asset forfeiture model is compatible with basic human rights, first and foremost the ECHR. To be more precise: Will a civil asset forfeiture system be considered a “criminal” measure in terms of ECHR Art. 6? If answered in the positive, it has to be decided whether the burden of proof (“balance of probabilities” and not “beyond reasonable doubt”) is compatible with the presumption of innocence in ECHR Art. 6 No. 2.
- A *second* question is whether the reversed burden of proof for the third party claiming rights to the property is in accordance with the same Article.
- A *third* question is how the requirement for the third party to speak and produce evidence should be considered in light of the right to remain silent and not incriminate himself, as provided for in ECHR Art. 6 No. 1.⁵¹
- A *fourth* area of potential conflict is the possibility to launch a civil asset forfeiture procedure after final acquittal in a criminal case. ECHR Protocol 7 Art. 4 contains a prohibition on double jeopardy (*ne bis in idem*). The notion of what constitutes a “criminal” case in the Article is to be understood mainly in the same terms as the contents of Art. 6.⁵²
- Last but not least; if the civil asset forfeiture system is regarded as a criminal measure in terms of ECHR Art. 7, the prohibition on retroactivity will apply. Hence, the notion of “criminal” in Art. 7 is identical with that in Art. 6.⁵³

According to well established case law, the European Court of Human Rights (ECtHR) sets out three criteria to be considered in the assessment of whether a measure is to be regarded as “criminal” in terms of Art. 6: the classification of the measure in national law, the nature of the offence, and the severity of the sanction. The second and third criteria are alternatives; it is sufficient that the offence in question is regarded as criminal by its nature.⁵⁴ Even though, on a general level, the ECtHR

holds that a measure might be considered “criminal” if the sanction is severe and the nature of the offence is *not* criminal, this has, to my knowledge, never happened. The reason is most likely that it is a contradiction in terms to conclude that a measure is not criminal in nature but nevertheless “criminal” in terms of the ECHR.

Since a possible EU civil asset forfeiture system would be classified as civil by the EU legislator and operate completely separate from criminal proceedings, the decisive question will be whether the ECtHR finds that civil asset forfeiture is criminal in nature. When analysing this matter, the Court will turn its focus towards how the EU legislator has reasoned when introducing the measure. If it has provided persuasive reasons for not placing the measure in the criminal sphere, the general tendency of the Courts’ case law is that this choice is respected.⁵⁵ This leads us to a crucial question: What is the aim and purpose of a civil asset forfeiture system?

The ECtHR has touched upon the question in relation to ECHR Art. 7 in an admissibility decision,⁵⁶ but has not yet had the opportunity to scrutinise in depth a true civil asset forfeiture model as described above.

The question has been vividly debated among commentators.⁵⁷ *Young* poses the question as to “whether civil forfeiture is really ‘criminal forfeiture dressed up in sheep’s clothing’.”⁵⁸ A common criticism is that civil asset forfeiture achieves the same objectives as criminal forfeiture but without the procedural safeguards and human rights protections that apply to criminal proceedings.⁵⁹ *Smith/Owen* finds that “(t)here is no doubt that the consequence of both criminal confiscation and civil recovery is to circumvent (the) staple aspects of due process protection in the criminal law.”⁶⁰

Turning to formal authorities, the first test of the purpose of a civil asset forfeiture system was carried out by the Irish Supreme Court in 2001.⁶¹ The Irish civil asset forfeiture system has the same main characteristics as the system outlined above.⁶² The defendants alleged that the civil asset forfeiture system formed part of criminal law and not civil law. Thus, they were deprived of some of the most important safeguards that had historically been a feature of criminal law, e.g., the standard of proof requirement in criminal cases, the presumption of innocence, and the double jeopardy protection. Art. 38 of the Irish Constitution states that “No person shall be tried on any criminal charge save in the due course of law.” The Supreme Court concluded that the purpose of the civil asset forfeiture system was not to punish, reasoning that “there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a per-

son in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a *nolle prosequi* at any stage.”⁶³

In 2005, the Court of Appeal of Northern Ireland concluded that the UK civil asset forfeiture model did not amount to a criminal charge in terms of ECHR Art. 6,⁶⁴ reasoning that “the essence of art 6 in its criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings *in rem*. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences.”⁶⁵

In contrast, the US Supreme Court has concluded that federal civil asset forfeiture legislation had to be regarded “in part” as a punishment in relation to the Excessive Fines Clause in the Eighth Amendment of the Constitution.⁶⁶ After considerable twists and turns, however, the Supreme Court held that civil asset forfeiture neither amounts to a punishment nor is a criminal sanction in relation to the double jeopardy clause in the Fifth Amendment. Still, several State Supreme Courts have held that civil asset forfeiture laws are punitive and violate the double jeopardy clause.⁶⁷

Based on this short survey, two conclusions can be drawn. Firstly, it is not clear whether an EU civil asset forfeiture model containing the elements described above will be considered “criminal” in terms of the ECHR. If such a model is considered “criminal” it is, however, not certain that all procedural guarantees in Art. 6 will apply with full force. There are some judgments by the ECtHR, which suggest that the guarantees may be relativised under appropriate circumstances, especially in “*quasi criminal*” cases.⁶⁸

Secondly, even though the ECtHR executes an objective and independent evaluation of the aim and purpose of a measure presented by the EU legislator, it has an impact on the Court’s scrutiny of how the legislator describes the aim and purpose of the civil asset forfeiture system. There are several possibilities: One is that it is necessary to take criminally tainted property out of circulation in legal channels in order to prevent the disruption of the credibility and predictability of the economic system. Whether this line of reasoning completely

removes civil asset forfeiture from the “criminal” realm or that of “sanctions” remains open. Another way of viewing civil asset forfeiture would be to see it as a proprietary remedy. In *US v. Ursery*, Justice Stevens explained the proprietary angle in the following terms: “Those funds are the proceeds of unlawful activity. They are not property that the respondents have any right to retain. The forfeiture of such proceeds, like the confiscation of money stolen from a bank, does not punish respondents because it extracts no price in liberty or lawfully derived property from them. I agree that the forfeiture of such proceeds is not punitive ...”⁶⁹ This line of reasoning rests on the logic that criminally tainted property cannot rightfully be owned by a private person and that such property belongs to the state.⁷⁰

In addition to the ECHR, the general principles of European Union law and the EU Charter of Fundamental Rights may pose challenges to introducing a civil asset forfeiture model on the EU level. Even though a measure is not regarded as “criminal” in nature, the general principles of European Union law must nevertheless be observed during an administrative procedure.⁷¹

The *second* challenge for an EU civil asset forfeiture model is on a more (practical-) philosophical level: Is it recommendable to rely on the construction that the property itself is a wrongdoer? This construction may be vital for the view that civil asset forfeiture proceedings are totally independent of any criminal proceedings against a person. The quality and logic of the construction has been intensively debated in several US Supreme Court cases.⁷²

The *third* main challenge will be how to carve out a civil asset forfeiture model which is fair, practical, and adaptable in all 27 EU Member States. It is not possible to analyse this challenge to its full extent within the framework of this article. However, some preliminary remarks are possible. First and foremost, a civil asset forfeiture system should be limited to cases of organised crime. Secondly, it might be in the interest of justice to limit the possibilities for administrative authorities to forfeit property without the scrutiny of an independent and impartial tribunal. In addition, the funding of civil asset forfeiture authorities should not be linked to the amounts of property forfeited. Much of the criticism launched by US commentators on the civil asset forfeiture system can be traced back to the lack of judicial control over the federal administrative authorities’ competence to execute administrative forfeiture and how civil asset forfeiture authorities are funded.⁷³ Thirdly, a civil asset forfeiture system should not be used as a means to circumvent the procedural guarantees afforded in the European systems of criminal procedure.

c) Conclusion

The first step towards a European civil asset forfeiture model will be taken this year when the European Commission proposes legislation to facilitate mutual recognition of civil asset forfeiture orders between the EU Member States. The next step is to develop substantial EU legislation on civil asset forfeiture. The Commission has already signalled that such legislation could be considered for discussion. As we have seen, there are clear provisions in important international global legal instruments directing authorities to consider implementing civil asset forfeiture legislation. In 2011, it is common knowledge that fighting organised crime at the national level alone is impossible. EU legislation in this field has a clear added value over national action and will be legitimate and cred-

ible.⁷⁴ We also know that the European Union measures up to establishing a common area of freedom, security and justice.⁷⁵ Thus, it lies in the hands of the European Union to develop an EU model of civil asset forfeiture.

A civil asset forfeiture model on the EU level will offer significant advantages in fighting organised crime. It is evident, however, that the introduction of such a model will meet (at least) the three aforementioned focal challenges. The key to success is being able to strike a fair balance between adopting practical and effective rules to fight organised crime, on the one hand, and protecting the rights of individuals, on the other. The ongoing research project at the Max Planck Institute of Foreign and International Criminal Law aims to contribute to this endeavour. The project will be completed in 2012.



Dr. Jon Petter Rui
University of Tromsø, Norway;
Norwegian Finance Market Fund

1 MONEYVAL, 3rd round of mutual evaluation reports. Horizontal Review, Council of Europe December 2010, published 1.4.2011. On the basis of an analysis of legislation in all 47 Member States of the Council of Europe, the report concludes that "convictions for serious and major money laundering offences still appear to be the exception rather than the rule." It states further: "This review notes, with concern, how few cases are being brought for autonomous money laundering on behalf of organised crime by 'professional' laundriers or other third parties, when it is clear that organised crime is active in money laundering. This is disappointing."

2 Communication from the Commission to the European Parliament and the Council: Proceeds of organised crime. Ensuring that "crime does not pay", COM (2008) 766 final, Brussels 20.11.2008, p. 4: "At present the overall number of confiscation cases in the EU is relatively limited and the amounts recovered from organised crime are modest, especially if compared to the estimated revenues of organised criminal groups."

3 A. Kennedy, Justifying the Civil Recovery of Criminal Proceeds, *Journal of Financial Crime*, Vol. 12 No. 1/2004, p. 10.

4 Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the misuse of the financial system for the purpose of money laundering and terrorist financing, preamble Art. 2: "The soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates either to disguise the origin of criminal proceeds or to channel lawful or unlawful money for terrorist purposes."

5 UNDOC: The Globalization of Crime. A Transnational Organized Crime Threat Assessment, Vienna 2010, p. vi and p. 15: "There are a number of areas around the world where criminals have become so powerful that, rather than seeking to evade the government, they begin to directly confront it. In these cases, a pattern of

symptoms is typically manifest. Investigators, prosecutors and judges who pursue organized criminals are threatened and killed. Journalists and activists may also be targeted. Corruption is detected at the highest levels of government, and law enforcement can become paralysed by mistrust. Portions of the country may effectively drift beyond state control. This is the situation presently confronted in some parts of Central America and West Africa ..."

6 Intelligence Unit Bureau of Internal Revenue Treasury Department. Organization, Functions and Activities. A Narrative Briefly Descriptive of the Period 1919 to 1936, available at <http://www.irs.gov/pub/irs-utl/file-5-intelligence-unit-narrative-of-period-1919-1936-by-guy-helvering.pdf>, last visited 15.9.2011.

7 E. Rees/R. Fisher/R. Thomas, *Blackstone's Guide to The Proceeds of Crime Act*, Fourth Edition, Oxford 2011, pp. 185-186.

8 Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the misuse of the financial system for the purpose of money laundering and terrorist financing.

9 S. N.M. Young, Why civil actions against corruption?, *Journal of Financial Crime*, Vol. 16 No. 2/2009, p. 145.

10 T. Daniels/J. Maton, *Civil Proceedings to recover corruptly acquired assets of public officials*, in: M. Pieth (ed.): *Recovering Stolen Assets*, Bern 2008, p. 245.

11 General Assembly Resolution 58/4 of 31 October 2003, United Nations Convention against Corruption.

12 I. Smith/T. Owen, *Asset Recovery: Criminal Confiscation and Civil Recovery*, London 2003, pp. 2-3.

13 S.D. Cassella, "An overview of asset forfeiture in the United States" in S. N.M. Young: *Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crime*, Northampton 2009, pp. 24-25.

14 E. Ennis, An Uncertain Precedent: *United States v. Santos* and the Possibility of a Legislative Remedy, *Cornell Law Review* 2009/2010, pp. 195-196 and M. Michelle Gallant, "Promise and perils: the making of global money laundering, terrorist finance norms", *Journal of Money Laundering Control*, Vol. 13 No. 3/2010, p. 176.

15 Cassella, 2009, pp. 29-30.

16 D.R. Edgeworth, *Asset Forfeiture. Practice and Procedure in State and Federal Courts*, Chicago 2004, p. 7.

17 Cassella, 2009, pp. 32-36.

18 Edgeworth, 2004, p. 3.

19 Cassella, 2009, pp. 37-38 and Edgeworth 2004, pp. 3-4.

20 S.D. Cassella, "The case for civil forfeiture. Why in rem proceedings are an essential tool for recovering the proceeds of crime", *Journal of Money Laundering Control*, Vol. 11 No. 1/2008, p. 10.

21 Cassella, 2009, pp. 41-43.

- 22 Smith/Owen, 2003, p. 235.
- 23 Rees/Fisher/Thomas, 2011, p. 158.
- 24 *Op. cit.*, p. 156.
- 25 *Op. cit.*, p. 164.
- 26 *Op. cit.*, p. 161 and 165.
- 27 *Op. cit.*, p. 165.
- 28 A.V.M. Leong, Assets recovery under the Proceeds of Crime Act 2002: the UK experience", in Simon N.M. Young (ed.): Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crime, Northampton 2009, p. 209.
- 29 Rees/Fisher/Thomas, 2011, pp. 169-170.
- 30 *Op. cit.*, p. 174.
- 31 P. Asp, Chapter III. Mutual Recognition and the Development of Criminal Law Cooperation within the EU, in: E. J. Husabø/A. Strandbakken (eds.): Harmonization of Criminal Law in Europe, Antwerpen/Oxford 2005, pp. 31-33; U. Sieber, Die Zukunft der Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems, in: Zeitschrift für die gesamte Strafrechtswissenschaft, 121. Band 2009/1, pp. 30-35, and A. Suominen: The Principle of Mutual Recognition in Cooperation in Criminal Matters. A Study of the Principle in Four Framework Decisions and in the Implementation Legislation in the Nordic Member States, Bergen 2011, p. 56.
- 32 Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.
- 33 Report from the Commission to the European Parliament and to the Council based on Art. 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, p. 2.
- 34 COM (2010) 673 final, Brussels 22.11.2010, p. 6.
- 35 D. Claman, The promise and limitations of asset recovery under the UNCAC, in: Mark Pieth (ed.): Recovering Stolen Assets, Bern 2008, p. 347.
- 36 See, in the same vein, T.S. Greenberg, et al., Stolen Asset Recovery. A Good Practices Guide for Non-Conviction Based Asset Forfeiture, Washington 2009, p. 9.
- 37 *Op. cit.*
- 38 FATF: 40 Recommendations, October 2003.
- 39 Resolution 1617 (2005) adopted by the Security Council at its 5244th meeting on 29 July 2005 para. 7.
- 40 A. Kennedy, Designing a civil forfeiture system: an issues list for policymakers and legislators, Journal of Financial Crime, Vol. 13 No. 2/2006, p. 132 and K. M. Stephenson, et al., Barriers to Asset Recovery, Washington 2011, p. 66.
- 41 N. Nikolov, "General characteristics of civil forfeiture", Journal of Money Laundering Control, Vol. 14 No. 1/2011, p. 17 and Stephenson et al., 2011, p. 66.
- 42 COM (2010) 673 final, Brussels, 22.11.2010, p. 6.
- 43 COM (2008) 766 final, Brussels 20.11.2008.
- 44 *Op. cit.* p. 7.
- 45 P. van Dijk et al.: Theory and Practice of the European Convention on Human Rights, Fourth Edition, Antwerpen/Oxford 2006, pp. 625-627.
- 46 *Op. cit.*, pp. 589-591.
- 47 M. Pieth, Recovering stolen assets – a new issue, in: M. Pieth (ed.): Recovering Stolen Assets, Bern 2008, p. 14. See also W. Hofmeyr, Navigating between mutual legal assistance and confiscation systems, in: M. Pieth (ed.): Recovering Stolen Assets, Bern 2008, pp. 137-138 and P. Gully-Hart, International asset recovery of corruption-related assets: Switzerland, in M. Pieth (ed.): Recovering Stolen Assets, Bern 2008, p. 181.
- 48 Greenberg et al., 2009, pp. 14-15.
- 49 Hofmeyr, 2008, p. 138.
- 50 Daniel/Maton, 2008, pp. 243-244.
- 51 O'Halloran and Francis v. the United Kingdom, Application nos. 15809/02 and 25624/02, Grand Chamber Judgment of 29 June 2007 para. 45-52.
- 52 Sergey Zolotukhin v. Russia, Application no. 14939/03, Grand Chamber Judgment of 10 February 2009 para. 52-57.
- 53 van Dijk et al., 2006, p. 652, and D.J. Harris et al., Law of the European Convention on Human Rights, Second Edition, Oxford 2009, pp. 332-333.
- 54 Jussila v. Finland, Application no. 73053/01, Judgment of 23 November 2003 para. 30-31.
- 55 Janosevic v. Sweden, Application no. 34619/97, Judgment of 23 July 2002 paras. 61 and 68 and Exeh and Connors v. The United Kingdom, Applications nos. 39665/98 and 40086/98, Grand Chamber Judgment of 9 October 2003 para. 105.
- 56 Dassa Foundation and Others v. Liechtenstein, Application no. 696/05, Decision of 10 July 2007 "The Law", C. Complaint under Art. 7 of the Convention.
- 57 See Smith/Owen, 2004, pp. 217-237, and S. N.M. Young, Introduction, in: S. N.M. Young (ed.): Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crime, Northampton 2009, pp. 1-10.
- 58 *Op. cit.*, p. 5.
- 59 *Op. cit.*
- 60 Smith/Owen, 2003, p. 21.
- 61 Murphy v. G.M., 4 I.R., 18th October 2001, Irish Reports, pp. 113-159.
- 62 F.H. Cassidy, Targeting the Proceeds of Crime, in: Greenberg et al., 2009, pp. 153-162 and F.J. McKenna/K. Egan, Ireland: a multi-disciplinary approach to proceeds of crime, in: S. N.M. Young: Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crime, Northampton 2009, pp. 67-75.
- 63 *Op. cit.*, p. 147.
- 64 Walsh v. Director of the Assets Recovery Agency (2005) NICA 6, The Northern Ireland Law Reports 2005 Part II (2005) NI 188-526, pp. 383-398.
- 65 *Op. cit.*, p. 397.
- 66 Austin v. US 113 S.Ct. 2801 (1993), West's Supreme Court Reporter, October Term 1992, p. 2810.
- 67 Edgeworth, 2004, pp. 205-209.
- 68 Jussila v. Finland, Application no. 73053/01, Grand Chamber Judgment of 23 November 2006 para. 43 and O'Halloran and Francis v. the United Kingdom, Application nos. 15809/02 and 25624/02, Grand Chamber Judgment of 29 June 2007 para. 53. See, in this vein, KME Germany AG/KME France SAS/KME Italy SpG, Case C-277/09P, Opinion of Advocate General Sharpston, delivered on 10 February 2011 para. 67.
- 69 US v. Ursery, 116 S.Ct. 2135 (1996), West's Supreme Court Reporter, October Term 1996, p. 2152.
- 70 Smith/Owen, 2003, pp. 22-23.
- 71 FMC Foret SA v. European Commission, Case T-191/06, Judgment of 16 June 2011 para. 138.
- 72 Austin v. US 113 S.Ct. 2801 (1993), West's Supreme Court Reporter, October Term 1992, pp. 2806-2810 and pp. 2812-2815; US v. Ursery 116 S.Ct. 2135 (1996), West's Supreme Court Reporter, October Term 1996, pp. 2140-2149 and pp. 2149-2161 and US v. Bajakajian, 118 S.Ct. 2028 (1998), West's Supreme Court Reporter, October Term 1998, pp. 2033-2036.
- 73 E. Blumenson/E. Nilsen, Policing for Profit: The Drug War's Hidden Economic Agenda, The University of Chicago Law Review, Vol. 65 No. 1/1998, pp. 111-114, and M.n R. Williams et al., Policing for Profit. The Abuse of Civil Asset Forfeiture, Arlington 2010 (122 p.), especially pp. 34-37.
- 74 See Sieber, 2009, pp. 45-57 and V. Reding, European Criminal Law Review (EuCLR), Vol. 1 No. 1/2011, pp. 5-6, as regards the clear added value-concept and the demands for legitimacy and credibility.
- 75 European Council: The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), p. 4 and p. 15.

The Isolation of Dutch Environmental Criminal Law

Rob de Rijck*

I. The Legal Organisation of Dutch Environmental Criminal Law

The penalisation of environmental offences in the Netherlands differs from the penalisation of typical criminal offences such as murder or theft. Except for an occasional environmental offence in the Criminal Code and the applicability of, e.g., forgery in environmental cases, the penalisation of environmental offences is effected via the Economic Offences Act.¹ When this Act was realised in 1950, its purpose was to protect the restoration of the economic order after the Second World War, and it initially only comprised economic offences. From the seventies onwards, the legislator used it increasingly to penalise also environmental crimes.

The Economic Offences Act itself does not describe criminal offences. It merely lays down maximum penalties for the violation of other, substantive acts with respect to the economy or the environment. It also harmonises these penalties, since it determines the same penalties for the violation of an abundance of laws. In a great number of cases, the maximum penalty for violation if the crime is committed with criminal intent is a prison sentence of six years and a fine of €76,000 for natural persons or a fine of €760,000 for legal persons, or the closing down of the company within which the offences were committed for the duration of a year.

These substantive economic and environmental offences are summed up in the Economic Offences Act in a list of economic offences and a list of environmental offences. If the legislator wishes to penalise the violation of a new act, he only has to include the relevant provisions in the list of Section 1 (economic acts) or in the list of Section 1a (environmental acts). In the meantime, the list of environmental offences has become longer than the list of economic offences, and it includes hundreds of provisions.

This article does not deal with the organisation of investigating, prosecuting, and trying environmental offences in the Netherlands. Suffice it to say that, as of 2005, the prosecution of environmental offences is carried out by a specialised national prosecution service, the so-called Functional Prosecutor's Office. This agency also deals with the majority of fraud cases. The investigation of environmental offences is very fragmented and is, *inter alia*, the responsibility of the police.

II. Dutch Environmental Criminal Law in the Context of other Systems

Dutch environmental criminal law can only be properly understood if one realises that it is related to three other branches of law. The first of these is common criminal law. Environmental criminal law is a full part of criminal law, since its general provisions (definition of a perpetrator, types of punishment, powers of investigation, procedural law, etc.) also apply to environmental criminal law. In addition, the organisations that are traditionally charged with the application of criminal law (police, Prosecution Service, criminal courts) have a responsibility in this field, too.

Nonetheless, the special nature of environmental criminal law makes it an “outsider” in the field of criminal law which these traditional organisations have difficulty with. As it happens, it deviates substantially from conventional criminal law in a number of respects. Usually, it is impossible to point out direct victims, and thus no reports are filed with the police. Often, it is not immediately clear why the violation of an environmental regulation is an infringement of the legal order. Moreover, the regulation is usually of a more complex nature than in traditional criminal law.

All this often leads to a troublesome relationship between (the organisations responsible for) environmental criminal law and common criminal law. But environmental criminal law is still criminal law and therefore targets criminal behaviour. The “courtroom dynamics” of the criminal proceedings work in the same way in environmental criminal cases. As phrased by the presiding judge of the Rotterdam District Court at a symposium held by the Rotterdam Erasmus University in March 2011: “A public prosecutor of environmental cases who is not aware of how the proceedings about pre-trial detention work, has a big problem.”

The second branch of law related to environmental criminal law is administrative enforcement and thus administrative law. Any environmental violation will lead to and, in principle, even oblige the administrative body in charge, to act against that violation. The administrative authority (inspectors of departments, municipalities, provinces, environmental offices) can force the offender to stop a violation or to undo it on penalty of periodic payments.

The consequence of this enforcement structure is that, in the case of an environmental violation, the Prosecution Service can act on the grounds of the suspicion of a criminal offence and, at the same time, the administration must act to have the violation stopped. This requires an exchange of information between both legal bodies and a coordination of their actions. For a number of reasons, this particular relationship is problematic. The administration, and thus administrative enforcement, is responsible for acting in the interest of the environment and therefore for bringing violations to an end. The termination solves the problem. However, the administration has multiple duties. It is also responsible for the economy, traffic, and spatial planning, which may lead to conflicts of interest.

Criminal law, on the other hand, is tasked with combating criminal behaviour. From this point of view, environmental interests are not of prime relevance, but instead concepts such as retaliation, deterrence, maintenance of legal standards, and confiscation of criminally obtained proceeds. All this leads to criminal law and administrative law speaking different languages and, up to now, coordination between these two branches has been laborious. This problem is further aggravated by the fragmentation of the administrative bodies active in protecting the environment (approx. 500 institutes), by an inadequate exchange of information, and by the fact that Dutch governmental bodies are occasionally suspected of having violated environmental law themselves.

III. European Rules to Protect the Environment

European regulations on the environment make up the third field that Dutch environmental criminal law continually relates to. To illustrate this, three areas of environmental protection in which the European Union lays down the rules, either directly in the form of a regulation or as an instruction to the Member States in the form of a directive, will be given as examples. These three areas are the cross-border transport of waste, the production of and trade in substances that affect the ozone layer, and the use of hazardous substances on a large scale. The substance of Dutch legislation to protect the environment is almost entirely determined by the EU. Other examples could be found in agriculture, nuclear energy, protected animals and plants, etc.

1. Waste Shipments

The first area is that of cross-border shipments of waste. The importance of this subject should not be underestimated. According to estimates by the Dutch Ministry of Infrastructure and Environment, 15% of all container shipments involve

waste. All cross-border shipments of waste are covered by *Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste*² – the Waste Shipment Regulation (WSR). This Regulation defines a system of export and import prohibition and compulsory notification for international waste transports. The WSR is also meant to implement the commitments of the *Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal*, which the EU is party to.

In Art. 2(35), the Regulation defines illegal shipment as any shipment of waste effected

- (a) without notification to all competent authorities concerned pursuant to this Regulation; or
- (b) without the consent of the competent authorities concerned pursuant to this Regulation; or
- (c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or
- (d) in a way which is not specified materially in the notification or movement documents; or
- (e) in a way which results in recovery or disposal in contravention of Community or international rules; or
- (f) contrary to Arts. 34, 36, 39, 40, 41 and 43 (*export and import prohibitions, dR*); etc.

The Dutch legislator has prohibited these illegal shipments by Section 10.60 clause 2 of the Environmental Management Act,³ which prohibits carrying out actions as referred to in Art. 2(35) of the WSR. Subsequently, these violations have also been made punishable by including Section 10.60 in the environmental list of the Economic Offences Act.

2. Ozone Layer Depleting Substances

A second example is the EU's restriction of ozone layer depleting substances by means of *Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer*.⁴ Like the WSR, this is a regulation that was formulated after the Union as such had become party to two worldwide conventions: the *Vienna Convention for the Protection of the Ozone Layer* and the *Montreal Protocol on Substances that Deplete the Ozone Layer*. The structure of this Regulation is in many ways comparable to that of the WSR. The Regulation lays down rules to control the production, use, import and export of substances that deplete the ozone layer, such as hydrochlorofluorocarbons. These rules are directly binding for, for instance, the producers. One of the main provisions is Art. 20 *Trade with a State not party to the Protocol and a territory not covered by the Protocol*:

1. Import and export of controlled substances and of products and equipment containing or relying on controlled substances from and to any State not party to the Protocol shall be prohibited.

Violation of the provisions of this Regulation is prohibited in the Netherlands on the basis of the *Implementation Decree EC-Regulation on ozone layer depleting substances*,⁵ which determines in Section 3 that it is forbidden to act in contravention of various sections of the Regulation. Acting in contravention of these prohibitions is punishable, since the decree is based on Section 9.2.2.1 of the Environmental Management Act, and all decrees on the basis of this Section have been included in the environmental list of the Economic Offences Act.

The ozone Regulation surpasses the WSR in one respect because it confers responsibility on the European Commission regarding its application. It is the Commission that issues import and export permits (Arts. 15, 17, and 18), and Art. 27 obliges the producers, importers and exporters to report to the Commission on an annual basis. As will be indicated below, in individual cases, the Commission can address a request for enforcement to the Member States after receipt of these reports.

3. Major Accidents Involving Dangerous Substances

The European rules for working with large quantities of hazardous substances, for instance in the petrochemical industry, differ from the two previous examples, because these rules were formulated in a directive. *Council Directive 96/82/EC of 9 December 1996 on the control of major accident-hazards involving dangerous substances*,⁶ known as the second Seveso Directive, is aimed, according to Art. 1, at the prevention of major accidents that involve dangerous substances and the limitation of their consequences for man and the environment.

Three obligations are listed in the following that the Member States should impose on companies that are covered by the Directive:

Art. 5 General obligations of the operator:

1. Member States shall ensure that the operator is obliged to take all measures necessary to prevent major accidents and to limit their consequences for man and the environment.

Art. 7 Major-accident prevention policy:

1. Member States shall require the operator to draw up a document setting out his major-accident prevention policy and to ensure that it is properly implemented. (etc.)

Art. 9 Safety report:

1. Member States shall require the operator to produce a safety report. (etc.)

The Dutch legislator has taken over these provisions in a governmental decree, namely the *Decree on Risks of Major Accidents (BRZO 1999)*⁸ in clauses 1 and 2 of Section 5 and in Section 9. Failure to comply with these provisions is punishable. After all, the BRZO 1999 is, *inter alia*, based on provisions taken from the Environmental Management Act and from the

Working Conditions Act, and these provisions have been included in the lists of the Economic Offences Act. On occasion, technical legal problems in criminal cases have been caused by including provisions from the Environmental Management Act in the environmental list of the Economic Offences Act and provisions from the Working Conditions Act in the economic list.

IV. The Obligation for Member States to Impose Criminal Sanctions

As described above, the Dutch legislator has implemented the two Regulations and the Directive by determining that their violation constitutes a criminal offence. In the Regulations, the EU has indeed made it obligatory for the Member States to penalise their violation. For the WSR, this has been laid down in the first clause of Art. 50.

Enforcement in Member States:

Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

The ozone Regulation has the same provision. This obligation was formulated slightly differently in the preceding Regulation (No 2037/2000).

Art. 21 Penalties:

Member States shall determine the necessary penalties applicable to breaches of this Regulation. The penalties shall be effective, proportionate and dissuasive.

The text of the provision of 2009, however, is identical to that of the WSR:

Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

The Directive on major accidents does not contain any stipulation regarding the punishment of infringements. Thus, the two Regulations oblige Member States to impose serious punishments following violations, but the sanctions do not have to be of a criminal nature. This is different in *Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law*.⁸ It determines that the Member States are obliged to define the actions described in Art. 3 as a criminal offence. Furthermore, this obligation on the part of the Member States applies to all three areas mentioned above.

Art. 3 Offences:

Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:
(...)

(c) the shipment of waste, where this activity falls within the scope of Art. 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (...)
the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Such actions must be placed under the threat of criminal sanctions:

Art. 5 Penalties:

Member States shall take the necessary measures to ensure that the offences referred to in Arts. 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.

What is striking in these various provisions is that they impose the obligation on Member States to make violations of the rules of the two Regulations or the Directive punishable by law. Instructions for effective investigation and prosecution are not explicitly given. This, however, should be understood implicitly, since it is not likely that the European legislator intended his standards to be merely symbolic.

An obligation for the Member States to actually impose sanctions in case of an infringement has been more explicitly formulated elsewhere. As regards the protection of flora and fauna, clause 1 of Art. 16 of *Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein*⁹ reads as follows:

Art. 16 Sanctions:

1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation (etc.)

V. The Practice of Criminal Sanctioning in the Netherlands

1. Waste Shipments¹⁰

Prosecution for illegal shipments of waste has been made a priority by the Public Prosecutor's Office. In the years 2006 through 2009, about 200 cases were dealt with *per annum*. In 2010, this number dropped to 90 *per annum* due to unknown reasons. The prosecution policy has been laid down in an internal instruction by the Chief Public Prosecutor. If waste is transported without the required notification, the starting point is a fine of €450 for each transported metric ton. It goes without saying that, in case of violation of an export ban or in case of fraud, a more severe punishment is appropriate. The Dutch

Prosecution Service laid down this prosecution policy without coordinating it within the EU. Comparable sanctions sometimes apply elsewhere, but policy abroad may deviate quite markedly from Dutch policy. This led to the following case:

In January 2009, a Portuguese firm shipped nine containers containing a total of 184,000 kilos of rubber and synthetic waste (code B3080) to Vietnam. The transport was carried out via Rotterdam, and customs authorities there found that the transport was taking place in contravention of Art. 36 clause 1 under f of the WSR, because Vietnam prohibits the importing of such waste. The Prosecutor's Office in Rotterdam intended to submit the case to the District Court and demand a fine of at least €100,000. But then the lawyer from the company informed the Rotterdam unit that the Portuguese Ministry of Agriculture, Sea, Environment and Regional Planning (*Ministério do Ambiente e do Ordenamento do Território*) had imposed a fine of €1,600 on the company for the very same transport. The Rotterdam District Court declared the prosecution inadmissible on the basis of the prohibition of double jeopardy.¹¹ It should be noted that the fine in Portugal was not of a criminal but of an administrative nature.

The issue of the EU's criminal approach to illegal waste transports is also monitored, incidentally, by a number of national Courts of Audit. At this very moment, eight Courts of Audit (Bulgaria, Greece, Hungary, Ireland, Norway, Poland, Slovenia, and the Netherlands) are involved in a coordinated audit to investigate the criminal enforcement of the WSR. The results are expected in the last quarter of 2012.

2. Ozone Layer Depleting Substances

In contrast to WSR violations, the Netherlands does not have a policy for the criminal settlement of violations of Regulation (EC) No 1005/2009, let alone that any European agreement has been implemented. Moreover, only rarely has a criminal investigation been initiated for such cases. One example is a recent criminal case that was investigated on the initiative of the European Commission. The latter asked the Dutch Inspectorate of Public Housing, Spatial Planning and the Environment for investigation and enforcement after a chemical plant had reported to the Commission on the basis of Art. 27 of the Regulation.

This case concerned suspicion of a number of infringements of the Regulation, specifically the export of hydrochlorofluorocarbons without an export authorisation, taking back part of this shipment without an import authorisation, and (especially) trading with a non-party to the Montreal Protocol. The Commission's request reads as follows:

We are concerned by the high number of violations, the volume involved (...) and in particular (the export to a non member to the Montreal Protocol) which has already raised concerns at the Ozone Secretariat.

Therefore, we would like to ask you to investigate this case further and ensure that the Regulation (EC) No 1005/2009 is properly enforced in your Member State. (...)

Subsequently, the case became the subject of a criminal investigation, which led to a report on the company concerned. At the time of writing this article, it is up to the Prosecuting Service to judge what an appropriate criminal sanction would be. There is, however, no national guideline in place for such sanctions, and no reference material is accessible or even known.

3. Major Accidents Involving Dangerous Substances

Violations of the BRZO 1999 are prosecuted more often, albeit usually in conjunction with the prosecution of other violations, e.g., regarding the environmental permit. If indeed a serious accident with hazardous substances occurs, the obligation exists, in principle, to initiate a criminal investigation on the basis of a “designation” of the Dutch Board of Prosecutors General. There is, however, no policy in place for punishment in such cases. Furthermore, no criminal policy at all has been formulated for violation of the obligation to draw up a prevention policy and a safety report.

An example of a case that concerns a violation of Section 5 clause 1 BRZO 1999 is that of a large storage and transshipment company in the Rotterdam Europort District, following a massive fire on the premises. The fire was caused by using equipment on a pumping platform to loosen a bolt that had become stuck. The equipment hit steel, thus causing a spark that shot into an open pipe with combustible substances. The ensuing criminal proceedings involved the allegation that, since the company did not use spark-reducing equipment and did not carry out measurements on the platform as to the presence of explosive fumes, it had not taken all necessary measures to prevent harmful consequences for man and the environment.

In the end, the Court only considered as proven the part of the indictment that concerned not carrying out measurements on the platform. The Rotterdam District Court and, in the appeal case, the Court of Appeal in the Hague imposed a fine of €45,000 that was eventually reduced to €42,500 by the Supreme Court due to expiration of the reasonable term of trial.¹² For these punishments, one can also conclude that they were imposed without the courts knowing what is commonly imposed as a punishment in comparable cases elsewhere in Europe.

VI. Conclusion and Outlook

1. Exceptional Position of Environmental Criminal Law

The conclusion that can be drawn from the above is that the Netherlands penalises violation of the rules in the three areas of environmental protection and that these violations are, in fact, criminally prosecuted. This is done either on the basis of a chosen policy or on a more incidental basis. In none of the cases so far, however, has there been any coordination at the level of the EU with regard to sanctions or any interpretation of terminology on a national level. This is true for the Netherlands and is probably also the case in other Member States.

This nationally oriented approach has two consequences, like two flip sides of a coin. Firstly, if the actual sanctioning of an EU rule is only nationally determined, this rule is not fully applied as an EU rule. This also affects the level playing field for corporate activities in the Union. The cited Portuguese-Dutch WSR case is a striking example of this. Secondly, this situation contributes to the exceptional position of environmental criminal law, which it has anyway at the national level. Such isolation makes this part of criminal law vulnerable and does not promote its functioning. To stop this isolation, connections should be introduced or reinforced. The connection with regular criminal law and with administrative enforcement is an issue to be tackled at the national level. To achieve this, the Netherlands is now indeed taking initiatives.

2. Possible Solutions

The orientation within the EU, especially with respect to the criminal sanctioning of violations of EU rules¹³, should be reinforced.¹⁴ It seems desirable to make at least two steps in this direction. It would be favourable if prosecutors charged with prosecution of environmental cases could form a network to exchange information at a practical level. This should not be a conference network, but a coordinated system to exchange case law. A beautiful example of what such an exchange could achieve is a recent English judgment in a WSR-case in which the appellate court in London explicitly refers to a judgment of the Dutch Supreme Court.¹⁵ The author is familiar with two initiatives for such a network, both of which are in their very early stages. One originated at the seminar on “Investigation, prosecution and judgment of environmental offences” held from 24-27 May 2011 in Durbuy, Belgium, organised by IGO/IFJ, the training institute of the Belgian judiciary. This seminar focused on the entire field of environmental criminal law.

The second one is the present IMPEL-TFS¹⁶ project to build a network of prosecutors in which project the author partici-

pates. This network is intended especially to exchange information with respect to the WSR. The initiative is the follow-up to a seminar initiated by the Inspectorate of Public Housing, Spatial Planning and the Environment, hosting public prosecutors charged with environmental cases on illegal international shipments of waste held in The Hague on 29-30 June 2010. Following from such a network, a database should become available with criminal verdicts by national courts on (part of) the environmental rules stemming from the EU. The development of such a database is not an easy task, because it demands an infrastructure. Possibly, EUR-lex could offer a solution for this?

* The views expressed in this article are those of the author and do not necessarily reflect the views of the Rotterdam Public Prosecution Office.

1 Wet op de economische delicten.

2 O.J. L 190, 12.07.2006, pp. 1-98.

3 Wet milieubeheer.

4 O.J. L 286, 31.10.2009, pp. 1-30.

5 Uitvoeringsbesluit EG-verordening ozonlaagafbrekende stoffen, Staatsblad 2011, 281.

6 O.J. L 10, 14.01.1997, pp. 13-33.

7 Besluit risico's zware ongevallen 1999, Staatsblad 1999, 234.

8 O.J. L 328, 06.12.2008, pp. 28-37.

9 O.J. L 61, 03.03.1997, pp. 1-69.

10 On the necessity of harmonisation of prosecution in WSR cases, see De Rijck, Rob, A Flaw in the Criminal Approach of International Waste Transport in Europe,

paper for the INECE 9th International Conference, (published on the site of the conference) for more details. This paper also discusses in more detail the lack of harmonisation of interpretation of the Regulation.

11 Rotterdam District Court 19 July 2011, 10/994500-11, unpublished.

12 Supreme Court of the Netherlands, 28 September 2010, LJN: BN8465.

13 The necessity of harmonising the interpretation of terminology is only mentioned in passing in this article. The international dimension of environmental crime itself (trading in waste or protected animals and plants) is also not discussed here. In general, investigation should be more international.

14 The Dutch Supreme Court also emphasises, of course in a much wider context, the importance of internationalising jurisdiction. Its report on the years 2009 and 2010 is even entirely geared towards this approach. "(F)ewer and fewer of the questions put before the Supreme Court as a court of cassation concern Dutch law alone. In many cases the Supreme Court is asked to adjudicate on questions of law relating to the interpretation and application of rules embodied in treaties and the instruments of European law," according to the English version of the introduction to the report on the Supreme Court's website.

15 Court of appeal in the Royal Courts of Justice, 19 October 2011, [2011] EWCA Crim, p. 2342.

16 European Union Network for the Implementation and Enforcement of Environmental Law, cluster Transfrontier Shipments of Waste. This is a network for administrative enforcement.

Rob de Rijck

Public Prosecutor, Functional Prosecutor's office
for fraud and environmental crime; Head of the Unit
Rotterdam
r.de.rijck@om.nl



Terrorism Lists and Freezing of Assets

Getting Behind Appearances

Réno Pijnen, LL.M, M.Phil.

I. Introduction – The Relevance and Importance of the Criminal Charge Question

Counter Terrorism Financing (CTF) asset freezing leads to the suspension of access to financial assets of persons or organisations which are considered to be involved in committing or facilitating the commission of terrorist acts. The listing-decisions that precede the asset freezes entail the prohibition of making assets available to the target individual or organisation. Doctrinally, asset freezes are temporary administrative law measures with preventive security purposes.

They are issued on a non-judicial basis and do not adhere to criminal standards such as a conviction or an indictment. Therefore, they can be issued in procedures which do not have to respect fair trial standards when a criminal charge is involved. During the first years of its operation, the question was raised whether asset freezes weren't actually of criminal nature and resulted in a confiscation or other criminal penalties. This was based on three main arguments: 1. Asset freezes lead to immense financial isolation, 2. They are open-ended in duration, 3. They show major due process *lacunae* in their application.

The *legal* relevance of the criminal charge qualification lies in comparing its procedural consequences with the current asset freezing procedures. The current procedures are the result of EU case-law on asset freezing in which, with reference to Article 6(1) ECHR under its civil head, the right to judicial protection, a fair hearing (encompassing the right to a notification of the listing decision) and the right to a statement of reasons for being listed were found to be applicable to these procedures.¹ The legal relevance in relation to Article 6(1) concerns the difference in the degree of rigor to which fair trial-standards will be applied and to which extent exceptions will be weighed under the (general) principle of proportionality of the ECHR. In particular, this includes the equality of arms and adversarialness of the proceedings (under which I, as the ECtHR indirectly does, subsume investigations), the standards on the disclosure of evidence, the role of the courts in the proceedings, and the “legal test” they will apply.²

The rights relevant to the current asset freezing procedures which derive from Articles 6(2) and 6(3) (which *specify* Article 6(1)) are the presumption of innocence (placing the burden of proof on the prosecution), the right to be informed of the charges, i.e. a prompt and intelligible notification of the prosecution, and the right to examine the sources of evidence. From the perspective of the ECtHR, the procedural differences found in this comparison may turn out to be of modest importance nonetheless. This follows from the fact that Strasbourg organs have construed the obligations deriving from paragraphs 2 and 3 widely, leading to their application by analogy in civil cases.³ Similarly, the ECtHR has accepted lessened procedural safeguards when a criminal offence is outside the “hard core of criminal law” and light penalties are expected.⁴

Nonetheless, the reasoning of the proponents of classifying asset freezing as a criminal charge has never really caught on. Academic analyses came to the conclusion that asset freezes bear a “criminal connotation”,⁵ are “quasi-criminal”,⁶ possess “hybrid nature”⁷ or have “both criminal and civil elements”⁸ – findings which do not seem really helpful. Moreover, these assessments were part of a wider human rights argumentation in favor of the adoption of due process provisions and in response to the argumentation that asset freezes are administrative measures of an inherently political nature and therefore only marginally reviewable by the courts.⁹ Besides this latter notion, a set of factors of politico-legal nature is responsible for the lack of definitive answers in literature or in case-law to the question whether asset freezing can be classified as a criminal sanction. These factors make answering the question whether the legal instruments for asset freezing include a “criminal charge” cumbersome as the positions from which this question can be answered are numerous and the emphasis

put on the possible factors differs. The debate on the criminal character of asset freezing has almost come to a standstill since recent due process improvements have been made by the EU and the UN.¹⁰ Still, as I hope to show, this does not mitigate the academic and practical relevance of assessing asset freezes from the perspective of “criminal” procedures.

II. The *Engel*-Criteria Applied

For the sake of argument, we will apply the *Engel*-criteria: the classification of the offence under domestic law, the nature of the offence and the degree of stigma attached to it and the severity of the possible sanction.¹¹ In doing so, we see that the “domestic” classification is explicitly administrative.¹² The second criterion, the nature of the “offence”, can only be answered with ambiguous results however. In relation to the main elements of these criteria it can be observed that the regime is of a generally binding character, with a pre-dominantly¹³ preventive effect, which the EU and the UN consistently classify as administrative in nature.¹⁴ Asset freezes are instituted by a public body which has indirect statutory powers of enforcement through the Member State’s obligation of implementing the listing decision. Asset freezes are, on the other hand, typically not based upon finding a person or organisation guilty of committing an offence.¹⁵ The conduct leading to the listing and asset freezing may not yet amount to a criminal act as established in a court of law. The standard of proof as explicated by the Financial Action Task Force (FATF) for both regimes for listing is that of “a reasonable basis for suspecting that a person is a terrorist or a supporter of terrorism”.¹⁶

The third criterion, the severity of the “penalty” which the person risks incurring¹⁷ and which can have a cumulative effect with the second criterion,¹⁸ equally does not result in straightforward answers. The freezes impose a strong stigma, as the target is said to be “involved in terrorism” yet, due to their preventive purpose are temporary in nature and do not impose a criminal stigma. In practice, asset freezes have been in force for ten years in relation to particular targets, i.e. since a few weeks after the 9/11 attacks. This brought the General Court to submit, in relation to Kadi who had been under an asset freeze for ten years, that “[i]n the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one”.¹⁹

This short *Engel*-analysis, in my view, shows that asset freezes are not criminal *in nature*, even though they indeed bear

“criminal law connotations”. The reason that asset freezes are not criminal *in nature* lies in that its doctrinal appearance withstands the aforementioned argument of the asset freezes being open-ended in duration and the argument regarding the intrusive financial isolation, specifically as these arguments do not directly substantiate a predominant punitive *intent* of asset freezes. This assessment is in line with comparable, contra-mafia measures which, in ECHR case-law, were not found to represent criminal charges.²⁰ Even though these measures were highly intrusive, they did not represent a punitive intent and were explicitly not based on criminal offences.²¹ Furthermore, the ECtHR accepted that these preventive measures were necessary in the fight against the mafia. Nevertheless, the comparison is flawed, especially with respect to the last of the three main arguments on whether asset freezes are criminal in nature or not: the due process *lacunae*. This is particularly important as this last argument influences the assessment of the first two. Similar to the argument of due process *lacunae* and the question of the classification of asset freezing as criminal sanctions, the ECtHR’s reliance on the necessity of contra-mafia measures implicates two notions that influence its appreciation of “preventive measures”.

The first is the margin of appreciation the Court leaves to the Member States to meet the ECHR’s obligations. The second is the set of reasons for using procedures which are below the standards inherent to criminal proceedings. The latter notion specifically influences the use of the second and most important criterion of the *Engel*-criteria. The ECHR takes into account the actuality of the politico-legal reasons for a particular non-criminal law classification and the attempt to operate an instrument below the criminal procedure standards. Regardless of what one might think of this approach,²² the ECtHR, in effect, assesses whether these reasons are applied with consistency to the measure and legal safeguards in a particular procedure.²³

III. Some Politico-Legal Factors Influencing the Classification of Asset Freezing

Politico-legal factors have influenced the legal classification of asset freezing and they present an indication of whether asset freezing necessarily and proportionally remains subpar criminal justice standards. A first influential factor is presented by the varied (politico-legal) background of asset freezes itself and the influence of national considerations and international jurisdictions engaged in multi-level asset freezing regimes. In these jurisdictions, i.e. the UN as well as the EU,²⁴ no central, concrete and unifying definition of terrorism has yet been pro-

vided. Furthermore, it remains difficult to achieve a system in which intelligence is disclosed to other Member States, the sanctioning committees in the UN and the EU, the EU’s courts and the UN’s sanctioning committee’s ombudsperson as well as to the targeted individuals and organisations.

Furthermore, case-files submitted to the sanctioning committees at UN and EU level can be derived from a large range of different proceedings albeit some basic conditions have been defined by the EU courts.²⁵ Blacklisting and asset freezing, in its variants of traditional, economic comprehensive sanctions and, more recently, smart sanctions against e.g. dictators of rogue states, are of a political nature. It is easy to see the legal and conceptual gap between a fair trial within criminal proceedings as a response to a traditional criminal offence on the one hand and a fair trial in judicial review proceedings involving a listing decision in which, e.g., a member of a military junta is named as part of a political conflict between the target-state and the sender-state on the other hand.

A third factor is that asset freezing is more than responding to terrorism financing. It targets, on different grounds, several types and forms of terrorist individuals and organisations. This third factor encompasses the differences in targets of the (national, regional and international) lists and the role which asset freezing has in disrupting “terrorism”: whether as part of a war-like strategy or as part of a criminal justice approach. It further includes the different purposes of asset freezes. The typical purposes of asset freezes are preventing the use of assets for terrorist attacks as well as shutting down the financial key nodes. Another traditional goal of financial or economic sanctions is to induce a change in behavior of targeted individuals and organisations so as to stimulate a delisting. It is remarkable that this goal is unmentioned in current policy papers on CFT, while in practice it appears to be a reason to target, e.g., charities which have shown questionable funding activities and which can become delisted if they, e.g., replace board members.²⁶

However, a similar approach appears to be dysfunctional when dealing with terrorist operatives which may not even be led to change their behavior when threatened with “targeted killing”. The instrument of asset freezing is used against both types of targets. Additional purposes are that asset freezes are diplomatic tools in engaging other countries in the war on terror. Asset freezes have symbolic and deterrence value for “upper-world” donors whose reputation may be damaged when identified as involved in terrorism (financing).²⁷ The symbolic nature may also lie in publicly defaming a militant organisation which uses terroristic methods, or labeling a leader of a terrorist network as responsible for a terrorist attack while the individual

concerned does not have a banking account. The freezing-action following a listing decision provides (financial) teeth to the dog barking at the “terrorist”. These additional purposes would not be relevant in a comparison between asset freezing and the criminal sanction concept if a decisive substantive standard would be available for applying asset freezes. Punitive responses to misconduct can have several secondary purposes while its proportionality (i.e. their maximum) is directly and inherently defined by the criminal conduct. Yet, such an “inherent” and adequate standard has not been laid down in the law on asset freezing. The instrument of asset freezing is too varied to deduce one from its politico-legal background or *ratio*²⁸, even though echoes of this substantive law notion can be seen in procedure-related issues. This can be seen when it is argued that the respective decision-maker is under a duty to determine, firstly, whether the evidence before it contains all the relevant information to be taken into account in order to assess the situation; secondly, whether that evidence is capable of substantiating the allegation that the person or organisation concerned participates in terrorism;²⁹ and thirdly, that the evidence requirement calls for sufficient material to indicate to a person affected by a funds-freezing order the essential allegations that he needs to counter.³⁰

The aforementioned factors have prevented the argument of asset freezing being a criminal sanction from playing a significant role. The varied politico-legal background withstands classifying the measure as a criminal charge. This background has also influenced the EU case-law and how the due process *lacunae* have been addressed by the courts. The courts clearly felt the need to balance human rights concerns about the lacking safeguards in asset freezing decision-making with the security interests so strongly felt after 9/11 and had to take into account the international law obligations to implement the aforementioned UN Security Council Resolutions based on Chapter VII of the UN Charter.³¹ The courts also understood that asset freezes are more effective when following an internationally binding listing decision which is not hindered by the conundrum of national objections against implementing international listing decisions. These objections could be submitted if the listing decisions, previously part of transnational security law, could be set off against national criminal justice regimes and the many views on reasonable evidence standards and norms, fair trial guarantees and questions of proportionality of asset freezes *vis-à-vis* the conduct against which the listing decisions react. Additionally, the UN and the EU both do not have a criminal justice regime to substitute their international asset freezing-regime. With qualifying asset freezes as criminal sanctions, the courts would have effectively struck down an entire regime which was said to be essential to CT.

Consequently, a human rights approach was applied with a view to closing the major due process *lacunae* in the sanctioning regimes, while leaving a range of legal questions effectively unanswered: the legal test used for reviewing the lawfulness of the listing decisions; the requirements on the proceedings used for creating case-files for the sanctioning committees and the sanctioning committees’ and the courts’ assessment of the eventual outcome of these proceedings; the extent of restrictions on disclosure of intelligence to the individuals and organisations and to the courts on grounds of public policy, public security or the maintenance of international relations³² and the legally relevant considerations for applying asset freezes and correspondingly the type of (past) conduct as a basis for (preventive) asset freezes.³³

Taking into account the previous considerations and given the general fact that the ECtHR sees itself as subsidiary to the national systems and will only hold them accountable for complying with EU law when the protection of ECHR rights was manifestly deficient,³⁴ it appears that it will not rule that asset freezing entails a criminal charge.

IV. The Unsatisfactory Outcome of the Politico-Legal Influence

The aforementioned situation is unsatisfactory. This follows from two considerations. The first is that the current level of due process is negatively influenced by (what we can summarise as) a lack of constitutional framework to decide questions such as the proper legal classification of asset freezes. Both the EU and the UN have an interest in not having asset freezes be declared as criminal sanctions and international courts have to deal with this problem. The second consideration concerns asset freezing and the legality principle. The factors which have influenced the courts’ assessment of asset freezing and induced their procedural approach and balance of security considerations with human rights considerations are undeniably of even greater influence with respect to questions of substantive law and the *lex certa*-principle, i.e. in its stringent criminal law context and form as opposed to the far more lenient administrative law context and form. Deciding on the substantive remit of legal instruments is primarily and largely a matter for the legislator and involves political appreciation which is outside the constitutional task, powers and expertise of courts.

At this point, however, a circular reasoning appears. Because of a politico-legal *status quo*, asset freezing differs strongly from criminal law when it comes to providing foreseeability on when someone will be subjected to a “financial measure”.

Even if it could be maintained that this in itself is justifiable, given the particular nature of asset freezing, this is still problematic regarding the suboptimal level of due process – which is suboptimal because of that *same* politico-legal background.

V. Behind Appearances – Revisiting the Criminal Charge Question

When we look behind the procedural appearances, by observing how they have come into existence, we can note that what has caused the current state of due process in asset freezing may have had great influence on the substantive law of asset freezing. The substantive law was one of the causes for not being able to unambiguously answer the question of the proper classification of asset freezes, the level of procedural safeguards and, more importantly, the lack of an inherent standard for assessing the proportionality of an asset freeze. This makes the current instrument of asset freezing flawed since it

can be used systematically for different purposes and for longer periods of time than it was supposed to. The suboptimal level of due process in asset freezing does not compensate for this flaw.³⁵

When we return to the question of asset freezing entailing a criminal charge, the sincerity in a non-criminal law classification and the ECtHR perhaps one day having to answer this question, the conclusion can be drawn that the question of the classification as preventative or punitive, protective or confiscatory, civil or criminal indeed seems now to be an open one in the light of the aforementioned *legal* relevance of the criminal charge question. Even if asset freezings remain to be classified as a mere administrative measure, the combination of the “legality” and due process level of asset freezes implies that courts, from the perspective of their tasks, powers and expertise, have to remain vigilant at least *as long as* the aforementioned range of legal questions remain unanswered at EU and at UN level. However, they at some point may become inclined to play the criminal charge card.

1 See on freezing of assets and the EU case-law: eucrim 4/2010, pp. 141-142, eucrim 3/2010, p. 96, eucrim 4/2009, pp. 138-139, eucrim 3/2009, p. 74, eucrim 1-2/2009, p. 14, eucrim 1-2/2008, pp. 33-35, eucrim 3-4/2007, pp. 105-108 and eucrim 3-4/2006, pp. 66-68.

2 ECtHR *Imbrioscia v. Switzerland* (J. of 24.11.1993 – 13972/88, § 36).

3 ECtHR *Dombo Beheer B.V v. The Netherlands* (J. of 27-10-1993 – 14448/88, § 32). *Ch. Rozakis*, The Right to a Fair Trial in Civil Cases, Judicial Studies Institute Journal, 2004, 96-106 (96).

4 ECtHR *Jussila v. Finland* (J. of 23.11.2006 – 73053/01, §§ 38 and 43).

5 White Paper prepared by the Watson Institute, Strengthening Targeted Sanctions through Fair and Clear Procedures, 2006, p. 13, www.watsoninstitute.org.

6 *I. Cameron*, UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, Nordic Journal of International Law, 2003, pp. 159-214 (159).

7 *C. Eckes*, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions, 2010, p. 137.

8 *D. Marty*, UN Security Council Blacklists: Introductory Memorandum, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 19.3.2007, <http://assembly.coe.int>.

9 T-315/01 *Kadi I*, [2005] ECR II-3649, §§ 149 and 167. See *Eckes*, *op. cit.*, pp. 141-147.

10 See however *M. van den Broek/M. Hazelhorst/W. de Zanger*, Asset Freezing: Smart Sanction or Criminal Charge?, Merkourios Utrecht Journal of International and European Law, 2010, pp. 18-27.

11 ECtHR *Engel and others v. The Netherlands* (J. of 8.6.1976 – 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, § 82).

12 See, e.g., UNSCR 1822 (2008) and Council for the European Union, Working methods of the Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, 10826/1/07 Rev 1, 28.6.2007, <http://www.register.consilium.europa/in>.

13 More on this *infra*.

14 ECtHR *Öztürk v. Germany* (J. of 21.2.1984 – 8544/79, § 53).

15 ECtHR *Benham v. The United Kingdom* (J. of 10.6.1996 – 19380/92, § 56).

16 *FATF*, Interpretative Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, 2003, <http://www.fatf-gafi.org>.

17 ECtHR *Campbell and Fell v. The United Kingdom* (J. of 28.6.1984 – 7819/77, 7878/77, § 72).

18 ECtHR *Bendenoun v. France* (J. of 24.2.1994 – 12547/86 § 47).

19 T-85/09 *Kadi II*, § 150.

20 E.g. ECtHR *Raimondo v. Italy* (J. of 22.2.1994 – 12954/87).

21 ECtHR *Labita v. Italy* (J. of 6.4.2000 – 26772/95, § 195).

22 See the partly dissenting opinions of judges Costa, Cabral Barreto and Mularoni and Caffisch in ECtHR *Jussila v. Finland*, *op. cit.*

23 See ECtHR *Arcuri v. Italy* (J. of 5.7.2001 – 52024/99, §§ 1-2) and ECtHR *Jussila v. Finland*, *op. cit.*, §§ 36, 38 and 49, ECtHR, *Janosevic v. Sweden*, (J. of 23.7.2002 – 34619/97) and ECtHR *Öztürk/Germany*, *op. cit.*, § 49. In the latter case, the decriminalisation followed the want to relieve courts of the task of prosecution and punishment of a large number of minor offences, while the rule of law that could be infringed had undergone no change of content.

24 *E. Symeonidou-Kastanidou*, Defining Terrorism, European Journal of Crime, Criminal Law and Criminal Justice, 2004, pp. 14-35.

25 T-341/07, *Sison v. Council*, (Sison II), [2009] ECR II-3625, PMOI.

26 Although in *FATF*, *op. cit.*, p. 9 and in the EU's and the UN's policy papers delisting is considered to be “appropriate” whenever the criteria for listing are “no longer met”, which amounts to the person or entity concerned “affirmatively” showing to have severed all possible (alleged) terrorist connections or other involvement in terrorism, this is not set out as a purpose of asset freezing. See for the UN Security Council Committee Established Pursuant to Resolution 1267(1999) Concerning

Réno Pijnen, LL.M., M.Phil.

PhD Candidate on Due Process in Counter Terrorism Financing Asset Freezing in the EU and UN, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University, The Netherlands
r.pijnen@uu.nl



Al-Qaida and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of its Work as amended on 26 January 2011, <http://www.un.org/sc/committees/1267/>. See for the EU *Council for the European Union*, *op.cit.* Additionally, the European Union Counter-Terrorism Strategy, 14469/4/0 Rev 4, 30.11.2005 § 29, merely speaks of "creating a hostile operating environment for terrorists". *Council of the European Union*, The Fight against Terrorism Financing, 16089/04, 14.12.2004, §§ 4 and 7 tellingly speak of "Identifying and disrupting the mechanisms through which terrorism is financed" and "The transition from applying asset freezing measures primarily as a political measure against governments ... to freezing as a preventive measure ...".

27 *J. Roth v. D. Greenburg v. S. Wille*, Monograph on Terrorist Financing: Staff Report to the Commission National Commission on Terrorist Attacks upon the United States, Washington, DC: National Commission on the Terrorist Attacks Upon the United States, p. 14.

28 *I. Tappeiner*, The Fight against Terrorism: The Lists and the Gaps, *Utrecht Law Review*, 2005, pp. 97-125; *I. Cameron*, The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, Report to Council of Europe, 2006, p. 8.

29 See Opinion of Advocate General Sharpston delivered on 14 July 2011 in C-27/09 P *French Republic v People's Mojahedin Organization of Iran*, § 88.

30 *Ibid.*, § 136.

31 *P. De Sena/M.Ch. Vitucci*, The European Courts and the Security Council: Between *Dédoulement Fonctionnel* and Balancing of Values, *The European Journal of International Law*, 2009, pp. 193-228.

32 T-228/02, *Organisation des Modjahedines du peuple d'Iran*, (OMPI) [2006] ECR II-04665, §§ 119 and 124.

33 *Cf. F. Meyer*, EU Terrorism Lists in the Eye of the Rule of Law, *eucri* 1-2 / 2008, p. 87 and *F. Spaventa*, Case T-256/07, *People's Mojahedin Organization of Iran v. Council*, judgment of the Court of First Instance of 23 October 2008, Case T-284/08, *People's Mojahedin Organization of Iran v. Council*, judgment of the Court of First Instance of 4 December 2008, *Common Market Law Review*, 2009, pp. 1239-1263.

34 ECtHR *Bosphorus/Ireland*, (J. of 30.6.2005 – 45036/98).

35 It is noteworthy that the procedural and proportionality safeguards in the contra-mafia measures-case were higher than the current standards in asset freezing. *Cf.*, e.g., ECtHR *Arcuri/Italy*, *op. cit.*

Imprint

Impressum

Published by:

**Max Planck Society for the Advancement of Science
c/o Max Planck Institute for Foreign and International
Criminal Law**

represented by Director Prof. Dr. Dr. h.c. mult. Ulrich Sieber
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
Internet: <http://www.mpicc.de>



Official Registration Number:
VR 13378 Nz (Amtsgericht
Berlin Charlottenburg)
VAT Number: DE 129517720
ISSN: 1862-6947

Editor in Chief: Prof. Dr. Dr. h.c. mult. Ulrich Sieber

Managing Editor: Dr. Els De Busser, Max Planck Institute for
Foreign and International Criminal Law, Freiburg

Editors: Dr. András Csúri, Max Planck Institute for Foreign and In-
ternational Criminal Law, Freiburg; Sabrina Staats, Duke University,
Durham, USA; Cornelia Riehle, ERA, Trier; Nevena Borislavova
Kostova, Claudia Lydia Kurpjuweit, Max Planck Institute for Foreign
and International Criminal Law, Freiburg

Editorial Board: Francesco De Angelis, Directeur Général Hono-
raire Commission Européenne Belgique; Prof. Dr. Katalin Ligeti,
Université du Luxembourg; Lorenzo Salazar, Ministero della Giustizia,
Italia; Prof. Rosaria Sicurella, Università degli Studi di Catania,
Italia; Thomas Wahl, Bundesamt für Justiz, Deutschland

Language Consultant: Indira Tie, Certified Translator, Max Planck
Institute for Foreign and International Criminal Law, Freiburg

Typeset: Ines Hofmann, Max Planck Institute for Foreign
and International Criminal Law, Freiburg

Produced in Cooperation with: Vereinigung für Europäisches
Strafrecht e.V. (represented by Prof. Dr. Dr. h.c. mult. Ulrich Sieber)

Layout: JUSTMEDIA DESIGN, Cologne

Printed by: Stückle Druck und Verlag, Ettenheim/Germany

**The publication is co-financed by the
European Commission, European
Anti-Fraud Office (OLAF), Brussels**



© Max Planck Institute for Foreign and International Criminal Law
2011. All rights reserved: no part of this publication may be repro-
duced, stored in a retrieval system, or transmitted in any form or by any
means, electronic, mechanical photocopying, recording, or otherwise
without the prior written permission of the publishers.

The views expressed in the material contained in eucrim are not neces-
sarily those of the editors, the editorial board, the publisher, the Commis-
sion or other contributors. Sole responsibility lies with the author of the
contribution. The publisher and the Commission are not responsible for
any use that may be made of the information contained therein.

Subscription:

eucrim is published four times per year and distributed electroni-
cally for free.

In order to receive issues of the periodical on a regular basis,
please write an e-mail to:

eucrim-subscribe@mpicc.de.

For cancellations of the subscription, please write an e-mail to:

eucrim-unsubscribe@mpicc.de.

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

The European Criminal Law Association is a network of lawyers' associations dealing with European criminal law and the protection of financial interests of the EU. The aim of this cooperation between academics and practitioners 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.

